

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

**THE HONOURABLE THE AG.CHIEF JUSTICE MR.ASHOK BHUSHAN
&
THE HONOURABLE MR.JUSTICE A.M.SHAFFIQUE**

THURSDAY, THE 12TH DAY OF FEBRUARY 2015/23RD MAGHA, 1936

WA.No. 1304 of 2010 ()

(AGAINST THE JUDGMENT IN WP(C).NO. 25089/2007 DATED 02-06-2010)

APPELLANT(S)/RESPONDENTS:

- 1. STATE OF KERALA, REPRESENTED BY THE
SECRETARY TO GOVERNMENT, EXCISE AND PROHIBITION
DEPARTMENT, SECRETARIAT, THIRUVANANTHAPURAM.**
- 2. THE COMMISSIONER OF EXCISE,
COMMISSIONERATE OF EXCISE, THIRUVANANTHAPURAM.**

BY SPL. GOVERNMENT PLEADER SMT. GIRIJA GOPAL

RESPONDENT/PETITIONER:

**P. BALACHANDRAN PARAKATTIL,
EXCISE CIRCLE INSPECTOR (RETD.) NOW RESIDING AT
"LAKSHMI KORUNA", POOJA NAGAR, PUTHUR,
PALAKKAD. PIN-678 005**

BY ADV. SRI.S.EASWARAN

**THIS WRIT APPEAL HAVING BEEN FINALLY HEARD
ON 08-01-2015 , THE COURT ON THE 12-02-2015 DELIVERED
THE FOLLOWING:**

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APPENDIX

PETITIONER'S ANNEXURES:

- ANNEX A1** COPY OF THE AUTHENTIC AND OFFICIAL SENIORITY LIST OF EXCISE PREVENTIVE OFFICERS FOR THE PERIOD FROM 09-09-1974 TO 31/12/1994 PUBLISHED VIDE ORDER NO.XE2/24236/94 DATED 20/01/1996 OF THE SECRETARY (EXCISE), BOARD OF REVENUE, TVM.
- ANNEX A2** COPY OF THE LIST OF QUALIFIED AND ELIGIBLE SENIORS ABOVE THE RESPONDENT
- ANNEX A3** COPY OF THE SELECT LIST FOR PROMOTION TO THE POST OF EXCISE INSPECTOR FOR THE PERIOD FROM 10/10/1985 TO 01/01/1996
- ANNEX A4** COPY OF THE SELECT LIST FOR PROMOTION TO THE POST OF EXCISE INSPECTOR FOR THE PRIOD FROM 02/01/1996 TO 31/12/1998

RESPONDENT'S ANNEXURES:

(I.A.NO.802/2011) A1 TO A3

- ANNEX A1** COPY OF THE COMMUNICATION NO.13711/F1/2010/TD DATED 17/06/2010 PRINCIPAL SECRETARY TO GOVERNMENT
- ANNEX A2** COPY OF THE COMMUNICATION DATED 24/10/2011 ISSUED BY THE STATE PUBLIC INFORMATION OFFICER.
- ANNEX A3** COPY OF THE SANCTION ORDER NO.XDI-12948/07 DATED 9/7/2010 ISSUED BY ADMINISTRATIVE OFFICER, COMMISSIONERATE OF EXCISE, THIRUVANANTHAPURAM.

(I.A.NO.800/2013)

- ANNEX R1** COPY OF THE PROCEEDINGS NO.EX.D.1259/10 DATED 01/02/2010 ISSUED BY THE STATE PUBLIC INFORMATION OFFICER.
- ANNEX R1(A)** COPY OF THE LETTER DATED 31/3/1987 FROM THE SECRETARY (EXCISE) BOARD OF REVENUE, TRIVANDRUM TO THE ASST. EXCISE COMMISSIONER, PALAKKAD ALONG WITH COPY OF LIST QUALIFIED PREVENTIVE OFFICERS FOR PROMOTION AS ASST. EXCISE INSPECTOR PREPARED ON THE BASIS OF THE TEST RESULT PUBLISHED IN THE GAZETTE DATED 16/12/1986.

