

CENTRAL ADMINISTRATIVE TRIBUNAL

CIRCUIT BENCH, R A N C H IOA/051/00003/2017OA/051/00006/2017OA/051/00012/2017Order Reserved on: 13-MAR-2019Order Pronounced on: 15-MAR-2019C O R A M

HON'BLE MR. JAYESH V.BHAIRAVIA, MEMBER (JUDL.)

HON'BLE MR. DINESH SHARMA, MEMBER (ADMN.)

1. OA/051/00003/2017

Ujjwal Kumar Tiwary, son of Shri Krishna Prasad Tiwary, aged about 37 years, now posted as Office Superintendent (O.S.) in the office of Assistant Commissioner of Income Tax, Circle-I, C.H.Area, Jamshedpur-831 001.Applicant.

By Advocate:- Mrs. M.M.Pal, Sr. Advocate with Ms. Mahua Palit & Reeta Kumari.

Vs.

1. Union of India through the Chairman, Central Board of Direct Taxes, ARA Centre, E-2, Jhandewalan Extension, New Delhi-110 007.
2. Principal Chief Commissioner of Income Tax (B&J), 1st Floor, Central Revenue Building, Birchand Patel Marg, Patna-800 001.
3. Dy. Commissioner of Income Tax (Hqrs.) Admn., Revenue Building, Birchand Patel Marg, PO & PS-Kotwali, District-Patna-800 001.
4. Chief Commissioner of Income Tax, Ranchi, Central Revenue Building 5, Main Road, Ranchi-834 002.
5. Mr. Manoj Kumar, SLA/0339, now posted as O.S. in the Office of Dy. Director of Income Tax, One Office Road, Jamshedpur-831 001, Jharkhand.
6. Mr. Shambhu Kumar, SLA/0362, now posted as O.S. in the office of the Income Tax Officer, Ward-1(1), Muzaffarpur, Chandralok Bhawan, Naya Tola, Muzaffarpur, Bihar-842 001.
7. Mr. Santosh Kumar, SLA/0375, ACIT, Central Circle, Aaykar Bhawan, Lubi Circular Road, Dhanbad-826 001.
8. Mr. Arbind Kumar Prasad, SLA/0423, now posted a O.S. in the office of the Chief Commissioner of Income Tax Central Revenue Building-5, Main Road, Ranchi-834 001.
9. Mr. Sanjay Kumar, SLA/0445, now posted as O.S. in the office of Income Tax Officer, Ward-1(5), Koderma Stationed at Aayakar Bhawan, Ravindra Path, Hazaribagh, Jharkhand-825 301.

10. Mr. Kumar Abhay, SLA/0465, now posted as O.S. in the office of the Pr. Director of Investigation, Patna, 3rd Floor Central Revenue Building, Birchand Patel Marg, Patna-800 001, Bihar.

.....Respondents.

By Advocate:- Mr. Rajendra Krishna, Sr. Standing Counsel.
Mrs. J. Majumdar (For private respondents)

2. OA/051/00006/2017

Sushanta Paul, son of Late Sahdeo Chandra Paul, age about 38 years now posted as Office Superintendent (O.S.), Office of the Income Tax Officer, Ward 1(2), 47, C.H.Area, Jamshedpur-831 001.Applicant.

By Advocate:- Mrs. M.M.Pal, Sr. Advocate with Ms. Mahua Palit & Reeta Kumari.

Vs.

