

CENTRAL ADMINISTRATIVE TRIBUNAL
ERNAKULAM BENCH

Original Application Nos.180/00505/2017

Tuesday, this the 16th day of April, 2019

CORAM:

Hon'ble Mr. E.K.Bharat Bhushan, Administrative Member
Hon'ble Mr. Ashish Kalia, Judicial Member

1. K. Unnikrishna Pillai, S/o. Late Kuttan Pillai, aged 57 years,
 Radio Fitter (Highly Skilled I),
 Naval Ship Repairing Yard, Cochin – 682 004.
2. Jijimon Abraham, S/o. Abraham, aged 51 years,
 Radio Fitter (Highly Skilled I), Naval Ship Repairing Yard,
 Cochin – 682 004.
3. P.M. Joseph, S/o. P.L. Mathew, aged 55 years,
 Radio Fitter (Highly Skilled I), Naval Ship Repairing Yard,
 Cochin – 682 004. **Applicants**

(By Advocate - Mr. C.S.G. Nair)

V e r s u s

1. Flag Officer Commanding-in-Chief,
 Southern Naval Command, Cochin – 682 004.
2. Union of India, represented by its Secretary,
 Ministry of Defence, South Block,
 New Delhi – 110 001.
3. E.P. Joseph, aged 57 years, S/o. E.J. Pius,
 Master Craftsman (Radio Mechanic),
 Radio Shop, NSRY, Cochin – 682 004.
4. K. Fabian Sunny, aged 56 years, S/o. K.G. Stanslaus,
 Master Craftsman (Radio Mechanic), Radio Shop,
 NSRY, Cochin – 682 004.
5. D.R. John De Fernandez, aged 56 years,
 Joseph Fernandez, Master Craftsman (Radio Mechanic),
 Radio Shop, NSRY, Cochin – 682004.
6. N.P. Xavier Roy, aged 57 yars, S/o. Late N.X. Peter,
 Master Craftsman (Radio Mechanic), Radio Shop,
 NSRY, Cochin – 682 004. **Respondents**

[By Advocates – Mr. K.Kesavankutty, ACGSC (R1&2) & Mr. S. Radhakrishnan (R3-6)]

This application having been heard on 10.4.2019, the Tribunal on 16.04.2019 delivered the following:

ORDER

Per: Hon'ble Mr. Ashish Kalia, Judicial Member

The relief claimed by the applicants are as under:

“(i) To call for the records leading up to the issue of Annexure A6 and quash the same.

(ii) To declare that those who have not passed the departmental qualifying tests are not entitled for promotion as MCM/Chargeman.

(iii) To direct the respondents to promote the applicants as MCM/Chargeman and fill up the existing posts of MCM/Chargeman only from among those who have passed the departmental qualifying tests including the applicants.

(iv) Grant such other relief or reliefs that may be prayed for or that are found to be just and proper in the nature and circumstances of the case.

(v) Grant cost of this OA.”

2. The brief facts of the case are that the applicants are working as Radio Fitter, Highly Skilled-I in the Naval Ship Repairing Yard (NSRY) at Cochin. They joined as Radio Fitters Skilled during 1987. They were promoted as Highly Skilled-II and then as Highly Skilled-I w.e.f. 1.2.2008, 1.3.2008 and 1.1.2006 respectively. All the three applicants have passed the departmental qualifying test for the post of Chargeman. In the order dated 9.1.2008 in OA No. 677 of 2006 (Annexure A17) this Tribunal held that the applicants who had qualified in the trade test had not been placed in their proper seniority position and consequent to which they had not been considered for placement as Master Craftsman. The order directed the 1st respondent to draw the seniority list in HS Grade as per paragraph 8 of Annexure A17 in respect

