

\$~

*

IN THE HIGH COURT OF DELHI AT NEW DELHI

%

Judgment Reserved on : February 14, 2013

Judgment Pronounced on : February 18, 2013

+

W.P.(C) 6563/2012

BHARAT SANCHAR NIGAM LTD AND ANR Petitioners

Represented by: Mr.K.K.Rai, Sr.Advocate
instructed by Mr.Rajnish Prasad, Advocate.

versus

NEERAJ JAIN AND ORS

..... Respondents

Represented by: Mr.Amit Gupta, Advocate with
Mr.Sabin Rana, Advocate.

AND

W.P.(C) 6665/2012

B.S.N.L. AND ANR

..... Petitioners

Represented by: Mr.K.K.Rai, Sr.Advocate
instructed by Mr.Rajnish Prasad, Advocate

versus

AKENDRA KUMARI

..... Respondent

Represented by: Mr.Amit Gupta, Advocate with
Mr.Sabin Rana, Advocate.

AND

W.P.(C) 7094/2012

BHARAT SANCHAR NIGAM LTD AND ANR

..... Petitioners

Represented by: Mr.K.K.Rai, Sr.Advocate
instructed by Mr.Rajnish Prasad, Advocate

versus

PRADEEP KUMAR AND ORS

..... Respondents

Represented by: Mr.Amit Gupta, Advocate with
Mr.Sabin Rana, Advocate.

AND

W.P.(C) 7095/2012

BHARAT SANCHAR NIGAM LTD AND ANR Petitioners

Represented by: Mr.K.K.Rai, Sr.Advocate
instructed by Mr.Rajnish Prasad, Advocate

versus

JAGDISH PAUL AND ORS

..... Respondents

Represented by: Mr.Amit Gupta, Advocate with
Mr.Sabin Rana, Advocate.

AND

W.P.(C) 7096/2012

BSNL AND ANR

..... Petitioners

Represented by: Mr.K.K.Rai, Sr.Advocate
instructed by Mr.Rajnish Prasad, Advocate

versus

NAVDEEP GARG AND ORS

..... Respondents

Represented by: Mr.Amit Gupta, Advocate with
Mr.Sabin Rana, Advocate.

AND

W.P.(C) 7973/2012

C.M.D. BHARAT SANCHAR NIGAM LTD AND ORS

..... Petitioners

Represented by: Mr.K.K.Rai, Sr.Advocate
instructed by Mr.Rajnish Prasad, Advocate

versus

VINAY KUMAR SINGH AND ORS

..... Respondents

Represented by: Mr.Amit Gupta, Advocate with
Mr.Sabin Rana, Advocate.

AND

W.P.(C) 7986/2012

C.M.D. BSNL AND ORS

..... Petitioners

Represented by: Mr.K.K.Rai, Sr.Advocate
instructed by Mr.Rajnish Prasad, Advocate

versus

BHUPENDRA KUMAR AND ORS

..... Respondents

Represented by: Mr.Amit Gupta, Advocate with
Mr.Sabin Rana, Advocate.

AND

W.P.(C) 7998/2012

BSNL AND ANR

..... Petitioners

Represented by: Mr.K.K.Rai, Sr.Advocate
instructed by Mr.Rajnish Prasad, Advocate

versus

MANISH SAMADHIYA AND ORS

..... Respondents

Represented by: Mr.Amit Gupta, Advocate with
Mr.Sabin Rana, Advocate.

CORAM:

HON'BLE MR. JUSTICE PRADEEP NANDRAJOG

HON'BLE MR. JUSTICE A.K.PATHAK

PRADEEP NANDRAJOG, J.

1. Under BSNL the post of Telecom Technical Assistant (TTA) is a post in the non-executive cadre. In the Executive cadre the hierarchy of posts is : Junior Technical Officer (JTO) > Sub Divisional Engineer (SDE) > Senior Sub Divisional Engineer, all of which are posts in the Executive cadre. The next above cadre is the Management cadre and the entry level post in Grade E-3 is that of Management Trainee.

2. Thus, we highlight that at the lowest rung of the cadres is the cadre of non-executives. Above is the cadre of Executives. Further above is the cadre of Management Trainees.

3. On September 13, 2007 BSNL had notified the 'BSNL Management Trainees' Recruitment Rules 2007 when only 300 posts at the entry level E-3 were sanctioned. As per the Rules, 50% posts were to be

filled up from amongst external candidates on the basis of a competitive examination and remaining 50% from the departmental candidates possessing the eligibility conditions through a limited internal competitive examination, and we highlight that a degree in Engineering was the minimum education qualification. In other words, all internal candidates below the Management Trainee cadre including Junior Technical Assistants were eligible to compete as long as they possessed the necessary educational qualifications. The internal candidates were not eligible for any age relaxation. Upper age limit for external candidates was 30 years. Meaning thereby in the external 50% quota the internal candidates could participate as external candidates but provided they had not crossed the age of 30 years.

