

Reserved
(On 25.04.2019)

CENTRAL ADMINISTRATIVE TRIBUNAL
CIRCUIT SITTING AT NAINITAL,
NAINITAL

Dated: This the 26th day of June 2019

Original Application No 331/01603/2017

Hon'ble Ms. Ajanta Dayalan, Member – A
Hon'ble Mr. Rakesh Sagar Jain, Member - J

Anuj Kumar, a/a 40 years, S/o Shri Ram Singh R/o I-63, Type-IV, IA&AD Residential Complex, Kaulagarh, Dehradun, Uttrakhand.

... Applicant

By Adv: Sri Shashank Upadhyaya

V E R S U S

1. The Comptroller & Auditor General of India, Pocket-9, Deen Dayal Upadhyaya Marg, New Delhi-110124.
2. The Accountant General Uttrakhand, Mahalekhakar Bhawan, Kaulagarh, Dehradun, Uttrakhand.

... Respondents

By Adv: Sri Rajnish Kumar Rai

O R D E R

Delivered by Hon'ble Ms. Ajanta Dayalan, Member - A

The present O.A. has been filed by the applicant Anuj Kumar seeking setting aside of para-5.6.6 of C&AG MSO (Admn.) Vol. 1 as ultra virus. The applicant has also sought direction 'to respondent No. 1 to fix inter se seniority of the applicant between direct recruits and promotes in the spirit of Hon'ble Apex Court Judgment in Union of India and others v. N.R. Parmar & Others case from the date of initiation of process for recruitment'.

2. According to the applicant, a requisition for filling up of posts of Section Officer (Audit) was sent to the Staff Selection Board on 17.08.2006 (Annexure A-4) and notification was published in the Employment News in September 2006. The applicant appeared in the said examination and was recommended for appointment as per result published in August 2007. He received offer of appointment dated 21.01.2008 and after completion of formalities, joined the

service in the office of respondent No. 2 on 18.02.2008. The post of Section Officer (Audit) was re designated as Assistant Account Officer (Audit) in May 2009. After completion of probation period, the applicant was confirmed on 30.11.2010 and was given seniority from the date of confirmation.

3. As per the applicant, on November 27, 2012, the Judgment in the case of Union of India v. N.R. Parmar and others in Civil Appeal No.7514/2005 (Annexure A-5) was pronounced by the Apex Court holding that inter se seniority shall be calculated from the year when recruitment process was initiated. The applicant approached the superior authorities to remove the anomaly and various representations were made to correct the seniority in spirit of this judgment.

4. The applicant has averred that the Hon'ble C.A.T, Chandigarh in its Judgment dated 07.09.2016 set aside para-5.6.2 and 5.6.6. of C&AG MSO (Admn.) Volume I in O.A. No. 063/00125/2015 of Deepak Sharma & Others v. Comptroller and Auditor General of India and others. The counsel for the applicant stated that this Judgment of C.A.T. Chandigarh has attained finality. Copy of this judgment is at Annexure 2 of Written Arguments filed on behalf of the respondents.

5. Now vide letter dated 30.09.2016 (and not dated 27.10.2016 as incorrectly mentioned in the OA) (Annexure A-1), the respondent No. 1 has informed the respondent No. 2 that the seniority of direct recruit SOs/AAO is to be fixed as per para-5.6.6. (iii) of C&AG MSO (Admn.) Volume I. The letter also refers to Supreme Court Judgment dated 29.03.2007 in M. Srinivasa Prasad and others v. Comptroller and Auditor General of India case.

6. The case of the applicant is that the provisions of MSO contained in para-5.6.6. having already been set aside by C.A.T. Chandigarh vide order dated 07.09.2016, relying upon the same and deciding seniority in view of this provision is illegal and needs to be quashed.

7. On the other hand, the respondents have contested the claim of the applicant. In their counter reply they have stated that the applicant is a direct recruit to the post of Section Officer (Audit) and his service is governed by the recruitment rules known as Indian Audit and Accounts Department Section Officer (Audit) Recruitment Rules, 1988 framed by the President of India under Article 148 (5) of the Constitution of India. These Rules inter alia provide the method of recruitment to be by promotion failing which by transfer/transfer on deputation and failing both, by direct recruitment. The Rules also provide the period of probation to be of two years. Note below Item 11 of Schedule attached therein provides that during the period of probation, they should qualify in the Section Officer's Grade Examination (SOGE) for appointment as regular Section Officer. Copy of Recruitment Rule is at Annexure CR-1.