of Radio Mechanic. Although a decade has passed, the 1st respondent has not followed the order. On 14.2.2010 restructuring of artisan staff in defence establishment was published based on the recommendations of the 6th CPC. The placement of the individuals in the posts resulting from the restructuring was made w.e.f. 1.1.2006 in relaxation of the conditions i.e. trade test etc. as a one time measure. The post of MCM was created based on the recommendations of the 3rd CPC and the post was created as per Annexure A3. The respondents instead of following the instructions in Annexure A3, granted promotions to those promoted as MCM to the grade of Chargeman which is a violation of clause No. 4 of the order in Annexure A3. In fact one time relaxation was given only from 1.1.2006 to 14.6.2010 the date of Annexure A2. The respondent No. 6 was promoted as MCM w.e.f. 1.4.2012 which is admittedly illegal. The action of the 1st respondent in this regard is a clear favoritism shown to the party respondents and is illegal. Denying promotion to the applicants to the post of Chargeman grade who have passed departmental qualifying test is highly arbitrary. Aggrieved, the applicants have filed the present Original Application.

3. Notices were issued to the respondents. They entered appearance through Shri K. Kesavankutty, ACGSC appearing for respondents Nos. 1 & 2 and Shri S. Radhakrishnan, learned counsel appearing for respondents Nos. 3-6. Respondents Nos. 1 & 2 have filed a reply statement contending that the promotion to the post of MCM is governed by rules promulgated vide letter Annexure A3 wherein it is provided that minimum qualifying service of ten years continuous service in the same or allied trade in the Skilled Grade is

required out of which three years service must be in the Highly Skilled Grade-I. Accordingly, the individuals placed in the grade of MCM have been given relaxation in the minimum qualifying service for the posts pursuant to restructuring as there was no trade test involved. The post of MCM became a part of promotional hierarchy with effect from 1st January, 2006 and rules for promotion wherever applicable has been implemented and vacancies were being filled up accordingly. However, due to non-availability of Recruitment Rules for the post, it is not feasible to incorporate the criteria of departmental qualifying test for promotion as MCM. Therefore, when there exists no departmental qualifying test for promotion as MCM, the contention of the applicants that promotions for the post of MCM are being effected by promoting unqualified persons who have not passed any departmental qualifying test is without logic and application of mind. Further no promotion can be given to the post of MCM based on passing of departmental qualifying test for the post of Chargeman. Until the promulgation of Recruitment Rules only qualifying service and seniority can be reckoned for determining the eligibility for promotion to the post of MCM. Respondents pray for dismissing the OA.

4. Respondents Nos. 3 to 6 have also filed a reply statement contending that the 1st and 3rd applicants have filed OA No. 99 of 2012 before this Tribunal making 3rd, 4th and 5th respondents as party respondents Nos. 5, 6 and 7 in the OA. This Tribunal considered the matter in detail on 5.11.2012 and on 16.11.2012 dismissed the OA holding that as under:

“The respondents Nos. 4 to 7 therein were senior to the applicants but did not pass the departmental qualifying test. However, consequent to the merger of post of HS-II and HS-I, they are re-designated as Radio Mechanic HS and they got placement as MCM by virtue of their seniority and length of service by relaxation of conditions i.e. passing of trade test, DTC etc.”

It was also held that respondents 4 to 7 continued to be senior to the applicants since the applicants were never promoted to HS-I during 1996 to 2003. This Tribunal also held in paragraph 12 as under:

“The promotion of seniors who got the benefit of one time relaxation in passing the trade test etc. is as per policy decision in the wake of restructuring which is not challenged by the applicants. We do not find any arbitrariness or illegality in the promotion granted to the seniors of the applicants.”

This Tribunal further held that there was no vacancy of HS-I against which the applicants could have been considered for promotion through they have passed the departmental promotion test. Therefore, it is clear that this Tribunal had in categorical terms found that the party respondents herein are senior to the applicants and their appointments to the post of Master Craftsman is perfectly legal, valid and in accordance with the rules and procedure in vogue. In the present OA the two applicants in OA No. 99 of 2012 along with the 3rd applicant approaches this Tribunal for the same relief. The applicants have not mentioned about OA No. 99 of 2012 in the present Original Application as well. The order passed in OA No. 99 of 2012 had already attained finality and it was not challenged before any higher for a. Thus, the present OA is barred by the principles of *res judicata* and is liable to be dismissed *in limine* due to suppression of material facts. Respondents 3-6 pray for dismissing the OA.