4. The posts of Management Trainees were enhanced to 600. Simultaneously an exercise was initiated to either amend or bring into force new Management Trainee Recruitment Rules. On November 17, 2008 an advertisement was issued inviting applications to fill up the vacancy of the 300 posts of Management Trainees in the External Quota and on November 28, 2008 an advertisement was issued to fill up the vacancy of the 300 posts of Management Trainees in the Internal Quota. Representations were received from the officers in the Executive Cadre referring to certain assurances made to limit promotions in the Internal Quota to only officers in the Executive Cadre i.e. to exclude Telecom Technical Assistants who were in the non-executive cadre and simultaneously amend the Rules to permit all internal candidates including Telecom Technical Assistants to compete against the external quota by granting age relaxation to the internal candidates. Thus, the selection process through the open competitive examination for the external quota and the internal limited departmental examination for the internal quota were deferred and on September 01, 2009

‘BSNL Management Trainee’ Recruitment Rules 2009 were issued notifying 600 posts of Management Trainees with 50% in the external quota and 50% in the internal quota. Pertaining to the external quota age relaxation for departmental candidates was provided for. For internal candidates only officers in the Executive cadre i.e. Junior Technical Officers and above were made eligible. Fresh advertisements were issued inviting applications from the internal candidates to take the limited internal competitive examination. The result was a large number of Graduate Engineers working as Telecom Technical Assistants approaching the Central Administrative Tribunal under various Original Applications, all of which have been decided by a common order dated July 28, 2010 which has been challenged in the captioned eight writ petitions.

5. The contention urged by the applicants before the Tribunal was that since the selection process for the internal candidates had commenced on November 28, 2008 and the ‘BSNL Management Trainees’ Recruitment Rules 2009 were promulgated on September 01, 2009, it being settled law that vacancies have to be filled up from amongst the eligible candidates in the year of the vacancy as per the then existing Recruitment Rules, BSNL could not fill up the vacancies under the 2009 Rules. They also pleaded that the Rules of 2009 did not supersede or repeal the Rules notified in the year 2007. They also pleaded a lack of rational criteria in excluding Telecom Technical Assistants as eligible candidates in the internal quota. All contentions have found favour with the Tribunal resulting in a direction to BSNL to consider even Telecom Technical Assistants as eligible to take the limited internal competitive examination.

6. Now, as regards the finding by the Tribunal that exclusion of Telecom Technical Assistants violates Article 14 of the Constitution of India

we need to only highlight that the Tribunal has overlooked the fact that the post of Telecom Technical Assistant is in the non-executive cadre and the post of Junior Telecom Assistant and above are in the executive cadre. The Tribunal has overlooked the already existing category of employees of BSNL being in two different cadres i.e. the non-executive cadre and the executive cadre with the former being Group 'C' posts and the latter being Group 'B' post. Had the Tribunal noted said fact it would have become apparent that the question of predicating an argument on the plea of being discriminated does not even arise for consideration because only equals are capable of being discriminated i.e. treated unequally. The question of even considering the plea of discrimination when there are two distinct groups does not arise. Thus, one of the three findings returned by the Tribunal is the result of overlooking material facts in the context of the cadre structure in BSNL.

7. The finding by the Tribunal that the Rules of 2009 do not supersede the Rules of 2007 is too technical a finding and emanates from the fact that the Rules of 2009 do not expressly overrule the Rules of 2007. But, the judicial approach has not to be technical or pedantic. It is the substance and not the form which matters. A perusal of the two Rules would reveal that every aspect of recruitment is covered by the span of the sweep of the Rules of 2009 i.e. each area pertaining to a Recruitment Rule which encompassed the sweep of the 2007 Rules stands spanned. Thus, with the promulgation of the Rules of 2009 it is but apparent that the Rules of 2007 stood impliedly superseded.

8. Thus, the second independent limb found favourable to the respondents by the Tribunal is a result of non focussed approach to the issues.

9. Now the third issue, which is at the heart of the matter. The law that posts have to be filled up with reference to the year of the vacancy and from amongst the eligible candidates as of the year of the vacancy applying the law in force as of the year of the vacancies has limited application to only when the posts are in the promotion quota. The same does not hold true when the posts are to be filled up by direct recruitment. It is also settled law that pertaining to direct recruitments if the selection process commences for the vacant posts as per existing Rules and for some reasons the vacancies are not filled up and in the interregnum Rules are amended, the said posts have to be filled up as per the amended Rules. In the decision reported as 1998 (4) SCC 202 Rajasthan Public Service Commission v. Chanan Ram & Anr. pertaining to advertisements issued on November 05, 1993 for recruiting 23 Assistant Director (Junior) when 'Rajasthan State Agricultural Marketing Service Rules 1986' were in force, the Rajasthan Public Service Commission was requested by the State of Rajasthan to keep on hold the recruitment process and on April 19, 1995 the Rules were amended. The issue came up whether or not the Recruitment process had to be finalized with reference to the amended Rules. The Supreme Court categorically held that vacancies being 23 in number may have pertained to the year 1993 but were required to be filled up as per the amended Rules of 1995.