8. The respondents have stated that in the Audit and Accounts Department, the seniority of direct recruited SOs (now AAOs) is to be determined in accordance with the seniority rules in force and seniority of direct recruited SOs is fixed as per para-5.6.6. (iii) of Comptroller and Auditor General's Manual of Standing Orders (Administrative), Volume I. This para stipulates that a direct recruited S.O. (now AAO) on passing the Subordinate Audit Service (SAS) examination and on successful completion of probation, shall be deemed to have been appointed as SO (now AAO) on regular basis from the date following the date of last paper of SAS examination, in which she/he has been declared successful. The seniority shall be reckoned from the date of such appointment on regular basis. It is further stipulated that seniority of direct recruits to the post of Section Officer on passing Part II of the Section Officer's Grade Examination shall be regulated by the following principles: -

para 5.6.6(i) "(i) A directly recruited Section Officer shall rank immediately below the last Section Officer's Examination passed member of the staff officiating in the Section Officers grade on the date on which he takes over charge as a regular Section Officer. If an officiating Section Officer reverts at any time to his previous post, the reversion not being on account of his proceeding on leave, he

shall lose his seniority vis-à-vis all those recruited directly, who are appointed as Section Officers up to the date on which he again begins to officiate continuously."

...

Para 5.6.6(iii) "A direct recruit is appointed as a Section Officer on regular basis only on satisfactory completion of the period of probation prescribed in the Recruitment Rules even though he passes the examination before that period, his seniority is also effective on his actually taking over charge as a regular Section Officer".

The respondents have averred that the seniority of applicant has been fixed as per the Recruitment Rules and these provisions. A copy of relevant provisions of Manual of Standing Orders (Administrative), Volume I (MSO) are at CR-2.

9. The respondents have confirmed that the applicant was given seniority w.e.f. the date of confirmation after passing of SAS examination in accordance with para-5.6.6. (iii) of Manual of Standing Orders (Administration). They have clarified that the candidates- both direct and departmental appear in the departmental examination with same syllabus and same number of papers. The CAG has designed a departmental examination SOGE (now SAS) to adjudge suitability of candidates for the Department. When both departmental and direct recruit pass the examination simultaneously, direct recruits are placed senior in the office gradation list to the departmental official who is placed junior to all the direct recruited AAOs who qualify the same examination.

10. They have also stated that the applicant accepted the terms and conditions of offer of appointment at the time of his initial appointment. Para-3 of this offer of appointment reads as under: -

"On conclusion of the training referred to in para 2 above, he/she will have to qualify the Section Officers Grade Examination (S.O.G.E. Part-I & Part-II) conducted by the I.A.&A.D. On account of failure to pass the SOGE (Part-I & Part-II) during the probation period (including the extended probation period, if any), he/she will be liable to be discharged from the service. After passing the said examination, he/she will be appointed as regular Section Officer (Audit)."

Thus, qualifying in S.O.G.E. was a pre condition for the appointment as regular S.O. (Audit). Even the terms and conditions of offer of appointment clearly state that they will be appointed as regular S.O. only after passing of the said examination. It is further stated therein that in case of failure to pass the examination during the probation period, he is liable to be discharged from service. A copy of offer of appointment is at Annexure CR-3.

11. The respondents have further stated that the condition of probation, training during probation period and passing the SOGE are also mentioned in para-8 of the terms and conditions of offer of appointment, which reads as under: -

“8. On satisfactory completion of the probation he/she will be eligible for confirmation in the cadre of Section Officer (Audit). His/her confirmation is also subject to his/her being considered fit in all respects for permanent retention in the service. His/her confirmation in the Section Officer cadre will not, however, give him/her any special claim to seniority. The seniority of direct recruits in the cadre vis-à-vis the departmental candidates passing the Section Officer Grade Part-II Examination will be fixed in accordance with the seniority rules as at present, viz. that a directly recruited Section Officer (Audit) shall rank immediately below the last Section Officer Grade Examination passed person officiating in the Section Officer (Audit) cadre on the date on which he/she is treated as a regular Section Officer (Audit).”

Also the term last SAS examination passed member of staff refers to one who has passed in an earlier examination and not in the examination in which the direct recruit has come out successful.

12. Further it is stated that even the notification by Staff Selection Commission clearly stated that the selected candidates will have to undergo training and will have to pass the concerned examination in Audit to be conducted by C&AG within the probation period (Annexure CR-5).