5. Heard Mr. C.S.G. Nair, learned counsel appearing for the applicants, Mr. K. Kesavankutty, ACGSC learned counsel appearing for respondents

Nos. 1 & 2 and Shri S. Radhakrishnan, learned counsel appearing for respondents Nos. 3-6. Perused the records and the argument note submitted by the applicants.

6. We have gone through the order passed by this Tribunal in OA No. 99 of 2012 dated 16.11.2012. The order so passed by this Tribunal is extracted below:

“The industrial cadre of artisan staff in the respondents' organization was restructured vide order dated 20.05.2003 at Annexure A-2 into a three tier structure of Skilled (SK), Highly Skilled (HS) and Master Craftsman (MCM) with effect from 01.01.1996. The post of MCM was a placement and not a promotion. The three tier structure was further modified vide order dated 14.06.2010 into a four tier structure of SK, HS Grade-II, HS Grade-I and Master Craftsman. The post of Master Craftsman was made a promotion post from HS Grade-I. The placement of individuals for the above posts resulting from the restructuring was made in relaxation of conditions, if any, i.e. trade test etc. as one time measure.

2. In O.A. No. 740/2003, 741/2003 and 882/2003 which dealt with the restructuring with effect from 01.01.1996, this Tribunal vide order dated 17.05.2005 held that it would be wrong to deny an employee of the benefit of seniority enjoyed by virtue of regular promotion by an act of retrospective revision of cadre structure entailing forfeiture of promotional seniority already availed. Complying with this order, the respondents clarified vide order dated 27.03.2006 at Annexure A-4 that the individuals who got promotion by way of passing trade test etc. between 01.01.1996 to 19.05.2003 would be en-bloc senior to those who got promotion as a result of restructuring of cadre in relaxation of conditions of passing trade test etc.

3. Vide order dated 09.01.2008 in O.A. No. 677/2006, this Tribunal directed the respondents to draw the seniority list of HS grade on the lines specified in para 8 therein which is reproduced as under:

“8. Arguments were heard and documents perused. The V pay Commission had no doubt merged HS Grade II and I. The applicants have been holding post of HS Grade II as of 1989 itself. Therefore, when in 1996 the merger took place, the seniority of the H.S. should logically be as under:-

- a) All the H.S. Grade I as on 31-12-1995.
- b) HS Grade II who have passed the trade test maintaining their inter se seniority as of 31-12-1995.
- c) HS Grade II who have passed the trade test from 01.01.1996 to 2003 as per the Tribunal's order dated 27.03.2006.

d) Other HS grade II who did not qualify in the trade test till 2003.”

Based on this order, the applicants in O.A. No. 677/2006 were promoted as Radio Mechanic HS-I with effect from 24.03.2003 against the vacancies which arose on 31.03.1998 and 04.02.2000. The 3rd vacancy of Radio Mechanic which arose on 31.12.2001 was earmarked for Scheduled Caste candidate.

4. The applicants in this O.A had joined the service of the respondents as Radio Mechanic (SK) on 01.12.1987 and 01.04.1987 respectively. They were promoted as Radio Mechanic HS-II with effect from 01.03.1991 and 20.06.1996 respectively. They had passed the trade test in 1991 and 2003 respectively and need 3 years service in the grade of HS-II for promotion to the post of Radio Mechanic HS-I. While so, the grades of HS-I and HS-II were merged into a single cadre of HS with effect from 01.01.1996 vide order dated 20.05.2003.