1. Union of India through the Chairman, Central Board of Direct Taxes, ARA Centre, E-2, Jhandewalan Extension, New Delhi-110 007.
2. Principal Chief Commissioner of Income Tax (B&J), 1st Floor, Central Revenue Building, Birchand Patel Marg, Patna-800 001.
3. Dy. Commissioner of Income Tax (Hqrs.) Admn., Revenue Building, Birchand Patel Marg, PO & PS-Kotwali, District-Patna-800 001.
4. Chief Commissioner of Income Tax, Ranchi, Central Revenue Building 5, Main Road, Ranchi-834 002.
5. Mr. Manoj Kumar, SLA/0339, now posted as O.S. in the Office of Dy. Director of Income Tax, One Office Road, Jamshedpur-831 001, Jharkhand.
6. Mr. Shambhu Kumar, SLA/0362, now posted as O.S. in the office of the Income Tax Officer, Ward-1(1), Muzaffarpur, Chandralok Bhawan, Naya Tola, Muzaffarpur, Bihar-842 001.
7. Mr. Santosh Kumar, SLA/0375, ACIT, Central Circle, Aaykar Bhawan, Lubi Circular Road, Dhanbad-826 001.
8. Mr. Arbind Kumar Prasad, SLA/0423, now posted a O.S. in the office of the Chief Commissioner of Income Tax Central Revenue Building-5, Main Road, Ranchi-834 001.
9. Mr. Sanjay Kumar, SLA/0445, now posted as O.S. in the office of Income Tax Officer, Ward-1(5), Koderma Stationed at Aayakar Bhawan, Ravindra Path, Hazaribagh, Jharkhand-825 301.
10. Mr. Kumar Abhay, SLA/0465, now posted as O.S. in the office of the Pr. Director of Investigation, Patna, 3rd Floor Central Revenue Building, Birchand Patel Marg, Patna-800 001, Bihar.

.....Respondents.

By Advocate:- Mr. Rajendra Krishna, Sr. Standing Counsel.
Mrs. J. Majumdar (For private respondents)

3. OA/051/00012/2017

Vijay Kumar Singh, son of Sri Nitya Nand Singh, age about 42 years, now posted as Office Superintendent (O.S.), Office of the Assistant Commissioner of Income Tax, Circle-I, 47, C.H. Area, Jamshedpur-831 001.Applicant.

By Advocate:- Mr. M.A.Khan.

Vs.

1. Union of India through the Chairman, Central Board of Direct Taxes, ARA Centre, E-2, Jhandewalan Extension, New Delhi-110 007.
2. Principal Chief Commissioner of Income Tax (B&J), 1st Floor, Central Revenue Building, Birchand Patel Marg, Patna-800 001.
3. Dy. Commissioner of Income Tax (Hqrs.) Admn., Revenue Building, Birchand Patel Marg, PO & PS-Kotwali, District-Patna-800 001.
4. Principal Commissioner of Income Tax, Jamshedpur, District-Singhbhum (East), Jharkhand.
5. Mr. Prashant Kumar Sinha, now posted as O.S. in the Office of Income Tax Officer, Ward-6(4), Patna, 3rd Floor, Laok Nayak Jaiprakash Bhawan, New Dak Bungalow Road, Patna-800 001, Bihar.
6. Mr. Manish Kumar Sinha, Office of the Asstt. Commissioner of Income Tax, Circle 3, Banglow No.2, Bagmati Road, Jamshedpur-831 001.
7. Mr. Manoj Kumar, SLA/0339, now posted as O.S. in the Office of Dy. Director of Income Tax, One Office Road, Jamshedpur-831 001, Jharkhand.
8. Mr. Shambhu Kumar, SLA/0362, now posted as O.S. in the office of the Income Tax Officer, Ward-1(1), Muzaffarpur, Chandralok Bhawan, Naya Tola, Muzaffarpur, Bihar-842 001.
9. Mr. Santosh Kumar, SLA/0375, now posted as O.S. in the Office of the Income Tax Officer, Ward-2, Begusarai Income Tax Office, Begusarai, Bihar.
10. Mr. Arbind Kumar Prasad, SLA/0423, now posted as O.S. in the office of the Chief Commissioner of Income Tax, Central Revenue Building-5, Main Road, Ranchi-834 001.
11. Mr. Sanjay Kumar, SLA/0445, now posted as O.S. in the office of Income Tax Officer, Ward-1(5), Koderma Stationed at Aayakar Bhawan, Ravindra Path, Hazaribagh, Jharkhand-825 301.
12. Mr. Kumar Abhay, SLA/0465, now posted as O.S. in the office of the Pr. Director of Investigation, Patna, 3rd Floor Central Revenue Building, Birchand Patel Marg, Patna-800 001, Bihar.

.....Respondents.

By Advocate:- Mr. Rajendra Krishna, Sr. Standing Counsel.

Mrs. J. Majumdar (For private respondents).

O R D E R

Dinesh Sharma, Member (Admn.):-Since the facts and issue involved in the three OAs mentioned above are same, these are being disposed of with the following common order.