(I.A.NO.595/2014)

- ANNEX XI** COPY OF THE LIST PREPARED ON THE BASIS OF THE SENIORITY LIST OF EXCISE PREVENTIVE OFFICERS FROM 9/9/1974 TO 31/12/1994 ALONG WITH THE RELEVANT EXTRACT OF THE SENIORITY LIST OF EXCISE PREVENTIVE OFFICERS FROM 9/9/1974 TO 31/12/1994.

/TRUE COPY/

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P.S.TO.JUDGE

Ashok Bhushan, Ag. C.J & A.M. Shaffique, J.

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W.A. No. 1304 of 2010

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Dated this, the 12th day of February, 2015.

J U D G M E N T

Shaffique, J.

Respondents in the writ petition are the appellants. They challenge the judgment dated 2.6.2010 in W.P (C) No. 25089/2007 by which the learned Single Judge allowed the writ petition filed by the respondent herein, who is the writ petitioner, quashing Ext. P7 and directing the appellants to consider the claim of the petitioner for inclusion in the select list for the year 1984 in the place of respondents 3 to 10 in O.P. No. 16264/1996, ignoring the fact that there were other senior officers who had acquired test qualification earlier than the respondent, who is hereinafter referred to as the petitioner.

2. The short facts involved in the writ petition are as under:

The petitioner entered into service as Excise Preventive Officer on the advise of Kerala Public Service Commission on 16.8.1980. He acquired test qualifications required for promotion on 8.5.1984. The petitioner had claimed promotion by submitting representations when it was known that promotions were given to persons who had not acquired test qualification. The petitioner filed O.P. No. 16264/1996 before this Court. This Court, by judgment

dated 16.1.2007, found that though respondents 3 to 10 in the said case have passed the test, they acquired the qualification only in the 5th chance and therefore they were not eligible to be included in the select list for 1984, whereas, as per Rules, they had four chances for passing the departmental test. In such circumstances, including them in the select list of 1984 was bad in law and non-inclusion of the petitioner, though he was eligible to be included in the 1984 select list, was not correct. Hence, the learned Single Judge directed constitution of a Review Departmental Promotion Committee to consider the case of the petitioner for inclusion in the 1984 select list after excluding respondents 3 to 10. It was finally observed that "if he is found to be entitled to be included in the select list for 1984, he should be given promotion with effect from the date when the vacancy relating to 1984 select list arose and he should be given notional fixation in the promotion post with effect from that date aforesaid and all further dates of promotion of the petitioner shall also be revised accordingly." It was further directed that the petitioner shall not be entitled for any monetary benefits arising from re-fixation.

3. Pursuant to the aforesaid judgment, Ext. P7 order was passed, by which the 2nd respondent formed

an opinion that the petitioner is not entitled to be included in the 1984 select list, since there were seniors to the petitioner, who were only promoted subsequently.

4. In the writ petition, the petitioner contended that Ext. P7 order was not in conformity with the judgment. When respondents 3 to 10 in O.P.No. 16264/1996 were excluded from the field of choice, then the petitioner would be entitled to be considered for inclusion in the 1984 select list. That apart, it was contended that the finding in Ext. P7 order that there are seniors to that of the petitioner and they have been given promotion only subsequently as a result of which the petitioner cannot be included in the 1984 select list, is totally vitiated and baseless. It was further contended that even if there were other senior officers in the cadre of Excise Preventive Officers, as long as they have not challenged the select list in any proceedings, there was no reason to exclude the petitioner from the select list. None of the seniors have raised preferential claim over the petitioner and therefore Ext. P7 was liable to be quashed and appropriate directions have to be issued.