5. The applicants are aggrieved that the Annexure A-6 seniority list dated 30.08.2011 is issued placing respondents 4 to 7 above them and in the cadre of MCM. According to them, the respondents 4 to 7 are not qualified to be appointed as HS-I. Hence this O.A is filed for the following reliefs:

- (i) To call for the records relating to Annexures A-1 to A-7 and to quash A-1 to the extent it places respondents 4 to 7 in the grade of Master Craftsman on the basis of the promotions granted to respondents 4 to 7 to HS-I in preference to the applicants;
- (ii) To declare that the applicants are entitled to be promoted to Radio Mechanics Highly Skilled Grade-I on the basis of their qualifying in the trade test against the vacancies which arose on 31.03.1998, 04.02.2000 and 31.12.2001;
- (iii) To direct to the respondents to promote the applicants as Radio Mechanics HS-I with effect from 31.03.1998 and 04.02.2000 or 31.12.2001 or against any other subsequent vacancies in preference to respondents 4 to 7 and to grant all consequential benefits including arrears of salary;
- (iv) To pass any other orders which this Hon'ble Court may deem fit and proper in the circumstances of the case; and
- (v) To award costs of this proceedings.

6. The applicants contended that the refusal of the respondents to grant promotions to the applicants when there were vacancies and when they were qualified and granting promotions to the respondents 4 to 7 who are not qualified for promotion by granting one time relaxation and further promotion as MCM are highly illegal and arbitrary. The applicants who are qualified to be appointed as HS-I by passing the test, are entitled to be appointed to the existing vacancies and future vacancies. The vacancies in HS-I (Radio Mechanic trade) had arisen on 31.03.1998, 04.02.2000 and 31.12.2001. Granting one time relaxation does not mean that those who already stand qualified have to be denied promotion which had to be done till Annexure A-2 was issued. As per order of this Tribunal at Annexure A-3 in O.A. No. 740/2003 and connected cases, promotions need not be given to the

candidates who have not passed the trade test, when the candidates who have passed the test are already available. This Tribunal had specifically in its order dated 09.01.2008 in O.A. No. 677/2006 had directed the mode by which the seniority is to be assigned and further promotions are to be implemented.

7. The respondents 1 to 3 in their reply statement submitted that though the applicants had passed the trade test, as they were not promoted, the condition of treating en-bloc senior to those who got placement due to restructure of cadre will not apply to them. Mere passing of departmental qualifying test is not the only criterion for promotion. The senior most person who completed the requisite period of service in the feeder category and passed the departmental qualifying test are considered for promotion. 2 out of 3 vacancies which arose in the cadre of HS-I were filled up with two individuals who were much senior to the applicants. The remaining vacancy was reserved for Scheduled Caste candidate. The respondents 4 to 7 were senior to the applicants but did not pass the departmental qualifying test. However, consequent to the merger of posts of HS-II and HS-I, they were redesignated as Radio Mechanic HS and they got placement as MCM by virtue of their seniority and length of service by relaxation of conditions, ie. passing of trade test, DPC etc. They were placed as MCM strictly in accordance with the guidelines prescribed for restructure of cadre. The grievance of the applicants with regard to non-finalization of seniority list and rationalization of trade structure have been done and no deficiency was found by this Tribunal as per order dated 15.09.2009 at Annexure R-6. The applicants were given sufficient opportunity to raise any objection regarding discrepancies, if any, in the seniority list. The respondents 4 to 7 are definitely senior to the applicants and they were firstly redesignated as HS consequent to with effect from 01.01.1996 merger of posts of HS-II and HS-I and later on placed as MCM based on restructure orders of the Government with relaxation of rules for promotion. The applicants have not been superseded.