2. The claim of the applicants in these OAs are for quashing the seniority list circulated by order No. F.No.25015/05/2016-17/2772 dated 29th July, 2016 which was issued modifying the earlier seniority list circulated by F.No.25015/26/2015-06/9312, dated 18th January, 2016. These are annexed as Annexures-A/10 & A/9 respectively to the OAs. Both the seniority lists are purported to have been issued in view of judgment of Hon'ble Supreme Court in N.R.Parmar case (hereinafter referred as Parmar's case). The applicants have claimed that the revision made in the first mentioned seniority list above (at Annexure-A/10) by which the applicants have been put below the private respondents, is not correct since both the seniority lists are alleged to have been prepared on the basis of the ratio laid down by the Hon'ble Apex Court. Such a discrepancy between these two lists is not justified. Both the applicants and the private respondents are selected by the same examination process and it is wrong to put them below the private respondents since they were above them going by the result of the examination process in which both the applicants and the private respondents were selected.

3. The official respondents and the private respondents have denied the claim of the applicants. They have alleged that the change

between the two seniority lists was necessitated because of a claim made by both the applicants and the private respondents after the publication of the first seniority list to give them benefit of the “Next Below Rule” under which *“if a junior person is considered for promotion on the basis of his completing the prescribed qualifying period of service in that grade, all persons senior to him in the grade shall also be considered for promotions notwithstanding that they may not have rendered the prescribed qualifying period of service in that grade but have completed successfully the prescribed period of probation.”* Since three officials, namely, Shri Kailash Kumar Mishra, Shri Dhananjay Sharma and Shri Surya Narayan, were give promotion despite their being technically junior (on account of their inter cadre transfer) to the applicants and the private respondents, both the applicants and the private respondents have requested for putting them above these inter-cadre transferees following the “Next Below Rules”. Since on the relevant date (01.01.2010), the applicants did not have the required qualifications for promotion (completion of probation period or passing of departmental examination for ministerial staff), the applicants could not be given the benefit of Next Below Rules while the private respondents got this benefit and this is what explains the changes made in the second seniority list.

4. The applicants in their rejoinder have questioned the application of the Parmar’s decision stating that this decision was only for determining inter-se seniority between direct recruits and

promotees and should not have been used for making distinctions amongst recruits of the same batch. They have also questioned application of the ratio of Parmar's decision retrospectively (in the year 2010) while the decision itself was in the year 2012. They have also questioned non consideration of the applicants' request in the year 2016 by what time all of them had fulfilled the required qualification.

5. We have gone through the pleadings and have heard the learned counsels of the parties. For arriving at a decision in this matter it is necessary to determine the following issues:-

- (i) Whether the decision of the Hon'ble Supreme Court in Union of India vs. N.R.Parmar & Ors. [(2012) 13 SCC 340] is applicable to fixing the seniority amongst senior Tax Assistants (applicants and respondents in this case)?
- (ii) If it is so, whether this decision is to be implemented retrospectively for fixing seniority based on promotions done in the year 2010/2011 (before the decision in the Parmar's case)?
- (iii) Whether the revision in the two seniority lists which were both based on Parmar's judgment on account of "Next Below Rule", is correct ?

6. Regarding the first issue mentioned above, there is no disputing the fact that the judgment in the Parmar's case was in the context of determining inter-se seniority between direct recruits and promotes. The Hon'ble Court came to the conclusion that the direct

recruits could be given seniority with respect to the year in which the direct recruitment vacancy occurred/was notified and it need not be linked with the date when this direct recruitment actually occurred or the recruitees joined. It has also been brought to our notice that instructions have been issued by the DoPT and also by the CBDT with respect to this judgment. These instructions are reproduced here:-

"DoPT's O.M. No. 20011/1/2012-Estt.(D) dated 04.03.2014

After examining the above matter in pursuance of Hon'ble Supreme Court's judgment on 27.11.2012 in the case of NR Parmar, the DoPT had conveyed that the matter of determining inter se seniority of DRs and Promotees would be as under (emphasis added):-