5. Counter affidavit has been filed on behalf of the 2nd respondent inter alia stating that the

Departmental Promotion Committee (DPC) for selection to the cadre of Excise Inspector prepared a list from 17.1.1968 to 1.1.1998 and the select list was published after approval from the Government in which the petitioner was not eligible to get the position even in the year 1996. All the persons included in the select list for the year 1984 are senior most test qualified persons. The petitioner was not eligible to get such position in the select list during 1984 or the period prior to 1.1.1996.

6. It was further contended that large number of cases relating to seniority were pending before this Court on account of the fact that DPC was not convened in the Excise Department since 1980. By judgment dated 22.4.1995 in O.P.No 3504/1991 and connected cases, directions were issued that DPC should meet every year during the month of September and October and prepare a select list year-wise and publish them before 31st December for all the posts in strict conformity with the Rules. The DPC met and prepared a select list of Excise Inspectors for the period 17.1.1967 to 1.1.1996, which was approved by the Government as per notification dated 24.7.1996 and 10.12.1996. There was an amendment to the Special Rules on 14.5.1982 which was notified in the

gazette dated 6.7.1982, which required an obligatory test for promotion to the category of Excise Inspector. Two year period prescribed for qualifying in the test expired on 14.5.1984 and the 4th chance available for certain category of officers was conducted in July 1984. All the unqualified persons were reverted to lower cadre as per the judgment dated 15.4.1984 in O.P. No. 5733/1985 and connected cases. It is contended that as per the list available, there were more and 315 senior persons and therefore the petitioner was not eligible to be included in the select list for 1984. When he joined service as Preventive Officer in the year 1980, he was the junior-most person in the Department at that time. It was contended that out of 320 persons, senior to the petitioner in the seniority list, 106 persons were fully qualified to be considered for promotion to the post of Excise Inspectors and 70 persons were seen included in the select list. It is submitted that even if the respondents in O.P. No. 16264/1996 are excluded from the select list for the year 1984, still the petitioner cannot be included as there were large number of other senior officers to the petitioner who had passed the test before the petitioner acquiring the same but were not included in the select list prepared only after 1984. The respondent also gave details of some of the

officers who were senior to the petitioner and who had passed qualifying test prior to the petitioner and they were included in the select list for the years 1993, 1994, 1995 etc. It is stated that the petitioner was included in the select list for promotion to the post of Excise Inspector in the year 1996. On this basis, it was contended that Ext. P7 order was passed in accordance with the procedure prescribed.

7. Reply affidavit was filed by the petitioner controverting the contentions urged in the counter affidavit.

8. The learned Single Judge observed that if there were senior officers who were eligible to be included in the select list for the year 1984 or thereafter, they ought to have agitated their grievances before the Departmental authorities or before this Court and since the same was not done, they have slept over their rights and that will not preclude the petitioner from getting the benefits of Ext. P5 judgment. It is on this basis that Ext. P7 was found to be unsustainable

9. While impugning the aforesaid judgment, the learned Special Government Pleader Smt. Girija Gopal contended that as per Special Rules, promotion is from the post of Preventive Officers to that of Assistant

Excise Inspector and the petitioner was promoted to the said post on 13.3.1996. Thereafter, he was promoted to the post of Excise Inspector on 21.1.1998 after having been included in the select list for the year 1996. The petitioner completed his probation in the post of Assistant Excise Inspector during March 1997. The post of Excise Inspector is a selection post for which declaration of probation is mandatory as per the Special Rules. In so far as he could claim promotion only after completion of the period of probation, he could not be included in the select list prepared during 1984. Further, it is contended that though respondents 3 to 10 in O.P.16264/1996 were not entitled to be included in the select list for the year 1984, there were large number of other eligible and qualified seniors to the petitioner who could be promoted only after 1997 especially since the petitioner is ranked as no. 318 in the final seniority list of Preventive Officers. He was also included in the final seniority list of Excise Inspectors for the period from 2.2.1993 to 1.6.2001 and if the judgment is permitted to operate, it will affect large number of seniors whose seniority had been settled long back and it will appear that a qualified senior was not given due promotion when such promotion has been given to a junior.