10. The decision of the Supreme Court highlights the principle of law which we have noted herein before.

11. But a word more needs to be spoken on the subject for the reason the respondents heavily relied upon the decision of the Supreme Court reported as 1988 Supp. SCC 740 P.Ganeshwar Rao v. State of A.P. wherein the Supreme Court had interpreted the effect of the amendment

made to the Rules pertaining to the appointment of Assistant Engineers as relatable to future vacancies alone and not the vacancies which had arisen prior to the amendment made. We simply would highlight that the special Rules amending the existing Rules had the crucial words '*37½% of substantive vacancies arising in the category of Assistant Engineers shall be filled by direct recruitment.*' In view of the word '*arising*' the Supreme Court held that the amendment was clearly intended to apply to vacancies arising, meaning thereby coming into being after the Rules were amended.

12. We find that in the impugned decision the Tribunal has relied upon the said decision in paragraph 10.

13. The Tribunal has overlooked the fact that the decision in P.Ganeshwar Rao's case (supra) was with respect to the language of the amended Rule containing the word '*arising*'.

14. In the instant case the 2009 Rules do not have any such expression and thus the legal position would be as declared in Chanan Ram's case (supra) provided we find that the appointment to the post in question is by way of a direct recruitment and not a promotion.

15. We have noted herein above that there is a three-tier cadre of posts in BSNL. At the lowest rung is the non-executive cadre. The next cadre above is that of the executives and at the top is the Management cadre. The post we are concerned is at the lowest level in the Management cadre. Rule 4 of the amended Rules states that 'The Management Trainee shall be appointed in IDA Scale (E-3) of ₹24900-50,500/-.' Rule 5 states that the initial strength of Management Trainees shall be 600. Rule 6 pertains to the manner of recruitment to the stream of Management Trainees and lists two streams: (i) appointment from eligible external candidates; (ii) appointment from eligible internal candidates. Rule 7 bifurcates the two streams into

50% each.

16. It is thus apparent that the post in question is to be filled up by direct recruitment from two streams and merely because one stream of eligible candidates is internal would not make the post a promotional post.

17. Assuming for the sake of argument that the post is a promotional post, even then we find that the exception carved out to the general principle of law that vacancies in the promotion posts have to be filled up from amongst the eligible candidates in the year of the vacancy and as per the then existing Recruitment Rules is as was declared by the Supreme Court in the decision reported as 1997 (3) SCC 509 Dr.K.Ramulu & Anr. v. Dr.Suryaprakash Rao & Ors. wherein a conscious decision taken in the year 1988 not to fill up promotional posts pending amendment to the A.P. Animal Husbandry Service Special Rules 1977 resulting in the A.P. Animal Husbandry Service Rules 1996 being promulgated repealing the 1977 Rules was held justifying the decision to fill up the vacancies which had arisen prior to the amendments by applying the amended Rule. The Court opined that the executive is entitled to take a decision not to fill up the existing vacancies as on the relevant date and that nobody acquires a vested right for being considered for promotion as and when the vacancy arises.

18. A residual issue sparked by the Tribunal needs to be dealt with. The Tribunal has held that people join service with the hope and expectation of being promoted. The Tribunal has found the said expectation of Telecom Technical Assistants to be unreasonably impinged upon. The Tribunal has overlooked the fact that hithertofore the Telecom Technical Assistants could not compete for the 50% external seats due to the age relaxation provision being missing, but can now compete through the said stream. Thus, the right to compete which hithertofore was available in the internal stream may

have been extinguished but the same right has been created in the external stream. Besides, the Telecom Technical Assistants can earn promotion to the next above post of Junior Telecom Officer i.e. the lowest post in the executive cadre and thereafter can move up the executive ladder.

19. The writ petitions are accordingly allowed. The impugned judgment and order dated July 28, 2010 is set aside and OAs No.2899/2009, 592/2010, 593/2010, 594/2010, 596/2010, 597/2010, 775/2010 and 1962/2010 filed by the respondents are dismissed.

20. No costs.

(PRADEEP NANDRAJOG)
JUDGE

(A.K.PATHAK)
JUDGE

FEBRUARY 18, 2013
dk