IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR.JUSTICE K.SURENDRA MOHAN
&
THE HONOURABLE MR. JUSTICE SHAJI P.CHALY

WEDNESDAY, THE 16TH DAY OF DECEMBER 2015/25TH AGRAHAYANA, 1937

OP (CAT).No. 199 of 2015 (Z)

AGAINST THE ORDER IN OA 180/01103/2014 of KERALA ADMINISTRATIVE TRIBUNAL, ERNAKULAM BENCH DATED 04-08-2015

PETITIONERS:
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1. UNION OF INDIA
REPRESENTED BY THE SECRETARY TO THE GOVERNMENT OF INDIA,
MINISTRY OF FINANCE, DEPARTMENT OF REVENUE,
NEW DELHI 110 001.

2. CHAIRMAN, CENTRAL BOARD OF DIRECT TAXES,
MINISTRY OF FINANCE, DEPARTMENT OF REVENUE,
DELHI - 110 001.

3. THE PRINCIPAL CHIEF COMMISSIONER OF INCOME TAX(CC A)
KERALA,CENTRAL REVENUE BUILDING, I.S PRESS ROAD,
COCHIN 682 018

4. THE DEPUTY DIRECTOR OF INCOME TAX (HRD)
CENTRAL BOARD OF DIRECT TAXES, DIRECTORATE OF INCOME TAX
(HUMAN RESOURCE DEVELOPMENT), ICADR BUILDING, PLOT
NO.6,VASANT KUNJ INSTITUTIONAL AREA PHASE II,
NEW DELHI 110 070

BY ADV. SRI.N.NAGARESH, ASSISTANT SOLICITOR GENERAL

RESPONDENTS:
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1. RASHEED.K.I
S/O. K.M IBRAHIMKUTTY, TAX ASSISTANT, O/O COMMISSIONER OF
INCOME TAX (TDS), KOCHI RESIDING AT MYALIL HOUSE,
THALAYOLAPARAMBU, KOTTAYAM DISTT 686 605

2. MADHU KUMAR M
S/O. MADHAVAN PILLAI P, TAX ASSISTANT, O/O ADDITIONAL
DIRECTOR OF INCOME TAX ,(INVESTIGATION),AAYAKARBHAVAN ,
KOLLAM, RESIDING AT GAYATHRI,KIDANGAYAM NADUVIL, SOORANADU
SOUTH, PATHRAM P.O, KOLLAM 690 567.

3. REJEESH. A.
S/O. A. RAMAKRISHNAN,
TAX ASSISTANT, O/O.THE JOINT COMMISSIONER OF INCOME TAX,
RANGE - 1, AAYAKARBHAVAN, KOZHIKODE, RESIDING AT SUDI,

PKC ROAD, NEAR GOVT. HOUSE, KOZHIKODE - 673 005.

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4. SULEESH SUKUMAR,
S/O. SUKUMARAN P.N.,
TAX ASSISTANT, O/O. THE COMMISSIONER OF INCOME TAX,
C.R. BUILDING, MANANCHIRA, KOZHIKODE, RESIDING AT SULI NIVAS
PATHEYAKUNNU. P.O.
PATHAIN, THALASSERY, KANNUR - 670 691.

5. SURESHBABU. P.K.
S/O.KRISHNAN NAIR. K.
TAX ASSISTANT, O/O THE ACIT, TARIFF BASAR, TIRUR,
RESIDING AT PANAELI THAZHAKURIYIL, NUT STREET P.O.
BADAGARA - 673 104.

6. ANILKUMAR. K.K.
S/O.SHRI. V.K. KOCHUKUNJU,
TAX ASSISTANT, O/O/THE DIRECTOR GENERAL OF INCOME TAX,
(INVESTIGATION) KOCHI
RESIDING AT ANILRAJNILAYAM, KARAKKAD. P.O.,
ALAPPUZHA - 689 504.

7. FAZA. R.I.
W/O.MANOJ ABDUL REHMAN. K.
TAX ASSISTANT, O/O. THE ADDITIONAL COMMISSIONER OF INCOME TAX,
RANGE - 2, KOCHI
RESIDING AT INCOME TAX QUARTERS, B-31,
PANAMPILLY NAGAR - 682 036.

8. BIJU AUGUSTINE, S/O. M.S. AUGUSTINE,]
TAX, ASSITANT, O/O.THE ADDITIONAL COMMISSIONER OF INCOME TAX,
RANGE - 1, KOCHI
RESIDING AT MAMKUZHICHALIL HOUSE, RAMAPURAM P.O.,
KOTTAYAM DIST., KERALA - 686 576.