10. On the other hand, the learned counsel Sri. S. Easwaran appearing on behalf of the respondent, supported the judgment of the learned Single Judge and inter alia contended that even in the judgment in O.P.No. 16264/1996, his right to be included in the 1984 seniority list was approved. If at all there were other seniors, who were entitled to be included in the 1984 seniority list, so long as they have not agitated their rights before the authorities, the learned Single Judge was justified in forming an opinion that they having slept over their rights and were not entitled to the benefit which accrued to the petitioner. Learned counsel also relied on the judgment of the Supreme Court in (2011) 4 SCC 374 [**BSNL v. Ghan Shyam Dass (2) & Others**].

11. During the pendency of the writ appeal, an affidavit is filed on behalf of the 2nd appellant producing certain documents. This affidavit is filed in answer to I.A. No. 595/2014 by which the petitioner produced a list prepared on the basis of the seniority list as Annexure II. In the affidavit filed in support of the document, it is stated that the list had been prepared on the basis of the seniority list prepared by the 2nd respondent for the period from 9.9.1974 to 31.12.1994, wherein the petitioner was included as sl. no. 316. It is

stated that all the seniors excluding three had retired, expired or left the Department. Annexure II is the said list. The appellants produced Annexure A1, which, according to them, is the authenticated list. It is stated that as per the said list, there were 106 seniors who were fully qualified to be considered for the selection list of Excise Inspectors. Such 106 seniors were found eligible after excluding expired, retired and the vacancies reserved apart for direct recruitment from the list. The list of such qualified seniors is produced as Annexure A2. It is further submitted on the basis of a comparative chart that M/s. Sajeev, T.S. Ansari, Aboobacker Sidik, Radhakrishan Nair and G.S. Prakash are the immediate qualified seniors to the respondent occupying position with Sl. Nos. 295, 309, 311, 316 and 317 respectively. Their details are also given. It is therefore submitted that the name of the respondent as well as his immediate seniors were included in the select list for promotion to the post of Excise Inspectors in the year 1996. It is also stated that Sri. S. Sajeev and Sri. P.S. Ansari, who were seniors to the petitioner, are still continuing in service occupying the post of Assistant Excise Commissioner. The petitioner could have occupied the said post, but for his superannuation on 28.2.2007 while holding the

post of Excise Circle Inspector. It is also mentioned that from Annexure A1 final seniority list, the first person who was eligible and qualified to be considered for promotion is Sri. T. Rajappan, who got a place in the select list for promotion as Excise Inspector only in the year 1993. When sl. no. 2 has only to be promoted in 1993, it was not possible to include the petitioner who was sl.no. 318 in the select list for the year 1984. It is further stated that sl. nos. 2, 11, 14, 43, 52, 96, 112, 114 and 131 were qualified, got promoted and retired from service as Excise Circle Inspectors. A comparative chart in that regard is also made available in the affidavit.

12. It is further submitted that a pass in the departmental test alone will not ensure the petitioner a place in the select list for future promotion. Select list for promotion is based on seniority from the eligible candidates. The petitioner is included only as sl. no. 45 in the select for the year 2.1.1996 to 31.12.1996. Annexure A4 is the select list. Therefore, they disputed the correctness of Annexure II list prepared by the petitioner.

13. Reply affidavit is filed by the petitioner stating that by virtue of the directions of this Court in the judgment dated 2.4.1995 in OP.No. 15979/1994

and connected cases, it was specifically mentioned that the Government shall not entertain any representations regarding seniority and promotions, if they are filed later than six months from the date of cause of action or the date of offending order. It is stated that as far as the seniors had not challenged the assignment of rank in the select list, they cannot get any benefits.

14. Having regard to the aforesaid submissions, the short question to be considered is whether the petitioner was entitled to be included in the select list of 1984 as directed in the judgment dated 16.1.2007 in O.P. No. 16264/1996.