13. The respondents have further averred that in case of M. Srinivasan Prasad and others v. Comptroller and Auditor General of India & others in Civil Appeal No. 5013 of 2000 and Civil Appeal No. 5504 of 2003, the Hon'ble Apex Court has dismissed the Appeal vide Judgment dated 29.03.2007. During arguments in that

case, the learned senior counsel for the appellants had contended that the general principle is that the seniority be reckoned from the date of appointment and that the executive instructions cannot supplement the rules and that merely accepting the terms and conditions of appointment would not debar the appellants from claiming seniority from the date of appointment. These contentions were dismissed by the Supreme Court. It was made clear that though the statutory rules are silent about the determination of inter se seniority, the position has been made clear by the C&AG MSO (Admn) and accordingly the appeal was dismissed by the Hon'ble Apex Court. A copy of this Hon'ble Apex Court judgment is at Annexure CR-4.

14. The counsel for the respondents further stated that the N.R. Parmar case (supra) is based on the departmental structure of Income Tax department only. In Indian Audit and Accounts Service, the entire structure is different. No one could get promotion to the post of AAO without passing the SOGE (now SAS) examination. Only SOGE (now SAS) examination is the criterion for confirmation of direct recruited SO (probationers) as well as for the departmental officials for the promotion to the post of SO (now AAO).

15. The Department has further contended that the applicant has not shown sufficient cause in delay condonation application to condone the delay in filing of the O.A. The department has further stated that the applicant has not challenged the order dated 30.09.2016 (and not 27.10.2016 as incorrectly mentioned in the OA) vide which representation for fixation of inter se seniority has been rejected. Hence, the O.A. needs to be dismissed.

16. The respondents have further averred that in O.A. No. 310/00676/2017 dated 27.04.2017 before this Tribunal, when a S.O. (probationer) failed to pass the SOGE within the stipulated number of chances within the prescribed time limit, he was reverted to the lower post of Auditor. After getting extra chance, he passed the said examination (Annexure CR-6).

17. The Department has, therefore, finally concluded that the Judgment held in the case of N.R. Parmar is not applicable to Indian Audit and Accounts Department as the case of Parmar related to the organization structure of Income Tax department only. On the other hand, Indian Audit and Accounts Department is organized under Article 148 of the Constitution of India under the special powers of Comptroller of Auditor General of India. The notification calling for the candidates for recruitment as well as recruitment rules, offer of appointment and the provisions of MSO are all very clear and make passing of SOGE mandatory before appointment as SO/AAO on regular basis. When both candidates from direct recruit and departmental employee pass the SOGE simultaneously, direct recruit employees are placed above the departmental candidates. All these are as per Recruitment Rules and MSO provisions and, therefore, there is no violation of rules or rights of employee. The applicant has also not challenged the order dated 30.09.2016 (and not 27.10.2016 as incorrectly mentioned in the OA) in the O.A. The delay in filing of O.A. is also not explained. Hence, the O.A. is misconceived and deserves to be dismissed both on delay as well as on merits.

18. We have heard counsels for both parties, have gone through the pleadings available on record, including the written arguments of applicant's counsel, and also given our thoughtful consideration to the entire matter.

19. The bare facts of the case are not in dispute. The applicant applied for the post of Section Officer (Audit) with reference to the notification published in Employment News in September 2006. He appeared in this examination, was selected and after completion of formalities joined the services in February 2008 as S.O. (Audit). This post was re designated as AAO (Audit). On completion of probation, he was confirmed on 30.11.2010 and was given seniority w.e.f. this date. The applicant is now seeking fixation of inter se seniority with reference to the Judgment of Hon'ble Supreme Court in the case of N.R. Parmar and others from the date of initiation of process of recruitment. According to him, in this

judgment it has been held that the inter se seniority shall be calculated from the year when recruitment process was initiated. The applicant has also referred to letter dated 30.09.2016 (and not 27.10.2016 as incorrectly mentioned in the OA) of the respondents wherein they have intimated that the seniority is fixed with reference to para-5.6.6. of MSO (Admn). The applicant has also stated that the respondents' department is relying on para-5.6.6. of MSO (Admn) even though the same has been set aside by C.A.T. Chandigarh and this order has attained finality; and hence the same is binding on the respondents. On the other hand, the respondents have contested the claim of applicant for the reasons discussed in the preceding paragraphs.