- (i) *DoPT O.M. No. 2011/2006-Estt.(D) dated 03.03.2008 is treated as non-existence/withdrawn ab initio;*
- (ii) *The rotation of quota based on the available direct recruits and promotes appointed against the vacancies of a Recruitment Year, as provided in DoPT O.M. dated 07.02.1986/03.07.1986, would continue to operate for determination of inter se seniority between direct recruits and promotes;*
- (iii) *The available direct recruits and promotes, for assignment of inter se seniority, would refer to the direct recruits and promotes who are appointed against the vacancies of a Recruitment Year;*
- (iv) *Recruit Year would be the year of initiating the recruitment process against a vacancy year;*
- (v) *Initiation of recruitment process against a vacancy year would be the date of sending of requisition for filling up of vacancies to the recruiting agency in the case of direct recruits; in the case of promotes the date on which a proposal, complete in all respects, is sent to UPSC/Chairman-DPC for convening of DPC to fill up the vacancies through promotion would be relevant date.*
- (vi) *The initiation of recruitment process for any of the modes viz. direct recruitment or promotion would*

be deemed to be the initiation of recruitment process for the other mode as well;

(vii) *Carry forward of vacancies against direct recruitment or promotion quota would be determined from the appointments made against the first attempt for filling up of the vacancies for a Recruitment Year;*

(viii) *The above principles for determination of inter se seniority of direct recruits and promotes would be effective from 27.11.2012, the date of Supreme Court Judgment in Civil Appeal No. 7514-7515/2005 in the case of N.R.Parmar vs. UOI & Ors.*

(ix) *The cases of seniority already settled with reference to the applicable interpretation of the term availability as contained in DoPT O.M. dated 07.02.1986/03.07.1986 may not be re-opened.*

Board's letter in F.No.C-18013/4/2014-87 dated 06.06.2014

Board conveyed certain clarifications from the DoPT, the highlights of which are as under:

(i) *Any seniority fixation done under the provision of O.M. dated 03.03.2008 is liable to be revisited as the said O.M. has been withdrawn and treated as non-existent ab-initio.*

(ii) *The seniority would have to be decided under DoPT O.Ms. dated 07.02.1986/03.07.1986 till 27.11.2012 and after that as per the DoPT O.M. dated 04.03.2014.*

(iii) *Since, in the Income Tax Department, the seniority has been fixed based on the available/implied interpretation as mentioned in O.M. dated 03.03.2008, it is unambiguously confirmed that the entire issue of seniority of the Income Tax Department would have to be revisited in compliance of the judgment of the Supreme Court."*

7. A plain reading of the above should leave no one in doubt about the fact that the Hon'ble Supreme Court's judgment was to be followed only in the matter of determining "inter-se seniority of DRs and promotes." Therefore, using the ratio of this

judgement for the purpose of determining seniority amongst persons who are recruited under the same stream (and in the present case following the same process of examination) will be *prima facie* not correct. It seems that the department has used this judgment for determining vacancies of a particular year, treating promotion as a method of recruitment, and though there is no *inter-se* seniority involved using the concept of recruitment year as a method of determining seniority amongst recruits from the same stream. This is obviously a very stretched interpretation of a judgment which was clearly not intended for this purpose. Hence, we are very certain in determining the first issue mentioned above in the negative and find that the judgment in the Parmar's case cannot be cited as a reason for re-fixing seniority amongst the applicants and the private respondents.

8. As can be seen from para (viii) of the DOPT's OM quoted in para-6 above, even if the Parmar's case was to be used for determining seniority, it was to be done only with effect from 27.11.2012 and thus, quoting Parmar's judgment for revising seniority on the basis of what happened before 27.11.2012 will be patently wrong. Thus, our finding on the second issue is also in the negative.

9. This brings us to the third issue of whether the revision in the seniority by quoting the 'Next Below Rule' is correct or not. In this context, another rule, following which the invocation of "Next Below Rule" became necessary in this case, is reproduced below:-

"Board's letter in F.No.A-22020/76/89-AD-VII dated 14.05.1990.