15. The main contention urged by the petitioner while challenging Ext. P7 is that there is non-compliance of the directions issued by this Court. In the judgment in O.P. No. 16264/1996, this Court was considering the question whether the petitioner could have been included in the 1984 select list. Petitioner contended that respondents 3 to 10 who are included in the select for 1984 were not eligible as they did not pass the obligatory test qualification within the time stipulated as per Rules. Apparently, learned Single Judge was considering the question whether respondents 3 to 10 were eligible to be included in the

select list for 1984. By the time the judgment was delivered, respondents 3 to 10 were no longer in service as they retired on superannuation. The learned Single Judge having found that respondents 3 to 10 should not have been included in the select list, observed that “if they are excluded from the field of choice, then, certainly, the petitioner would be entitled to be considered for inclusion in the 1984 select list, which fact has not been disputed in the affidavit. That being so, I am of the opinion that the petitioner should have been considered for inclusion in the select list for the year 1984.”

16. Therefore, what was directed by this Court was consideration of the question as to whether the petitioner could have been included in the 1984 select list, after excluding respondents 3 to 10 from the said list.

17. In Ext. P7, the 2nd respondent proceeded on the basis that other than respondents 3 to 10 in the aforesaid Original Petition, there were other seniors of the petitioner who were not included in the select list of 1984, though they were qualified. The details of such qualified persons who were not included in the list were also mentioned.

18. It is not in dispute that as per the Rules,

promotion to the post of Excise Inspector is by promotion from the category of Assistant Excise Inspector and promotion to the post of Assistant Excise Inspector is from category (2), which is Excise Preventive Officer. As on 1984, the petitioner was in the category (2), ie., Excise Preventive Officer. According to the appellants, he was promoted as Assistant Excise Inspector on 13.3.1996 and thereafter as Excise Inspector on 21.1.1998. This fact, apparently, has not been mentioned in the writ petition. Further, this Court had only directed the authorities to consider whether the petitioner could be included in the 1984 select list.

19. On a perusal of the seniority list prepared by the Department, it clearly indicates that there had been several senior persons of the petitioner, who were test qualified and were included in the select of the years 1993, 1994, 1995 and 1996. This is evident from the materials now made available in the form of an affidavit filed by the appellants, which cannot be disputed by the petitioner as well. Inclusion of a person in the select list is based on eligibility, merit and seniority. Further, there were seniors to the petitioner who could have been included in the 1984 select list and they were not included. Apparently, the

petitioner could not have been included in the 1984 list. The question would be, if the 1984 select list is recasted by specially constituted DPC as directed by this Court, after excluding 8 persons mentioned in the judgment aforesaid and the petitioner had a chance to be included, there was some justification. That is not the instance here. This is clear from the fact that there had been 106 persons who were senior to the petitioner and who were qualified. If such persons are not included in the select list, there is no reason for the petitioner to contend that he should have been included in the 1984 select list. Merely for the reason that the petitioner had test qualification and respondents 3 to 10 in O.P. No. 16264/1996 were not eligible, by itself is no reason to include the petitioner in the select list. If respondents 3 to 10 are excluded, necessarily the persons who were eligible during the relevant time have also to be considered for inclusion in the select list of 1984 to arrive at the fact as to whether the petitioner could be promoted. That was the direction issued by this Court in the judgment in O.P. No. 16264/1996. A different meaning cannot be attributed to the said judgment. Therefore, it was incumbent on the part of the appellants to have considered whether the name of the petitioner could have been included in

the 1984 select list. If DPC is of the opinion that it would not have been possible on account of the fact that there were other seniors, who also could have been included in the 1984 select list and thereby the petitioner will not get an opportunity, there is no justification in giving pay fixation to the petitioner alone by including him in the 1984 select list.

