

CENTRAL ADMINISTRATIVE TRIBUNAL, JABALPUR BENCH,
JABALPUR

TRANSFERRED APPLICATION NO.42 OF 2009
(WP No.13599/2008)

Jabalpur, this Friday, the 15th day of March, 2013

HON'BLE MR. JUSTICE DHIRENDRA MISHRA, JUDICIAL MEMBER
HON'BLE MR.G.P.SINGHAL, ADMINISTRATIVE MEMBER

1. Sunil Kumar Gupta, S/o Late D.R.Gupta,
Date of birth – 4-1-75, R/o, Flat No.4, UGF Block-A,
Sagar Royal Homes, Hoshangabad Road, Bhopal (M.P.)

2. Pavan Akhand, S/o Shri B.L.Akhand,
Date of birth 22-1-1979, R/o, L-91, Bharti Niketan,
Govindpura, Bhopal (M.P.)

3. Ashish Tiwari, S/o Shri B.M.Tiwari,
Date of birth – 19-5-1973, R/o 9, Ghamapur Chowk,
Jabalpur (M.P.)

4. Ram Pratap Shahu, S/o Shri R.W.Shahu,
Date of birth – 12-2-1976, R/o Type 3/10, Door Sanchar Colony,
Navratan Bagh, Indore (M.P.)

5. Sachin Sonkusare, S/o Shri Soma Sonkusare,
Date of birth – 23-4-1979, R/o B-41/2, Rajharsh Colony,
Akbarpur, Kolar Road, Bhopal (M.P.)

- Applicants

(By Advocate – Shri Vijay Tripathi)

V e r s u s

1. Bharat Sanchar Nigam Limited, Through its
Chairman-cum-Managing Director, Statesman House,
Barakhamba Road, New Delhi – 110001.

2. Bharat Sanchar Nigam Limited,
Chief General Manager, Telecom, M.P.Circle,
MP Nagar, Hoshangabad Road, Bhopal (MP).

3. General Manager, Admin, O/o Chief General Manager,
Telecom, M.P. Circle, MP Nagar, Hoshangabad Road,
Bhopal (MP).

4. Shri Ravi Anbhore, Through Chief General Manager,
M.P. Telecom Circle, Bhopal (MP).



5. Shri Pradeep Soni, Through Chief General Manager,
M.P. Telecom Circle, Bhopal (MP)

6. Shri Rajkishore Jain, Through Chief General Manager,
M.P. Telecom Circle, Bhopal (MP)

7. Shri P.S. Pooran Singh Perwal Through Chief General
Manager, M.P. Telecom Circle, Bhopal (MP)

-Respondents

(By Advocate – Ms. Anjali Banerjee for respondents Nos. 1 to 3 and
Shri C.A.Thomas for respondents Nos. 4 to 7)

(Date of reserving the order: 25.02.2013)

ORDER

By Dharendra Mishra, JM.-

The applicants have filed this Transferred Application and
prayed for the following reliefs:

- “(i) Summon the entire relevant record from the possession
of the respondents for its kind perusal;
- (ii) Set aside the seniority list dated Annexure P/1.
- (iii) Upon holding that the act of the respondent authorities in
giving relaxation to the private respondent bad in law,
command the respondents to assign the seniority to the private
respondents from the date of their substantive appointment to
the post of JTO and place them below the petitioner in the
gradation list (P/1). If necessary set aside the Order No. 12-
15/2002-DE dated 10th March, 2003 Annexure P/7.
- (iv) Command the respondents to restore the seniority of the
petitioners;
- (v) Any other order/orders, direction/directions may also be
passed;
- (vi) Award cost of the litigation in favour of the petitioners”



2. The applicants were appointed as Junior Telecom Officer (for
brevity ‘JTO’) against 50% direct recruitment quota under the Junior
Telecom Officers Recruitment Rules, 2001 in the year 2001-2002,
whereas the private-respondents were holding the posts of TTA and
participated in the examination conducted on 15-16.05.1999 for the
post JTO against 15% departmental quota required to be filled up on
the basis of Limited Departmental Competitive Examination (for
brevity ‘LDCE’) from amongst the Telecom Engineering Branch, as
per JTO Recruitment Rules 1996 (hereinafter referred to as ‘the 1996

Rules'). However, they were declared unsuccessful as they could not secure minimum qualifying marks. However, Bharat Sanchar Nigam Limited (for brevity 'BSNL') vide memo dated 10.03.2003 (Annexure -P-7) granted certain relaxation in qualifying standard for the examinations held in the year 1999 and 2000, and private respondents were declared successful vide order dated 23.02.2004 (Annexure R-7). Through this Original Application the applicants have prayed for quashing of the order dated 02.05.2008 (Annexure P-1) whereby in the gradation particulars in respect of JTOs notified on 2nd May, 2008 the private-respondents have been placed over and above the applicants though they were declared successful in the year 2004, after they were given relaxation in qualifying standards. The applicants have also prayed for quashing of the order dated 10.03.2003 (Annexure P-7) whereby the respondents have allowed relaxation in qualifying standards of selection in the examinations held in the years 1999 and 2000 for promotion on the post of JTO.



