

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

**THE HONOURABLE THE CHIEF JUSTICE MR.ASHOK BHUSHAN
&**

THE HONOURABLE MR.JUSTICE A.M.SHAFFIQUE

MONDAY, THE 28TH DAY OF SEPTEMBER 2015/6TH ASWINA, 1937

WA.No. 610 of 2015 () IN WP(C).20386/2014

**AGAINST THE ORDER/JUDGMENT IN WP(C) 20386/2014 of HIGH COURT OF KERALA
DATED 15-01-2015**

APPELLANT(S)/RESPONDENTS:

- 1. THE KERALA STATE ELECTRICITY BOARD
REPRESENTED BY ITS SECRETARY, VYDHUTHI BHAVANAM
PATTOM, THIRUVANANTHAPURAM 695 004**
- 2. THE CHIEF ENGINEER (HRA), KERALA STATE ELECTRICITY BOARD,
REPRESENTED BY ITS
SECRETARY, VYDHUTHI BHAVANAM, PATTOM
THIRUVANANTHAPURAM 695004**
- 3. ACCOUNTS OFFICER(PAY FIXATION)
OFFICE OF THE CHIEF INTERNAL AUDITOR
KERALA STATE ELECTRICITY BOARD, VYDHYTHI BHAVANAM
PATTOM, THIRUVANANTHAPURAM 695004**
- 4. DEPUTY CHIEF ENGINEER,
KERALAL STATE ELECTRICITY BOARD, TRANSMISSION CIRCLE
VYDHUTHI BHAVANAM, KANNUR DISTRICT, PIN-670 002**

**BY ADVS.SRI.RAJU JOSEPH (SR.)
SRI.K.T.PAULOSE, SC, KSEB**

RESPONDENT(S)/PETITIONERS:

**P SASIDHARAN
ASSISTANT ENGINEER(RETIRED)
KERALAL STATE ELECTRICITY BOARD
RESIDING AT KAKKOPRAVAN HOUSE, KOOLICHAL, PO MORAZHA
KANNUR DISTRICT, PIN-670 331**

BY SRI.P.M.PAREETH

**THIS WRIT APPEAL HAVING BEEN FINALLY HEARD ON 24-07-2015, THE
COURT ON 28-09-2015 DELIVERED THE FOLLOWING:**

ASHOK BHUSHAN, C.J.

“C.R.”

&

A.M. SHAFFIQUE, J.

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W.A. No. 610 of 2015

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Dated this, the 28th day of September, 2015

J U D G M E N T

Shaffique, J.

This appeal is filed by the respondents in WP(C) No.20386/2014 challenging judgment dated 15/1/2015 by which the learned Single Judge allowed the writ petition by setting aside Exts.P5 and P6.

2. The respondent herein, who is hereinafter referred to as the petitioner, filed the writ petition challenging Exts.P5 and P6 to the extent of altering his seniority in the post of Overseer and directing refixation of his salary and further directing recovery of excess pay allegedly drawn by the petitioner.

3. The short facts involved in the writ petition would disclose that the petitioner entered service in the Kerala State Electricity Board (hereinafter referred to as the Board) as Lineman on 15/12/1987. He was granted leave without allowance as per order dated 19/3/1988. He availed of leave from 22/3/1988. The

leave was subsequently extended for three years from 22/3/1991 and for another spell of three years w.e.f. 22/3/1994. He rejoined duty on 10/1/1997. His probation was declared on 10/7/1997. He was thereafter promoted as Overseer/Sub Engineer w.e.f. 14/9/1998 and thereafter as Assistant Engineer w.e.f. 13/6/2005. He retired in the said post on 30/11/2013. When his pension papers were being processed, the Accounts Officer raised certain objections which is evident from Ext.P2 dated 20/9/2013. One of the objection was with reference to petitioner's seniority as Overseer/Sub Engineer. On receipt of Ext.P2, petitioner submitted a representation to the Chief Engineer on 8/11/2013 stating that since he was promoted to the post of Sub Engineer after completion of probation, there is no reason to have any doubt regarding the promotion granted in his favour. Since nothing was done in the matter, petitioner approached this Court by filing WP (C) No.1798/2014, which was disposed of by judgment dated 4/2/2014 directing the appellant authorities to consider Ext.P2 dated 8/11/2013 and to pass appropriate orders. Ext.P5 is the order passed on 25/6/2014 by which Chief Engineer (HRM) has observed that the petitioner was not eligible for the seniority to