20. It is true that persons sleeping over their rights cannot agitate their claims at a later point of time. But, that is not the situation in the case on hand. In this case, the petitioner wanted to be included in the 1984 seniority list by contending that respondents 3 to 10 in O.P. No. 16264/1996 were not eligible. He had requested for recasting of the list, which was directed to be done. While recasting the list, it was incumbent on the part of the authorities to have verified whether the petitioner stood a chance to be included in the 1984 select list. If it was not possible on account of the fact of existence of others who were seniors to the petitioner, though they have not challenged the 1984 select list, it was not open for the authorities to ignore the seniority of such persons who were qualified and give a benefit to the petitioner. Therefore, we cannot agree with the learned Single Judge that seniors of the petitioner having slept over their rights, petitioner can

be given the benefit of inclusion in the 1984 select list. If seniors of the petitioner were not entitled for notional fixation as directed by the learned Single Judge, the petitioner also cannot claim the same. In **BSNL** case (supra) the Supreme Court held that where only the affected parties approach the court and relief is given to those parties, the fence-sitters who did not approach the court cannot claim that such relief should have been extended to them thereby upsetting or interfering with the rights which had accrued to others. Apparently that is not the situation in this case. Here none of the petitioner's seniors complained about the select list prepared in the year 1984 to the post of Excise Inspector. Such seniors had accepted the 1984 select list and seniority list prepared for the period from 9.9.1974 to 31.12.1994. The petitioner also did not challenge the seniority list. Whereas his challenge was regarding the 1984 select list for promotion by which he was not included and certain ineligible persons were included, and in that circumstance this Court in an earlier judgment directed to constitute DPC to consider whether petitioner could be included in the 1984 select list. In **Suresh v. Yeotmal Distt. Central Coop. Bank Ltd.**, (2008) 12 SCC 558) the Supreme Court held as under:

“15. Respondent 1 is a cooperative society. It has its own rules and bye-laws. The service rules framed by Respondent 1 stand approved by the Registrar. We have noticed hereinbefore that in the seniority list published in the year 1995, the position of the appellant was at Sl. No. 4. Those candidates whose names appeared at Sl. Nos. 2 and 3 were not impleaded as parties in the said proceeding. In their absence, the dispute could not have been effectively adjudicated upon.

16. This Court in *Rashmi Mishra v. M.P. Public Service Commission* observed: (SCC pp. 728-29, para 16)

“16. In *Prabodh Verma* this Court held: (SCC pp. 273-74, para 28)

“28. ... The first defect was that of non-joinder of necessary parties. The only respondents to the Sangh's petition were the State of Uttar Pradesh and its officers concerned. Those who were vitally concerned, namely, the reserve pool teachers, were not made parties—not even by joining some of them in a representative capacity, considering that their number was too large for all of them to be joined individually as respondents. The matter, therefore, came to be decided in their absence. A High Court ought not to decide a writ petition under Article 226 of the Constitution without the persons who would be vitally affected by its judgment being before it as respondents or at least by some of them being before it as respondents in a representative capacity if their number is too large, and, therefore, the Allahabad High Court ought not to have proceeded to hear and dispose of the Sangh's writ petition without insisting upon the reserve pool teachers being made respondents to that writ petition, or at least some of them being made respondents in a representative capacity, and had the petitioners refused to do so, ought to have

dismissed that petition for non-joinder of necessary parties.'

(See also All India SC & ST Employees' Assn. v. A. Arthur Jeen and Indu Shekhar Singh v. State of U.P.)."

None of the petitioners seniors who were test qualified were made parties to the lis. Petitioner also has a case that his seniors if any were not qualified. First of all such a contention has not been raised. Secondly the materials produced before this court clearly discloses the fact that there were 106 test qualified persons above the petitioner and therefore he could never be included in the 1984 select list. Therefore when a large contingent of the petitioners seniors were included in the select list for promotion only from 1993 onwards, the appellants were justified in not including the petitioner in the 1984 select list.

21. Under such circumstances, we are of the view that the judgment of the learned Single Judge is liable to be set aside.

Hence, the writ appeal is allowed setting aside the judgment of the learned Single Judge and dismissing the writ petition.

Sd/-

Ashok Bhushan, Ag. Chief Justice

Sd/-

A.M. Shaffique, Judge.

Tds/