9. ANJU. P.,
W/O.MANU R NAIR, TAX ASSISTANT, O/O. THE ADDITIONAL CIT,
RANGE - 1, KOCHI, RESIDING AT ANJALI, KATTANAM,
PALLICKAL. P.O., ALAPPUZHA - 690 503.

10. SANUSHA. S.
W/O.SANTHOSH KUMAR. S.R.
TAX ASSISTANT, O/O/COMMISSIONER OF INCOME TAX,
RANGE - 1, NON CORPORATE, 3RD FLOOR, C.R. BUILDING,
RESIDING AT Q.NO.B-19, INCOME TAX QUARTERS,
KOCHI - 682 036.

11. LOKESH R. SHENOY,
S/O.A. RATNAKARA SHENOY,
TAX ASSISTANT, O/O.THE ADDITIONAL COMMISSIONER OF INCOME TAX,
ALUVA, RESIDING AT ELUPARAMBIL HOUSE,
K.G.VADHYAR ROAD, ERNAKULAM - 682 035.

12. AMAL DEV. M.V.
S/O.KELAPPAN. P.K.(LATE)

TAX ASSISTANT, O/O THE COMMISSIONER OF INCOME TAX - 11,
KOCHI, RESIDING AT BLORA - 41, BLOSSOM ROAD,
ELAMAKKARA, KOCHI - 682 026.

13. REMYA.A.
W/O.AMAL DEV. M.V.
TAX ASSISTANT, O/O THE COMMISSIONER OF INCOME TAX,
(NON CORPORATE), KERALA, RESIDING AT BLORA - 41, BLOSSOM ROAD,
ELAMAKKARA, KOCHI - 682 026

14. MEENA V. PILLAI,
W/O. VIJAYAN PILLAI,
TAX ASSISTANT, O/O THE COMMISSIONER OF INCOME TAX - 1,
C.R. BUILDING, KOCHI,
RESIDING AT B-23, INCOME TAX RESIDENTIAL COMPLEX,
PANAMPILLY NAGAR, KOCHI - 682 036.

15. DEEPA.V.C., W/O.NILE KUMAR,
TAX ASSISTANT, O/O THE COMMISSIONER OF INCOME TAX
(COMPUTER OPERATIONS), C.R. BUILDING, KOCHI,
RESIDING AT VELICHERMPARRAMBIL HOUSE,
JANAKEEYA ROAD, ELAMAKKARA, KOCHI - 682 026.

16. MOHAMMED KASIM, S/O.ABDUL KAREEM,
TAX ASSISTANT, O/O THE ADDITIONAL COMMISSIONER OF INCOME TAX,
ALAPPUZHA RANGE, ALAPPUZHA - 688 001.
RESIDING AT DAR UI AFIYA, ALISSERY, ALAPPUZHA - 688 001.

17. BABU. T.T.,
S/O. T.V. THAMPI,
TAX ASSISTANT, O/O THE ADDITIONAL COMMISSIONER OF INCOME TAX,
ALUVA RNAGE, ALUVA - 683 101.
RESIDING AT TLIOTTAPPADAN HOUSE,ALLAPRA (PO),
ERNAKULAM DISTRICT - 683 556.

18. PRASOON. P., S/O.PRABHAKARAN,
TAX ASSISTANT, O/O THE DEPUTY COMMISSIONER OF INCOME TAX,
CENTRAL CIRCLE, KOZHIKODE - 673 001, RESIDING AT PILAKANDIYIL,
PAZHANKAVII, VADAKARA, KOZHIKODE - 673 104.

19. LEENA S. NAIR, W/O.SREENARAYANAN NAIR,
TAX ASSISTANT, O/O THE COMMISSIONER OF INCOME TAX CENTRAL,
K.K. TOWERS, M.G. ROAD, KOCHI.
RESIDING AT C70, INCOME TAX QUARTERS,
PANAMPILLY NAGAR, KOCHI - 36.

BY ADV.SRI.T.C.GOVINDA SWAMY

THIS OP (CAT) HAVING COME UP FOR ADMISSION ON 16-12-2015, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

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APPENDIX

PETITIONERS' EXHIBITS

EXHIBIT P1 TRUE COPY OF THE OA NO 180/01103/2014 DATED 14-12-2014 FILED BY THE RESPONDENTS BEFORE THE CAT, ERNAKULAM BENCH

EXHIBIT P2 TRUE COPY OF THE REPLY STATEMENT DATED 13-02-2015 FILED BY THE PETITIONERS

EXHIBIT P3 TRUE COPY OF THE REJOINDER DATED 06-03-2015 FILED BY THE APPLICANT.