8. In the reply statement filed by the respondents 4 to 7, they reiterated that the applicants are juniors to them. Only those persons who had passed the trade test and were actually promoted to HS-I are entitled to claim seniority over those who were promoted by relaxation of passing the trade test as a one time measure. The respondents 4 to 7 were promoted as HS when their turn arose on occurrence of vacancies. The vacancy that arose on 31.12.2001 had been filled up by promotion of a Scheduled Caste candidate. The vacancies to which the applicants claim promotion were filled up by their seniors and there were no other vacancies to which the applicants could have staked claim to. Annexure A-1 list is created on the basis of the cadre restructuring as recommended by the VIth Central Pay Commission and not on the basis of the order of this Tribunal in O.A. No. 677/2006. The applicants have chosen to accept Annexure A-6 seniority list and hence are not entitled to challenge Annexure A-1. The real intention of this Tribunal as evident from other paragraphs of the order in O.A. No. 677/2006 is that the HS-II who have passed the trade test and had been promoted between 01.01.1996 to 2003 could claim seniority under the 3rd category. However, the words "had been promoted" was not stated in paragraph 8(c), obviously inadvertently. This omission is being attempted to be taken advantage of by the applicants by claiming seniority merely because they have passed the trade test. One cannot claim seniority over his seniors by merely passing the trade test if he is not promoted. The respondents 4 to 7 continued to be senior to the applicants since the applicants were never promoted to HS-I between 1996 to 2003. The claim of the applicant for seniority on the basis of

Annexure A-5 judgement is misconceived.

9. The 11th respondent in his reply statement submitted that no Recruitment Rules for promotion to MCM is made till date. Therefore, no trade test can be conducted for promotion to the post of MCM. The 11th respondent is admittedly senior to the applicants. He was placed as Radio Mechanic HS and Radio Fitter HS-I along with the applicants, but maintaining his seniority over and above the applicants right from 1987. The applicants are not entitled to claim any additional advantage because of the trade test. The trade test could have been useful if they were promoted to any vacancies on or before 20.05.2003.

10. We have heard Mr. Shafik M.A, learned counsel for the applicants and Mr Sunil Jacob Jose, learned SCGSC appearing for the respondents 1 to 3, Mr. K.K. Mohammed Ravuf, learned counsel for respondents 4 to 7, Mr. M.r. Hariraj, learned counsel for the respondents 8 to 10 and Mr. S. Radhakrishnan, learned counsel for the respondent No. 11 and perused the records.

11. The applicants seek a declaration that they are entitled to be promoted as Radio Mechanic HS-I on the basis of their passing the departmental examination in 1991 and 2003 respectively against the vacancies which arose on 31.03.1998, 04.02.2000 and 31.12.2001, in the year 2002. Their claim is highly belated and barred by limitation.

12. The criteria for promotion to the HS-I is seniority and pass in the departmental qualifying examination. Mere passing of departmental qualifying test does not entitle the applicants for promotion. None of the juniors to the applicants has been promoted to the HS-I superseding them. The promotion of seniors who got the benefit of one time relaxation in passing the trade test etc. is as per policy decision in the wake of restructuring which is not challenged by the applicant. We do not find any arbitrariness or illegality in the promotion granted to the seniors of the applicants.

13. Out of the 3 vacancies in the HS-I cadre, 2 vacancies were filled in by the applicants in O.A. No. 677/2006, which was allowed by this Tribunal. The 3rd vacancy earmarked for a Scheduled Caste employee was also filled up. The simple fact is that there is no vacancy of HS-I against which the applicants could have been considered for promotion though they had passed the departmental qualifying test.

14. The direction of this Tribunal in O.A. No. 677/2006 to draw the seniority list as per para 8 therein dwelt with the integrated HS cadre which is not in existence since 01.01.2006 on account of the 2nd restructuring. Moreover, the direction has to be read in conjunction with the orders of this Tribunal in O.A. No. 741/2003 and connected cases and Annexure A-4 order and other paragraphs in the order itself. It would become clear that the direction of this Tribunal was that the HS-II who have passed the trade test and had been promoted between 01.01.1996 to 2003 can claim seniority over those whose promotion was, as a result of restructuring of cadre in relaxation of passing trade test etc. The obvious inadvertent omission of the words "had been promoted" cannot confer upon the applicant any right to claim seniority on the basis of passing the departmental test. The law is well settled that seniority is based on length of service from the date of entry into service/cadre and order of merit in the panel of selection and not on acquiring qualification for consideration for promotion. The applicants had ample

opportunities to raise objections to the seniority list at Annexure A-6, but they did not do so at the appropriate time. Annexure A-1 seniority list is based on restructuring of the cadres consequent to the implementation of the recommendations of the VIth Central Pay Commission.