3. Shri Vijay Tripathi, learned counsel for the applicants submits that it is settled law that no person can be promoted with retrospective date from a date when he was not borne in the cadre as to affect others and seniority can be claimed only from a date when a candidate is appointed after due selection process.

4. Questioning the legality of order dated 10th March, 2003 (Annexure P-7), whereby BSNL has extended relaxation in qualifying standards to the candidate who participated in the examination held during the years 1999 and 2000, it was argued that the private-respondents participated in the examination held in the year 1999 as per 1996 Rules framed by the Department of Telecommunication (for brevity 'DOT') and only the DOT had the power to relax the rules and the relaxation granted by the BSNL is without jurisdiction.

5. Refuting the contention of the respondents regarding waiver and acquiescence on the ground that the seniority list of JTOs was

issued in the year 2005 and 2008 and the applicants did not file their objections to the provisional seniority lists and, therefore, the same attains finality and cannot be challenged at this stage, it was argued that after receiving the information about the seniority list, the applicants submitted their representations on 25.09.2008 (Annexure P-8), however, their representations have not been considered and decided as yet and respondents have not yet issued final seniority list as both the seniority lists issued in the years 2005 and 2008 are provisional. Referring to the instructions of Department of Personnel and Training with regard to seniority of promotees and direct recruits (Annexures RJ-1 & RJ-2) it was argued that the persons appointed earlier should be placed over and above the persons who are subsequently appointed. Reliance is placed on the decisions of Hon'ble Supreme Court in the matters of **State of Bihar & ors. Vs. Akhourri Sachindra Nath & ors**, 1991 Supp (1) SCC 334, **Suraj Prakash Gupta & ors. Vs. State of J&K & ors**, (2000) 7 SCC 561: 2000 SCC (L&S) 977, **Uttaranchal Forest Rangers Association (Direct Recruit) & ors Vs. State of U.P. & others** (2006) 10 SCC 346, **State of Uttaranchal & another Vs. Dinesh Kumar Sharma** (2007) 1 SCC 683 and **Nani Sha Vs. State of Arunachal Pradesh**, (2007) 15 SCC 406.



6. On the other hand learned counsel for the respondents submit that decision of the BSNL to relax minimum eligibility for promotion under 15% quota of JTO vide order dated 10th March, 2003 (Annexure P-7) was brought to the knowledge of Hon'ble High Court in Writ Petition No.4092/2002 filed by Union of India against the decision of this Tribunal whereby entire selection process for promotion under 15% quota was quashed on the ground of certain irregularities in conducting examination, and in the said writ petition direction was issued to the Union of India that the respondents Nos.3 to 8 shall be extended the benefit of the selection pursuant to the order dated 10.04.2003 (sic-10.03.2003), and accordingly the result of the

departmental competitive examination for promotion as JTO under 15% quota held on 15th & 16th of May, 1999 was declared as per relaxation granted vide order dated 23.02.2004 (Annexure R-7) and the successful candidates were sent for training vide order dated 18.03.2004 (Annexure R-3). After successful completion of training they were posted vide order dated 20.8.2004 (Annexure R-4) for field training. The respondents were again sent for Phase II training vide communication dated 01.11.2004 (Annexure R-5). The Provisional Circle Gradation List of JTOs was published on 11.7.2005 (Annexure R-8) and objections were invited against the aforesaid publication within a period of one month, however, no objection was placed by the applicants. In the said gradation list dated 11.07.2005 applicants' names find place at Serial Nos.730, 878, 845 and 633 and 866 respectively, whereas private-respondents' names find place at serial Nos. 571, 376, 385 and 418 respectively. The applicants did not object to the seniority list so notified. They are now estopped from challenging the same and the doctrine of acquiescence is attracted. Examination for promotion to the post JTO was held on 15/16th May, 1999 as per the 1996 Rules. In exercise of powers conferred by proviso to Article 309 of the Constitution of India and in supersession of the 1996 Rules, the 1999 Rules were notified w.e.f. 31.8.1999 (Annexure R-9). Subsequently, after BSNL came into existence in 2000, the 2001 Rules came into existence, which were given prospective effect and, therefore, provisions of the 2001 Rules can not be given retrospective effect to the prejudice of the private-respondents. Private-respondents have been promoted on officiating basis vide order dated 3.4.2008 (Annexure R-10) as Sub Divisional Engineer (Telecom) purely on temporary and local officiating basis and only after their promotion, impugned gradation list of Annexure P-1 was published. It was vehemently argued that principle of substantive appointment is not applicable in the instant case as the private-respondents herein were declared successful in the supplementary results pertaining to LDCE as JTO under 15% quota