20. We find that Indian Audit and Accounts Department Section Officer (Accounts) and Section Officer (Audit) Recruitment Rules, 1988 (Recruitment Rules) (Annexure CR-1) have been framed by the President of India under Article 148 (5) of the Constitution of India. As such, these Rules have statutory powers. These Rules provide the method of recruitment by promotion failing which by transfer/transfer on deputation and failing both by direct recruitment. These Rules also provide period of probation to be 02 years. Note below Item 11 of Schedule attached therein provides as follows; "The direct recruits will be selected on the basis of an entrance examination conducted by the Comptroller and Auditor General of India or any authority specified by him. During the period of probation, **they should qualify in the Section Officers Grade Examination for appointment as regular Section Officers.**" These Rules are applicable to the applicant and their applicability is not under challenge in the OA.

21. We also find that the notification calling for candidates for direct recruit itself clearly stated about completion of training and passing of S.O.G.E. during the probation period as a pre requisite for appointment as S.O. on regular basis (Annexure CR-5). The terms of appointment (Annexure CR-3) of the applicant also stated that "**he/she will have to qualify the Section Officer examination,**

S.O.G.E. Part I and II conducted by the Indian Audit and Accounts Department.” The offer of appointment further stated that “**On account of failure to pass the SOGE (Part-I & Part II) during the probation period (including the extended probation period, if any), he/she will be liable to be discharged from the service**”.

22. Besides the above, the MSO (Admn) quoted extensively in respondents Counter Reply provides for fixation of seniority. These portions are extensively elaborated in Annexure CR-2 and have been discussed in detail while narrating respondents’ version. We, therefore, do not wish to repeat the same for the sake of brevity. But we note that these also clearly provide for passing of S.O.G.E. and completion of probation period as pre-condition for appointment as S.O. on regular basis. We have perused the provisions of Manual of Standing Orders (Admn) and note that besides paras 5.6.2 and 5.6.6 which have been set aside by CAT Chandigarh, there are other provisions in the Manual that are relevant in this regard – namely para 5.4.1 and para 5.5.2 which read as under;

para 5.4.1 “The details of the scheme and syllabus of the Section Officer Grade Examination are prescribed in Chapter IX. **No person who has not passed the prescribed examination is eligible for appointment as Section Officer.**”

Para 5.5.2 “Every direct recruit appointed to the cadre of Section Officer will be on probation for a period of two years. **During the period of probation he / she will have to qualify the S.O.G.E. Part II.** If a direct recruits fails to pass both parts of S.O.G.E. within the period of probation, he/ she will be removed from service or if fully deserving of retention, may be offered appointment as Auditor in respective officer against a direct recruitment vacancy, if available.”

We thus see that there are other provisions in the Manual, and not just paras 5.6.2 and 5.6.6. of the Manual which have been set aside by CAT Chandigarh, that mandate passing of SOGE as a pre condition for appointment as Section Officer. These provisions also mandate passing of SOGE during the period of probation in case of each direct recruit. Failing in the latter, the direct recruits are liable to be removed from service. These provisions have not been set aside and are still

relevant and applicable to the applicant. Thus, passing of SOGE is a pre condition for appointment as Section Officer. In the OA, there is no challenge to the applicability of these other provisions of the MSO (Admn) to the applicant. Hence, the applicant has to pass SOGE before appointment as Section Officer. In that case, it is logical to conclude that even as per these other provisions, seniority of the applicant as Section Officer will need to be decided based on the date of his passing of SOGE examination.

23. In view of all the above facts, we note that not just the MSO provisions of paras 5.6.2 and 5.6.6, but the notification calling for candidature, offer of appointment made to the selected candidates including the applicant as well as the Recruitment Rules for the post notified by the President of India and having statutory force and other provisions of MSO as discussed above - all mandate passing of SOGE before appointment as S.O. on regular basis. Hence, the applicant can be confirmed and appointed as Section Officer (Audit) on regular basis only on his passing of S.O.G.E.

24. Referring to the applicant's plea that 5.6.6 of Manual is not applicable in view of CAT Chandigarh Bench judgment dated 07.09.2016, firstly we note that the decision of CAT Chandigarh is under challenge in Hon'ble Himanchal Pradesh High Court and the case is still pending there. The Hon'ble High Court has directed for maintaining status quo till next date of hearing vide its order dated 10.01.2017 (Annexure 3 of Written Arguments filed on behalf of the respondents). Hence, it is incorrect to say that the CAT order has attained finality. Further, we find that the CAT Chandigarh itself in its later order dated 16.05.2018 in OA No. 60/324 of 2017 in case of Kamlesh Kumar and others vs. CAG of India and others has decided on the same issue in terms of judgment of the Hon'ble Apex Court in case of M. Srinivasa Prasad (supra) and many other judgments of the Hon'ble Apex Court and has taken a view that relief sought by the applicants in that OA is a settled matter and that OA has been dismissed both on merits as well as on

delay (A copy of the CAT Chandigarh Bench judgment dated 16.05.2018 is at Annexure 4 of Written Arguments filed on behalf of respondents).

