

**CENTRAL ADMINISTRATIVE TRIBUNAL
CHANDIGARH BENCH
CHANDIGARH**

**OA. No. 060/00410/2016
MA No. 060/00094/2017**

Order pronounced on : 20.12.2017
Order reserved on : 13.12.2017

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**CORAM: HON'BLE MR.JUSTICE M.S. SULLAR, MEMBER(J)
HON'BLE MRS.P. GOPINATH, MEMBER(A)**
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Anish Kumar son of Sh. Kewal Krishan age 49 years working as SDE presently posted as Assistant General Manager (EB) lookafter in the office of Senior GMTD, Bharat Sanchar Nigam Limited (BSNL) Jalandhar, Punjab.

.....Applicant

BY ADVOCATE: **MR. G.S. BAL, SENIOR ADVOCATE WITH MR. P.M. KANSAL**

VERSUS

1. Union of India through Secretary, Ministry of Information and Technology, Department of Telecom, Sanchar Bhawan, 20, Ashoka Road, New Delhi.
2. Bharat Sanchar Nigam Limited through its Chairman-cum-Managing Director, BSNL Corporate Office, Harish Chandra Mathur Lane, Janpath, New Delhi – 110 001.
3. The Senior General Manager Telecom District, Bharat Sanchar Nigam Limited, District Jalandhar, Punjab.

.....Respondents

BY ADVOCATE: **MR. D.R. SHARMA FOR RESPDTS. NO. 2 & 3**

ORDER

HON'BLE MRS. P. GOPINATH, MEMBER(A):-

1. Applicant joined the Department of Telecommunications as a JTO on 02.05.1994 and was absorbed in BSNL on the date when it came into existence i.e. 01.10.2000. As per Recruitment

Rules of SDE, the posts are to be filled 100% by promotion from JTOs as follows:-

- 75% on the basis of seniority cum fitness and
- 25% on the basis of LDCE

For the 25% LDCE quota examination, applications were called and approximately 12000 persons applied for the said examination. The LDCE was not held in the year 2001. The LDCE was conducted by the respondents in the year 2004. The filling up of the 75% quota by promotion was undertaken and completed in the year 2000. In the meantime, another 75% DPC quota promotion order based on seniority was issued on 07.12.2001. The 25% LDCE examination was held on 01.12.2002 for filling up 549 vacancies of 1996-97, 537 vacancies of 1997-98, 834 vacancies of 1998-99, 1132 vacancies of 1999-2000 and 582 vacancies of 2000-2001. Applicant also appeared in the examination held in 2002 and was declared successful against the vacancies for the year 1997-98 for promotion to the post of SDE.

2. The DoT issued an order on 27.04.2004 for 1587 JTOs under the 25% LDCE quota. Another order covering 1509 officers was issued on 26.05.2004 in which the name of the applicant appears at Sr. No. 491. Applicant joined the post of SDE on 09.06.2004. In the seniority list issued consequent to the examination, the seniority of persons promoted under the 75% DPC quota and those promoted under 25% LDCE quota was fixed inter

seniority as per percentage quota of SCF & LDCE in the ratio of 75% : 25%, yearwise.

3. Applicant draws attention to TA No. 84-HR-2009 wherein the Tribunal had held as follows:-

“24. In view of the above discussion, both these Original Applications are allowed. Orders/seniority list impugned in these petitions are quashed and set aside. The respondents are directed to re-draw the seniority of officers of TES Group B on the basis of dates of joining of incumbents, as discussed above, within a period of six months from the date of receipt of copy of this order. Before undertaking such exercise, respondents may invite objections from the persons likely to be adversely effected before re-drawing seniority as observed herein above. No costs.”

The above judgement very clearly directed the respondents to redraw the seniority on the basis of date of joining of incumbents. Going by this judgement, the seniority of the applicants in this OA will be determined by their date of joining the post on the basis of LDCE.

4. A second judgement relied upon by the applicants is OA No. 265 of 1990 titled N. Ravindran Vs. Central Provident Fund Commissioner wherein the Tribunal had laid down the law based on the reading of recruitment rules of EPFO that the examination quota candidates will be placed below the seniority quota candidates en bloc every year. The applicant in this OA is not challenging LDCE seniority vis a vis the promotion quota. The applicant is seeking directions to be placed in the seniority list of SDEs in a year prior to the holding of the LDCE examination for a particular vacancy year as against seniority fixed as per date of joining on qualifying the examination.

5. Applicant argues that whereas DPC was conducted frequently to fill up the seniority quota, the LDCE for various reasons was delayed and not held in time. The relief sought by the applicant is for a direction to the respondents to redraw the seniority list of SDE by following the dicta laid down in N. Ravindran case i.e. seniority of 75% promotes to be en bloc ranked senior to 25% LDCE promotes for a particular vacancy year.