held on 15/16th May, 1999 for the vacancies of the year 1998-99 and their appointment was much earlier in the point of time.

7. Heard learned counsel for the parties and perused the pleadings of the respective parties and the documents annexed therewith.

8. The short question for our consideration is whether the official-respondents were justified in placing the private-respondents, who were appointed subsequent to the applicants in the year 2004, by extending the relaxation in qualifying standard as per order dated 10.03.2003 (Annexure P-7), over and above the applicants who were directly recruited as JTO in the years 2002 and 2003?

9. So far as the applicants' challenge to the order dated 10th March, 2003 (Annexure P-7) is concerned, from the order dated 28.04.2003 passed by the Hon'ble High Court in Writ Petition No.4092 of 2002 (Annexure R-1), filed by the private respondents, it is clear that relaxation extended vide order dated 10th March, 2003 (Annexure P-7) has been approved by the Hon'ble High Court, and the official respondents have been specifically directed to extend the benefit of above relaxation to the present private respondents Raj Kishore Jain and Pradeep Soni, in addition to others. It was not brought to our notice whether aforesaid decision of Hon'ble High Court has been questioned by any of the parties before any superior forum. Therefore, we reject the challenge of the applicants to the order dated 10th March, 2003 (Annexure P-7), whereby BSNL has extended relaxation in qualifying standard to the participants of LDCE, including the private respondents, for filling of 15 % quota of JTO under the 1996 Rules.

10. Dates of appointments of the applicants as well private respondents as is reflected from impugned seniority list of Annexure P-1 dated 2.5.2008 are as under:



Applicant No.1 Sunil Kumar Gupta	Sl.No.504	- 25.03.2002
Applicant No.2 Pavan Akhand	Sl.No.754	- 12.05.2003
Applicant No.3 Ashish Tiwari	Sl.No.723	-14.04.2003
Applicant No.4 Ram Pratap Sahu,	Sl.No.525	-25.03.2002
Applicant No.5 Sachin Sonkusare,	Sl.No.744	-12.05.2003
Respondent No.4 Ravi Anbhore,	Sl.No.453	-04.09.2004
Respondent No.5 Pradeep Soni,	Sl.No. 299	-23.08.2004
Respondent No.6 Raj Kishore Jain,	Sl.No.307	-21.08.2004
Respondent No.7PSPooran Singh Perwal	Sl.No.339	-23.08.2004

11. Thus, the initial entry of the applicants in the grade of JTO is prior to the initial entry of private-respondents herein, who were held to be eligible for promotion only on the basis of relaxation in qualifying standard extended to them vide order dated 10.03.2003 (Annexure P-7).

12. In the matters of **Akhouri Sachindra Nath** the Hon'ble SC observed thus:

"12. It is well settled that no person can be promoted with retrospective effect from a date when he was not born in the cadre so as to adversely affect others. It is well settled by several decisions of this Court that amongst members of the same grade seniority is reckoned from the date of their initial entry into the service. In other words, seniority inter se amongst the Assistant Engineers in Bihar Engineering Service, Class II will be considered from ³⁴³the date of the length of service rendered as Assistant Engineers. This being the position in law respondents 6 to 23 cannot be made senior to respondents 1 to 5 by the impugned government orders as they entered into the said service by promotion after respondents 1 to 5 were directly recruited in the quota of direct recruits. The judgment of the High Court quashing the impugned government orders made in Annexures 8, 9 and 10 is unexceptionable".

13. In the matters of **Suraj Parkash Gupta (supra)** their lordships have held thus:

"81. This contention, in our view, cannot be accepted. The reason as to why this argument is wrong is that in service jurisprudence, a direct recruit can claim seniority only from the date of his regular appointment. He cannot claim seniority from a date when he was not borne in the service. This principle is well settled. In *N.K. Chauhan v. State of Gujarat* (1977) 1 SCC 308 : 1977 SCC (L&S) 127 Krishna Iyer, J. stated:



Later direct recruits cannot claim deemed dates of appointment for seniority with effect from the time when direct recruitment vacancy arose. Seniority will depend upon length of service.