15. In the light of the above discussion, there is no merit in the O.A. Hence the O.A. is dismissed with no order as to cost.”

7. We find that the applicants have very conveniently had not mentioned about the filing of OA No. 99 of 2012 in the present OA. Neither this fact was pointed out by the official respondents Nos. 1 & 2 in their reply statement. However, the party respondents Nos. 3-6 have pointed out this fact in their reply statement. The applicants have also filed a rejoinder to the reply statement filed by respondents Nos. 3-6 wherein they have denied the fact of filing OA No. 99 of 2012 before this Tribunal. The applicants have suppressed this fact in the present OA as well as the rejoinder filed by them to the reply statement filed by respondents Nos. 3-6. The relief claimed by the applicants in the present OA are exactly same to the relief claimed in OA No. 99 of 2012 and this Tribunal had already considered and decided the issue against the applicant by dismissing the OA. Therefore, now the applicants by way of the present O.A cannot try to re-litigate the same issue with some other applicant which had already been considered and decided by this Tribunal in OA No. 99 of 2012. Hence, the O.A. is hit by the doctrine of *res judicata* [see **R.C. Tiwari v. M.P. State Cooperative Marketing Federation Ltd. & Ors.** - (1997) 5 SCC 125].

8. In view of the above the Original Application is dismissed as hit by the principle of *res judicata*. There shall be no order as to costs.

(ASHISH KALIA)
JUDICIAL MEMBER

(E.K.BHARAT BHUSHAN)
ADMINISTRATIVE MEMBER

“SA”

Original Application No.180/00505/2017**List of Annexures****Applicants' Annexures**

Annexure A-1 - True copy of the seniority list published by the 1st respondent along with memo dt. 25.8.216.

Annexure A-2 - True copy of the letter No. 11(5)/2009-D (Civ.I), dt. 14.6.2010.

Annexure A-3 - True copy of the order No. 1(2)80/D(CIV-1), dt. 21.9.1982 issued by the 2nd respondent.

Annexure A-4 - True copy of the representation dt. 31.3.2015 submitted by the 1st applicant.

Annexure A-5 - True copy of the representation dt. 15.12.2016.

Annexure A-6 - True copy of the memo No. CS 2779/7 dt. 30.3.2017.

Annexure A-7 - True copy of the RTI question dt. 23.9.2014.

Annexure A-8 - True copy of the reply No. DL/0812/2823 dt. 20.12.2014.

Annexure A-9 - True copy of the RTI question dt. 10.12.2013.

Annexure A-10 - True copy of the letter No. 130/13/33/PIO dt. 10.2.2014 issued by the 1st respondent.

Annexure A-11 - True copy of the RTI question dt. 17.4.2013.

Annexure A-12 - True copy of the reply No. 130/13/33/PIO, dt. 21.5.2013.

Annexure A-13 - True copy of the result of departmental qualifying test conducted in January, 2003.

Annexure A-14 - True copy of the letter No. CP (NG)/3008/DPC/ENC/I dt. 12.6.2015.

Annexure A-15 - True copy of the memo No. 130/13/33/PIO, dt. 10.2.2014 issued by the 1st respondent along with the question asked.

Annexure A-16 - True copy of the letter No. CP (NG)/2852/RR/TRADES MAN, dt. 9.3.2011 issued by the 2nd respondent.

Annexure A-17 - True copy of the order in OA No. 677/2006 dt. 9.1.2008.

Respondents' Annexures

Annexure R1 - True copy of IHQ of MOD/DCPS letter CPT (JCM)/3543/XII/18SCM dated 25 May 2016.

Annexure R3(a) - True copy of order No. CS2765/34/1(i), dated 28.6.2013.

Annexure R3(b) - True copy of the communication No. CS2764/1/94(h) dated 22.12.2011 issued by Head Quarters, SNC.

Annexure R3(c) - True copy of the order in OA No. 99/2012 dated 16.11.2012.

Annexure R3(d) - True copy of circular No. 11(5)2009 D(Civ-I) dated 14.6.2010.

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