6. The respondents in their reply submit that seniority of SDEs was assigned on the basis of CAT's order dated 25.08.2009 and Supreme Court order dated 12.08.2014 wherein the CAT had unequivocally held that the seniority of the incumbents have to be determined on the date of their actual joining and not on notional basis by allotment of slots. The Hon'ble Supreme Court in the case reported as **Union of India and others v. K.K. Vadera and others, AIR 1990 SC 443**, held that there is no law or rule under which a promotion is to be effective from the date of creation of a promotional post and that after a post falls vacant for any reason whatsoever, a promotion to that post should be from the date the promotion is granted and not from the date when such post falls vacant. In **T.N. Administrative Service Officers Assn. v. Union of India, (2000) 5 SCC 728**, it was held as under:-

“The question then arises whether there is any such right in the petitioners to seek such creation of additional posts. It is a well-settled principle in service jurisprudence that even when there is a vacancy, the State is not bound to fill up such vacancy nor is there any corresponding right vested in an eligible employee to demand that

such post be filled up. This is because the decision to fill up a vacancy or not vests with the employer who for good reasons, be it administrative, economical or policy, can decide not to fill up such post(s). (See *State of Haryana v. Subash Chander Marwaha.*)

In **State of Uttaranchal v. Dinesh Kumar Sharma, (2007) 1 SCC 683**, has held to the following effect:-

“28. It is clear from the above that a person appointed on promotion shall not get seniority of any earlier year but shall get the seniority of the year in which his/her appointment is made. Therefore, in the present fact situation the respondent cannot claim promotion from the date of occurrence of the vacancy which is 1995-96 but can only get promotion and seniority from the time he has been substantively appointed i.e. from 1999. Likewise, the seniority also will be counted against the promotion/appointment in the cadre from the date of issuance of order of substantive appointment in the said cadre i.e. from 19-11-1999.

29. In a recent judgment of this Court in *Uttaranchal Forest Rangers' Assn. (Direct Recruit) v. State of U.P., 2006(4) SCT 487* (Dr. Ar. Lakshmanan and Tarun Chatterjee, JJ.), this Court was of the view that seniority has to be decided on the basis of rules in force on the date of appointment, no retrospective promotion or seniority can be granted from a date when an employee has not even been borne in the cadre. Similar view was taken by this Court in *Keshav Chandra Joshi v. Union of India, 1992 Supl.(1) SCC 334*.

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34. Another issue that deserves consideration is whether the year in which the vacancy accrues can have any relevance for the purpose of determining the seniority irrespective of the fact when the persons are recruited. Here the respondent's contention is that since the vacancy arose in 1995-96 he should be given promotion and seniority from that year and not from 1999, when his actual appointment letter was issued by the appellant. This cannot be allowed as no retrospective effect can be given to the order of

appointment order under the Rules nor is such contention reasonable to normal parlance. This was the view taken by this Court in the case of Jagdish Ch. Patnaik & ors v. State of Orissa & Ors., (1998)4 SCC 456.”

Similar is the view taken in **Nirmal Chandra Sinha v. Union of India, (2008) 14 SCC 29**, when it was held to the following effect:-

“7. It has been held in a series of decisions of this Court that a promotion takes effect from the date of being granted and not from the date of occurrence of vacancy or creation of the post vide Union of India v. K.K. Vadera, AIR 1990 SC 442, State of Uttaranchal v. Dinesh Kumar Sharma, (2007)1 SCC 683, K.V. Subba Rao v. Govt. Of A.P., (1988)2 SCC 201, Sanjay K. Sinha-II v. State of Bihar, (2004)10 SCC 734.” (emphasis provided)

Similar is the view taken in **K. Ramulu (Dr.) v. (Dr.) S. Suryaprakash Rao, (1997) 3 SCC 59**; a Division Bench of the **Delhi High Court in Union of India v. Vijender Singh & Ors., 2011(176) DLT 247** and Division Bench judgments of this Court reported as Ram Niwas, Junior Engineer, Marketing Board, Faridabad v. The Haryana State Agricultural marketing Board, Panchkula and another **1994(2) SLR 729** and in **CWP No.3865 of 2012 titled as Union Territory of Chandigarh and another v. Vin Dosanjh** and another decided on 4.3.2013. In Vin Dosanjh's case (supra), the Bench reiterated the well established principles that an official is not entitled to promotion from the date the vacancy arose. It was held as under:-

“4. During the course of hearing, it is fairly conceded by Ms. Lisa Gill, learned counsel for the petitioners on instructions from the departmental official that pursuant to the order under challenge passed by the Tribunal, the first respondent would not get any monetary benefit as she was already officiating as Head of the Department on current duty charge basis w.e.f. 12.12.2005 and was getting the salary of Head of the Department. It is pointed out by learned counsel for respondent No. 1 that she is otherwise senior-most in the Department. If that is so, it is obvious that neither respondent No. 1 would be entitled to any monetary benefit nor she affects anybody's seniority in the

department as a result of retrospective promotion from the date of occurrence of the vacancy. In this view of the matter, we do not deem it necessary to interfere with the directions issued by the Tribunal except to the extent that in our considered view, retrospective promotion cannot be claimed as a matter of right unless the Rules permits so or there exists some special or peculiar facts and circumstances for issuing such direction. The writ petition is accordingly disposed of without interfering with the order passed by the learned Tribunal, however, with a clarificatory direction that as and when an applicant seeks retrospective promotion on the basis of the instances referred to above or on the strength of the order under challenge, the learned Tribunal shall not be influenced by its previous orders and shall decide the same keeping in view the binding precedents in accordance with law.”(Emphasis Supplied)