25. Further in this regard, we are also of the view that there are other provisions in the Manual with same contention (as shown in the preceding para) that are applicable to the applicant and their applicability is not under challenge in the OA. Hence, irrespective of this argument by the applicant, the seniority of the applicant is to be fixed as per Recruitment Rules, notification for the recruitment and terms and conditions of offer of appoint as well as other provisions of MSO. Besides, it is observed that the order of CAT Chandigarh which sets aside paras 5.6.2 and 5.6.6 of the Manual is of September 2016. Hence, it should logically be applicable at best only w.e.f. that date (unless stayed or set aside by higher courts) and actions and decisions taken prior to that date in terms of these provisions should not be affected. In fact, the MSO has been operative for last over many decades and hundreds, if not thousands, of employees would have been granted seniority based on these provisions. Making a change in their seniority at this stage in respect of past cases by giving retrospective effect will adversely affect number of other persons who have been granted seniority as per these provisions. Third party rights will also come into play whereas in the present case, no private parties have been made respondents.

26. We also note that the case of N.R. Parmar (supra) is related to Income Tax department. On the other hand, the Indian Audit and Accounts Department is unique in the structure and draws its powers and functions from the Constitutional Scheme under Article 148 of the Constitution of India. The Recruitment Rules are approved by the President of India and these also clearly require passing of S.O.G.E. examination as a pre requisite condition for appointment as Section Officer on regular basis. We are, therefore, of the view that the case of N.R. Parmar (supra) is not applicable in the instant case.

27. The respondents have quoted the case of M. Srinivasa Prasad (supra) in their favour. This judgment specifically relates to the Organization of Comptroller and Auditor General of Indian and the SOGE examination. Hence, it is directly relevant in the instant case. We find that this case substantially supports the contention of respondents. It states clearly that in case Rules are silent on a particular aspect, the executive can fill up the gaps and supplement the Rules and issue instructions not inconsistent with the Rules already framed. In the instant case, we have seen that there is guidance in the Recruitment Rules. Further, gaps have been filled by various provisions in MSO (Admn), notification inviting application for the post of Section Officer as well as terms and conditions of the offer of appointment. Hence, this judgment of the Hon'ble Apex Court is applicable in the present and supports the contention of the respondents.

28. Further, we find that the applicant has referred to the letter dated 30.09.2016 (and not 27.10.2016 as incorrectly mentioned in the OA) in the O.A. but has not challenged the same in the relief sought by him. This letter clearly states that the seniority of direct recruit SOs/AAOs is to be fixed as per para-5.6.6. of MSO (Admn.) volume I. This is exactly what the applicant is challenging and contesting. However, this order has not been challenged in the relief claimed. On this ground also, the O.A. deserves to be dismissed.

29. We also find that the applicant is seeking relief of fixation of his inter se seniority from the date of initiation of process of recruitment in terms of N.R. Parmar case (supra). In the present case, the process was initiated in the year 2006 when requisition for posts was sent and the notification for examination was published in the Employment News. Hence, basically he is seeking fixation of his seniority w.e.f. 2006. We do not find logic in giving him inter se seniority with effect "from the date of initiation of process for recruitment." Here, the process of recruitment was through open competition. There is no justification for giving seniority even before the initial open entrance examination is held, the results are

declared and the candidate has qualified the examination. Besides, each examination has its own pre requisite conditions based on the requirement of functions that the employees are to perform after recruitment. Some of these conditions may be pre requisite even after being selected in the examination. These conditions could include conditions like training, completion of probation period, medical test and passing of further examination - as in the instant case. Hence, prior to fulfillment of these pre requisite conditions, the persons cannot be appointed on regular basis. Besides, the Judgment in N.R. Parmar case (supra) was keeping in view the structure of Income Tax department only. Hence, this prayer of the applicant is not justified.

30. We also find that the applicant has not given any specific fact or discrepancy that has been made in his case. Also, no specific anomaly in his particular case has been brought out and he is not even stating clearly how his seniority has been wrongly fixed. Hence, we find the prayer itself to be rather vague and not at all clear or specific. The O.A., therefore, needs to be dismissed on this count also.

31. In view of all above discussions, we find that the O.A. is devoid of merits and same is dismissed. No cost.

(Rakesh Sagar Jain)
Member – J

(Ajanta Dayalan)
Member – A

/M.M/