EXHIBIT P4: TRUE COPY OF THE ADDITIONAL REPLY STATEMENT DATED 20.03.2015, FILED BY THE PETITIONERS.

EXHIBIT P5: TRUE COPY OF THE COMMON ORDER IN OA NO.180/01103/2014 AND CONNECTED CASES, DATED 04.08.2015 OF THE CENTRAL ADMINISTRATIVE TRIBUNAL, ERNAKULAM BENCH.

RESPONDENTS' EXHIBITS : NIL

//TRUE COPY//

P.A. TO JUDGE

smv

K. SURENDRA MOHAN
&
SHAJI P. CHALY, JJ.

O.P(CAT) No.199 of 2015

Dated this the 16th day of December, 2015

JUDGMENT

Surendra Mohan,J.

The Union of India and respondents 2 to 4 in O.A. Nos.180/01103/2014, 180/01104/2014 and 180/01111/2014 of the Central Administrative Tribunal ("CAT" for short), Ernakulam Bench are the petitioners before us. They challenge Ext.P5 common order by which, the original applications have been allowed.

2. Respondents 1 to 15 in this Original Petitions are Tax Assistants under the petitioners. They are persons who have come to Kerala on Inter Charge Transfer. As per the undertaking given by them, they had obtained the transfers on their request, agreeing to forgo their seniority. In other words, they had agreed to join the Kerala Cadre as the junior most on the date of their joining after they had joined the Kerala Charge, proceedings were initiated for filling up the vacancies of Senior Sales Tax Assistants by promotion. One of the conditions for

promotion is that, the incumbent should have a minimum of 3 years service. The respondents were not promoted, on the ground that, they did not have the requisite service of 3 years. Aggrieved by the denial of promotion, the respondents had approached the CAT by filing the Original Applications. According to them, their past service outside Kerala ought to have been reckoned for the purpose of computing the 3 year service, that is stipulated as criterion of eligibility. The claim of the respondents were resisted by the petitioners, placing reliance on the executive instructions issued by the Central Board of Direct Taxes (CBDT). It was contended that, the respondents were entitled to claim the benefit of only the service rendered by them after their transfer to the Kerala Charge. However, the said contention has been rejected and the Original Applications have been allowed by Ext.P5 order. The petitioners have filed this Original Petition aggrieved by Ext.P5.

3. According to the learned Assistant Solicitor General of India (ASGI), Sri.Nagaresh, there is a difference between the concept of eligibility and concept of seniority. An employee, in spite of his seniority may not be eligible for appointment/promotion to the particular post. In the present

case, for the purpose of promotion to the post of Senior Sales Tax Assistants, an eligibility criterion of 3 years service is stipulated. As per the executive instructions of the CBDT, only the service put in by an employee after he joins the Kerala Charge can be reckoned. Since the respondents do not have the minimum eligibility of 3 years service, they were not considered. According to the learned ASGI, the said action was fully justified. The learned ASGI has a further contention that, the respondents are persons who have obtained transfers to the Kerala Charge, on their request, agreeing to forgo their seniority and to join in the Kerala Charge as the junior most in the cadre. They had also given an undertaking agreeing to abide by the terms and conditions of the Board letter dated 14.05.1990. A copy of the undertaking has been produced and marked as Annexure R2, which forms part of Ext.P4 in this Original Petition. The learned ASGI places reliance on a judgment of the Apex Court dated 4.8.2009 in Civil Appeal No.5079 of 2009 to support his contention that, the respondents cannot be permitted to resile from the terms of the undertaking given by them for the reason that,they had been transferred to Kerala on the basis thereof.

4. When this Original Petition was heard on 11.12.2015, a

doubt was expressed by the learned ASGI as to whether the respondents would have come within the zone of consideration in the matter of promotion to the post of Senior Sales Tax Assistants, in view of the fact that they had been placed at the bottom of the seniority in the Kerala Charge. Therefore, the learned ASGI was granted time to ascertain and to get further instructions on the above aspect. Accordingly, instructions have been received. As per the instructions, it is submitted by the learned ASGI that, the respondents would have fallen within the zone of consideration for promotion as Senior Tax Assistants, had they possessed the 3 years service at the relevant time. The above instructions put beyond the controversy, the fact that had the respondents satisfied the eligibility criterion of 3 years minimum service, they would have been entitled to be promoted. Their contention is that, their previous service outside Kerala is also to be reckoned for the purpose. Pursuant to the interim order issued by the CAT, we are told that the DPC has considered the respondents for promotion and they have been promoted as Senior Tax Assistants. They are presently working in the said post. Therefore, the only question that remains is whether the insistence of satisfying the requirement of 3 years service on the basis of service in the Kerala Charge alone is justified or not ?