Again, in *A. Janardhana v. Union of India* (1983) 3 SCC 601 : 1983 SCC (L&S) 467 : (1983) 2 SCR 936, 961 it was held that a later direct recruit cannot claim seniority from a date before his birth in the service or when he was in school or college. Similarly it was pointed out in *A.N. Pathak v. Secy. to the Govt.* 1987 Supp SCC 763 : 1988 SCC (L&S) 370 : that slots cannot be kept reserved for direct recruits for retrospective appointments”.

14. In the matters of Uttarakhand Forest Rangers Association (Direct Recruit) (supra) their lordships have held thus:

“37. We are also of the view that no retrospective promotion or seniority can be granted from a date when an employee has not even been borne in the cadre so as to adversely affect the direct recruits appointed validly in the meantime, as decided by this Court in *Keshav Chandra Joshi v. Union of India*—1992 Supp (1) SCC 272 : 1993 SCC (L&S) 694 : (1993) 24 ATC 545 held that when promotion is outside the quota, seniority would be reckoned from the date of the vacancy within the quota rendering the previous service fortuitous. The previous promotion would be regular only from the date of the vacancy within the quota and seniority shall be counted from that date and not from the date of his earlier promotion or subsequent confirmation. In order to do justice to the promotees, it would not be proper to do injustice to the direct recruits. The rule of quota being a statutory one, it must be strictly implemented and it is impermissible for the authorities concerned to deviate from the rule due to administrative exigencies or expediency. The result of pushing down the promotees appointed in excess of the quota may work out hardship, but it is unavoidable and any construction otherwise would be illegal, nullifying the force of the statutory rules and would offend Articles 14 and 16(1) of the Constitution”.

15. In the matters of Dinesh Kumar Sharma, (Supra) their lordships have held thus:

“16. It was further submitted that the decision to promote the respondent was taken by the appellants in accordance with the service regulations present in U.P. and that no interference could be made in such orders. Also that, the High Court was not justified in overlooking the statute law as well as the case-laws where it is stated in clear terms that seniority is determinable with reference to the date of substantive appointment. This was



the view taken by this Court in *K.V. Subba Rao v. Govt. of A.P.* (1988) 2 SCC 201 : 1988 SCC (L&S) 506 : (1988) 7 ATC 94, *M. Nirmala v. State of A.P.* (1986) 3 SCC 647 : 1986 SCC (L&S) 699 : (1986) 1 ATC 319 and *Sanjay K. Sinha-II v. State of Bihar* (2004) 10 SCC 734 : 2005 SCC (L&S) 169. In all these cases this Court has categorically held that seniority must be reckoned from the date of substantive appointment under the relevant rules and also that the right to frame rules for the determination of inter se seniority is the prerogative of the State".

16. In the matters of *Nani Sha (supra)* their lordships have held thus:

"13. Reverting back to the effect of the proviso, we do not find anywhere any such intention to apply the proviso with retrospective effect. In order to make a provision applicable with retrospective effect, it has to be specifically expressed in the provision. We do not find such an expression in the said proviso. Nothing had stopped the Government before amending the Rule to word it specifically, making it retrospective.

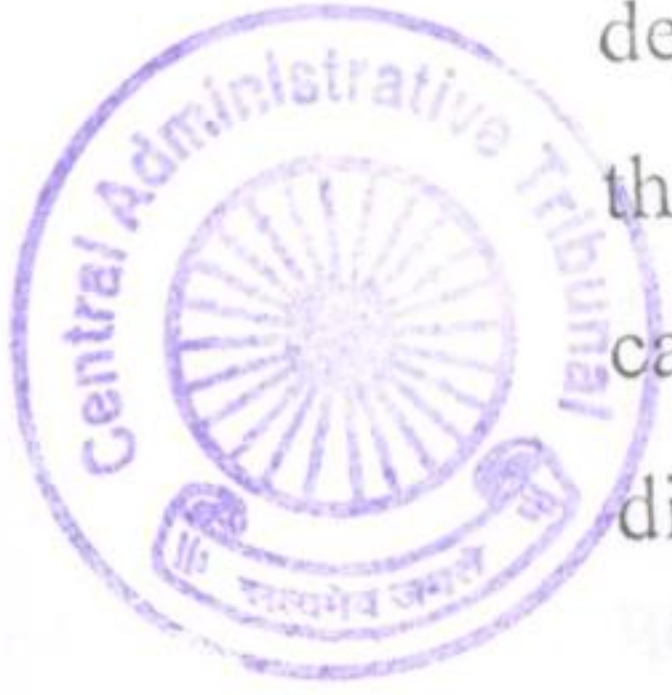
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16. Lastly, the High Court has specifically rejected the claim of the appellants on another ground, namely, that the appellants were not borne in the cadre of ACF on the date from which they have been given the seniority. We are in complete agreement with the High Court, particularly in view of the decision of this Court in *State of Bihar v. Akhoury Sachindra Nath* 1991 Supp (1) SCC 334 : 1991 SCC (L&S) 1070 : (1991) 16 ATC 936 which decision was reiterated in *State of Bihar v. Bateshwar Sharma* (1997) 4 SCC 424 : 1997 SCC (L&S) 975. We do not want to burden this judgment with further reported decisions. However, the same view has been taken in another reported decision of this Court in *Uttaranchal Forest Rangers' Assn. (Direct Recruit) v. State of U.P.* (2006) 10 SCC 346 : (2007) 1 SCC (L&S) 116 : JT (2006) 12 SC 513 where in para 18 this Court has taken a view that no retrospective promotion or seniority can be granted from a date when an employee has not even been borne in the cadre so as to be adversely affecting those who were appointed validly in the meantime".