*The service rendered in the old charge will not be counted in the new charge for the purpose of seniority. He/she will be placed at the bottom of the list of the employees of the concerned Cadre in the new charge. Seniority in the cadre in the Charge to which person is transferred will start from the day that person reports for duty in that charge. However, he will not rank senior to any official who belong to a batch **selected on merit whose inter-se-seniority is not regulated by date of joining.**"*

10. This Rule is an existing Rule which puts a person who seeks a voluntary transfer to a different cadre at the bottom of the seniority in the cadre to which he has sought such transfer to. By this logic the three persons mentioned in para-3 above, should not have been promoted in the first place if they were junior to the applicants and the respondents. Be that as it may, since they **were** promoted ignoring the loss of seniority quoted above, the department has quoted another rule which is reproduced below (proviso to item no.12 in the Schedule attached to the Income Tax Department Group 'C' Recruitment Rules, 2003) to put the private respondents above these "junior persons" –

"If a junior person is considered for promotion on the basis of his completing the prescribed qualifying period of service in that grade, all persons senior to him in the grade shall also be considered for promotion, notwithstanding that they may not have rendered the prescribed qualifying period of service in that grade but have completed successfully the prescribed period of probation."

11. Reading of the above rule will make it clear that it was meant for considering all the persons above a junior person who was considered for promotion on the basis of his completing the prescribed qualifying period of service. The rules provide for

recruitment “100% by promotion from amongst Tax Assistants who have rendered a minimum regular service of three years in the grade and have qualified the prescribed examination for ministerial staff” (item no.12 of the Schedule attached to the Rules). The argument of the respondents is that the applicants have not fulfilled the condition prescribed under this item and hence they could not be promoted while implementing the proviso to Note-I attached to this item no.12.

12. Since there is only one stream i.e. 100% by promotion from Tax Assistants, there cannot be any fixed quota of promotion versus direct recruitment in any particular year. Hence, the rule regarding determination of vacancies before the beginning of any recruitment year and starting the process of recruitment against such vacancies by direct recruitment will not apply to this category. The department will, however, be at liberty to promote only as many persons who fulfil the criteria prescribed under item 12 of the Schedule. In case a person does not fulfil that criteria at the relevant time he could be promoted only in a later year by which time he fulfils that criteria. Whether such delayed promotion would result in change in the seniority of such late promote does not appear to be clear from these rules. Logically speaking, if this argument is accepted this would mean that a delayed passing of examination would make a person perpetually junior, thereby affecting his/her future promotions also. This does not appear to be the intention of the rules quoted above.

13. In this regard a judgment by the Hon'ble Supreme Court in Union of India vs. Sadhana Khanna (2008(1) SCC 720) was brought to

our notice where the Hon'ble Apex Court found that just because of a delay in fulfilling the eligibility criteria cannot be a reason for superseding a senior. In this case also the persons who were junior, having lower rank in the Assistant grade examination were included in the select list while ignoring someone who secured a higher rank only on ground that she had not completed the minimum eligibility service requirement. Going by the ratio of this case, it is clear that changing a persons' place in the seniority list vis-a-vis others who were selected by the process of the same examination only because some of them cleared the criteria for promotion (that was absolutely based on seniority) later than their juniors, is not correct.

14. In the case before us it is not denied that both the applicants and the private respondents had fulfilled all the criteria before they were actually promoted and the actual date of promotion of the applicants is along with the private respondents or in some case, even before. In such a situation, determining a certain number of vacancies for a past year, promoting some "Junior" persons against these vacancies, and then correcting this anomaly using the 'Next Below Rule' in a later year (2016) by finding number of persons, who fulfil the criteria for promotion to fill these vacancies, appears to be a *prima-facie* stretched and probably incorrect exercise.

15. In the light of the above analysis, since the Parmar's case did not mandate any change in seniority amongst recruits of the same stream, and since the use of "Next Below Rule" to get over another rule regarding change of seniority due to inter-cadre transfer for

effecting promotions which happened about 5 years earlier, is not warranted either by rules or by Parmar's case, we accept the prayer of the applicants in these OAs and quash the changes made by the seniority list dated 29.07.2016 (Annexure-A/10) with respect to the applicants in these cases. The respondents are directed to publish fresh correct list, if necessary, in accordance with the rules prevailing at the relevant time, within a period of two months from the date of receipt of a copy of this order. There shall be no order as to costs.

(Dinesh Sharma)
Member (Admn.)

(Jayesh V.Bhairavia)
Member (Judl.)

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