5. A copy of the Recruitment Rules have been produced as Annexure A3, that forms part of Ext.P1. As per Annexure A3, promotion to the post of Senior Tax Assistants is to be effected from Tax Assistants who have rendered “ a minimum regular service of 3 years in the grade” and have satisfied the prescribed departmental examination. A perusal of the above shows that, what is contemplated is a minimum regular service of 3 years in the grade. The regular service of 3 years is not confined to any particular geographical region. However, the said stipulation is made as per Annexure A1(that forms part of Ext.P1) executive instructions dated 2.12.2014. The said executive instructions have been found to be unjustified by the CAT.

6. The respondents are persons who admittedly have more than 3 years service in the particular grade of Tax Assistants, in which they have been working. They are persons who have obtained transfer to the Kerala Charge on their own request forgoing their seniority position. However, they cannot be denied the benefit of the service that they have already put in for the only reason that the same was outside Kerala.

7. For the above reasons, we are not satisfied that insistence of the service being confined to the Kerala Charge alone is unreasonable. The CAT has placed reliance on the decisions of the Lucknow and Jodhpur Bench of the CAT where it has been held that eligibility for promotion should not be confused with depressed seniority by reason of transfer. We are also of the same view. The petitioners have by virtue of the transfer forgone only their seniority position. Therefore, their seniority has been brought down and they have joined the Kerala Charge as the junior most. That does not make them ineligible to be considered for the promotion to the higher post where a minimum service requirement is satisfied. For the purpose of satisfying the said eligibility criterion of minimum service, their entire service ought to be considered. There is no justification for denying to them the benefit of their service.

8. The learned ASGI has placed reliance on the decision of the Apex Court in **Union of India and others v. Deo Narain and others** [(2008) 10 SCC 84] to contend that, eligibility and seniority are distinct, different and independent. Despite a person satisfying the criterion of seniority, he may not be eligible for promotion. We have no quarrel with the above proposition.

The petitioners have only forgone their seniority. For the reason that, they have forgone their seniority, they do not lose their claim for further promotion provided, they satisfy the eligibility criterion. In the present case, it is already found, that they satisfied the eligibility criterion of possessing the 3 years service when their previous service outside Kerala is also reckoned. We are satisfied that the respondents are entitled to the benefit of their previous service while examining whether they have satisfied the eligibility criterion of 3 years minimum service.

9. Another contention put forward by the learned ASGI is that, since the petitioners had executed Ext.R2 undertaking agreeing to abide by the executive instructions contained in the Board's letter dated 14.5.1990 which is produced as Annexure R1, they should not be permitted to resile from the said undertaking. In the context of the above contention, it is necessary to examine the terms of the undertaking Annexure R2. As per the undertaking, the incumbent has agreed that the seniority in the Kerala Charge will start from the date of his reporting for duty in the charge. It is further stated that, he would be bound by the Board's letter dated 14.5.1990. It is not in dispute that, the respondents have been placed at the bottom

of the seniority position in the Kerala Charge. A perusal of Ext.R1 which forms part of Ext.P2 shows that, the conditions stipulated therein relate only to the seniority. Clauses f and g of Annexure R1 are extracted hereunder for convenience of reference:

> "(f) 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 belongs to a batch selected on merit whose inter-se-seniority is not regulated by date of joining.
>
> (g) On transfer, the transferee will forfeit all claims for promotion/confirmation in the old Charge. He/she will be eligible for promotion/confirmation only in the new Charge in accordance with the seniority allotted to him on transfer."

10. The above clauses show that, what is stipulated is that he/she would be placed at the bottom of the list of employees of the concerned cadre in the new Charge and that the seniority would start from the date he reports for duty in the charge. It is further stipulated that his/her eligibility for promotion/confirmation would be in accordance with the seniority allotted to him on transfer. The above clauses relate to the new Charge. Therefore, it is clear that, the undertaking related only to the seniority of the incumbent and not to his eligibility for further promotion.

The above being the position, we do not find any grounds to entertain this original petition or to grant any of the reliefs sought for. The original petition is therefore dismissed.

Sd/-
K. SURENDRA MOHAN
JUDGE

Sd/-
SHAJI P. CHALY
JUDGE

//true copy//

P.A. To Judge

smv
17.12.2015