17. We are not impressed by the argument of the learned counsel for the respondents that private respondents herein participated in the selection process as per the 1996 Rules against 15% quota for the vacancies of the year 1996-1998 and the examination was held in the year 1999 and, therefore, the supplementary result declared vide order



dated 23.2.2004 (Annexure R-7) is in continuation of the selection process commenced in the year 1999 and relates back to the year 1999. We also do not find any substance in the argument of the respondents that the selection of the private-respondents is governed by the 1996 Rules and, therefore, the provisions of the 2001 Rules can not be applied in their case to the detriment of their interest. In view of the fact that the applicants were directly appointed whereas the private respondents have been promoted to the post of JTO in the department, their inter se seniority is to be reckoned from the date of their initial entry into the JTO's grade and the private respondents cannot claim their seniority over and above the applicants who were directly recruited to the grade of JTO before them.



18. The counsel for the respondents has also vehemently argued that the instant Original Application suffers from delay and laches as the applicants did not challenge the seniority list circulated vide letter dated 11.7.2005 (Annexure R-8) and they also did not submit any representation against the impugned seniority list circulated vide letter dated 02.05.2008 (Annexure P-1) within the time allowed for the purpose and thus they are acquiesced of their position in the seniority list vis-à-vis private respondents. The above contention of the respondents is also without any substance as from a bare reading of both the seniority lists it is manifestly clear that the same were provisional lists and objections were invited from all concerned against the above provisional lists. Since the respondents without publishing any final list have given promotion to the private respondents to the higher post of SDE (Telecom) on officiating basis for a fixed period vide order dated 03.04.2008 (Annexure R-10) and thereby they are attempting to give effect to the provisional seniority list, without considering the representations of the applicants Sunil Kumar Gupta and Sachin Kumar (Annexure A-8 colly), the instant petition has been filed, and, therefore, the same does not suffer for

vice of delay and laches and principle of acquiescence is also not applicable in the present case.

19. In the result, on the basis of aforesaid discussions, the present Original Application is disposed of with a direction to the respondents to consider the objections of the applicants with regard to their position in the seniority list of Annexure P-1 vis-à-vis private respondents on the post of JTO keeping in view the observations made in this order. This exercise be completed within a period of four months from the date of communication of this order, after giving opportunity of hearing to all concerned including private respondents.

No costs.

(G.P.Singhal)
Administrative Member

(Dhirendra Mishra)
Judicial Member

rkv

पृष्ठ सं. ओ/न्या. 1609 जवाहरपुर, दि. 18-3-13
प्रतिनिधि अपने पालन
(1) उद्देश्य, उद्देश्य, उद्देश्य, उद्देश्य, जवाहरपुर
(2) अधिकार, अधिकार, अधिकार, अधिकार, के काउंसल
(3) प्रत्यक्षी, प्रत्यक्षी, प्रत्यक्षी, प्रत्यक्षी, के काउंसल
(4) उद्देश्य, उद्देश्य, उद्देश्य, उद्देश्य, जवाहरपुर जवाहरपुर
सचन एवं आवश्यक कार्यवाही हेतु

उप-रजिस्टार

Shri Vijay Tripathi,
Advocate

के.प्र.अ.प्रक्रिया नियमावली के नियम
22 के अंतर्गत निःशुल्क प्रतिलिपि

TRUE COPY

(Signature)
Section Officer
Central Administrative Tribunal
Jabalpur Bench, Jabalpur