In view of the various judgments referred to above, we find that a person is not entitled to seek promotion from the day vacancies arise. It is for the employer to initiate the process of promotion and to fill up the posts, keeping in view its requirements. The employee has no right to claim promotion from a particular date or for a direction that the vacancy in the promotional post should be filled up. However, if the decision of the employer is to fill up the promotional post is actuated by the considerations other than administrative, such action or inaction can be subjected to the judicial review, but there cannot be any direction to grant promotion from the date the vacancy arises. However, in case, an Officer is given Current Duty Charge or promoted on adhoc basis, he shall be entitled to the pay of the promoted post as has been held in Arindam Chattopadhyay’s case (supra) and State of Haryana Vs. P.K. Grover (1983) 4 SCC 291. In view of the consistent well established principles of law as enunciated in the above mentioned judgments, we find that the direction of the Tribunal holding that the applicants are entitled to be promoted from the day the vacancy arose is clearly not sustainable in law. Consequently the present writ petition is allowed and the impugned order dated 15.3.2012 passed by the Tribunal is set aside.”

7. The Apex Court had therefore settled the principle in service jurisprudence that a person's seniority cannot be granted from a retrospective date when the employee is not even borne in the cadre. The said seniority will be fixed in the year, in which the appointment to the post on the basis of an examination is made.

8. The Tribunal vide order dated 25.08.2009 in TA Nos. 84 & 85 of 2009 had held that if a selection does not take place in a process and promotees join earlier than those who qualify under LDCE quota, the latter LDCE quota persons cannot be allowed to claim that they should be granted seniority from the date of occurrence of vacancy or year of vacancy. The respondent has been taking the stand that the seniority of incumbents who became SDE by qualifying LDCE against vacancy years 1996-97 to 2000-2001 be interpolated by placing them in the ratio of 1 : 3 with those who became SDE through promotion by seniority cum fitness in the corresponding years. However, respondents are restrained by the order of the Apex Court dated 12.08.2014 in the batch of SLPs © 35930-35931 of 2012 in BSNL & Ors. Vs. S. Sadasivan & Ors. which held that :

“The view held by the Kerala High Court that a person appointed on promotion shall not get a seniority of an earlier year and that the date of occurrence of vacancy is not relevant for that purpose, in the absence of the rule to the contrary, is a correct view.”

In view of above ruling of Apex Court in respect of respondent department, applicability of ratio of N. Ravindran case, an employee of CPFC to the respondent in this OA i.e. BSNL is not an argument to

be fostered. The seniority lists 6, 7 and 8 of SDEs is in compliance of Apex Court order dated 12.8.2014 and is final. Maybe this would be the reason that applicant has not challenged the above seniority list as the Apex Court order placed a finality to the matter. Applicant was recruited as SDE under 1996 Recruitment Rules and he cannot claim any benefit by the subsequent 2002 RRs.

9. Applicant brings to our notice order of Principal Bench in OA No. 3300/2010 titled Sh. Raj Pal Singh & Ors. Vs. UOI & Or. Decided on 27.02.2017 wherein it was held that the seniority of LDCE appointees will be determined by preparing vacancy year-wise merit list taking into account the eligibility of the candidates. The inter se seniority between LDCE officers and promotee officers will be determined by applying rota quota principle between the merit list of LDCE 1995 prepared in the aforesaid manner and the seniority list of those promoted after the promulgation of the new RRs till 1995-96 to the extent 'rotation' is feasible taking into account the availability of officers in both categories, and the remaining officers will be placed below the last rotated officer in the seniority list. The 1996 RRs do not have a provision as to the manner in which inter-se seniority between promotees and LDCE is to be fixed. Hence, the Apex Court ruling on seniority cannot ever be revisited, on the grounds of the statutory RRs providing a rota quota provision to the contrary.

10. In view of above position, the LDCE JTOs can claim seniority only after they qualify the exam and are appointed to the post of SDE. The Tribunal in CPFC & another Vs. N. Ravindran &

Ors. , had held that had the 75% promotion of 25% LDCE been held in the same year then the ratio if any provided may be applied. In this matter under consideration, the promotions under both quotas were not held in the same year and no provision for fixing a ratio between the two quotas if held in different years is provided in the statutory rules. The respondents also bring to our notice that the impugned seniority lists are issued in accordance with CAT Chandigarh order dated 25.08.2009 and has been upheld by Apex Court order of 12.08.2014 and has attained finality. Thus, this matter does not merit re-adjudication on the same ground as it attracts the legal dictum of res-judicata.

11. In the light of the above arguments, the OA is devoid of merits and is dismissed. MA No. 060/00094/2017 is also disposed of accordingly. No order as to costs.

(P. GOPINATH)
MEMBER(A)

(JUSTICE M.S. SULLAR)
MEMBER(J)

Dated

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