the post of Sub Engineer and Assistant Engineer and therefore the same is required to be reviewed. Ext.P6 is the proceedings dated 30/11/2013 by which the rank of the petitioner was reassigned in the gradation list of Overseer as on 1/1/2004 and direction was issued to make necessary entries regarding the same. It was observed that the petitioner had availed leave without allowance before completion of his probation period and as per the Rule prevalent during the relevant time, he had to be deemed as new entrant and had to start afresh his probation on duty. Therefore, his probation was declared on 10/7/1997 consequent to which his seniority in the cadre of Overseer reckoned w.e.f. 15/12/1987 requires to be reviewed and rank has to be assigned in the gradation list of Overseer as on 1/1/2004. Hence he was placed in the rank between Sri.Divakaran T. and Sri.Abdul Khader, who were Sl.Nos.2813 and 2814 respectively.

4. According to the petitioner, promotions effected several years ago cannot be disturbed as the petitioner is entitled to the benefit of sit back theory. Further, it is contended that Ext.P6 order has been issued in violation of the principles of natural justice as the petitioner was not heard in the matter. It is

stated that petitioner has worked for more than 17 years as Sub Engineer and Assistant Engineer and therefore after such a long lapse of time, the promotion granted to him cannot be disturbed.

5. Counter affidavit has been filed by the appellants *inter alia* contending that Kerala Service Rules (for short KSR) applies in respect of Board employees as well and as per Appendix XII A Part I KSR, by virtue of Proviso 5, petitioner who had availed leave without allowance was not entitled for any benefit during the said leave period and he ought to have started afresh and completed his probation. Further reference is made to Rule 37A of Part I KSR by which it is indicated that erroneous appointment/promotion has to be corrected when it is found out by the Board. It is stated that the mistake had come to the notice of the Board only when the pension papers of the petitioner were being scrutinized and immediately thereafter appropriate action had been taken to rectify the defect. Viewed in the light of the aforesaid facts, the appellants supported Exts.P5 and P6.

6. The learned Single Judge after taking into consideration the relevant aspects allowed the writ petition on the ground that the promotion granted to the petitioner cannot be

revoked after a considerably long period.

7. Heard learned senior counsel Sri.Raju Joseph appearing on behalf of the appellants and Sri.P.M.Pareeth appearing on behalf of the writ petitioner.

8. Sri.Raju Joseph, learned senior counsel placed reliance on Rule 37A of Part I KSR, along with Government decisions 1, 2 and 3, which read as under;

“37A. Notwithstanding the provisions contained in these rules, the pay of a Government servant whose promotion or appointment to a post is found to be or to have been erroneous, shall be regulated in accordance with any general or special orders issued by the Government in this behalf.

GOVERNMENT DECISION

The following provisions shall govern the pay and increments of a Government servant whose promotion or appointment in a substantive or officiating capacity to a post is later found to BE erroneous on the basis of facts:-

1. The orders of promotion or appointment of a Government servant should be cancelled as soon as it is brought to the notice of the appointing authority that such a promotion or appointment has resulted from a factual error and the Government servant concerned should, immediately on such cancellation, be brought to the position which he would have held but for the incorrect order of promotion or

appointment.

2. Service rendered by the Government servant concerned in the post he was wrongly promoted/appointed as a result of the error should not be reckoned for the purpose of increments or for any other purpose in that grade/post to which he would not normally be entitled but for the erroneous promotion/appointment.

3. Any consequential promotions/appointments of other Government servants made on the basis of the incorrect promotion/appointment of a particular Government servant will also be regarded as erroneous and such cases also will be regulated on the lines indicated in the preceding paragraph."

9. Further reference has been made to Appendix XIIA of Part I KSR. Clause 5 is relevant, which reads as under;

"5. In the case of non-permanent Officers in regular service who have not completed probation in the entry grade, leave without allowances may be granted subject to the condition that they will have to start afresh and complete their probation on return from the leave without allowances. In other words, the Officers will forfeit the service benefits that had accrued to them prior to their proceeding on leave and they will be deemed as now entrants to Government service on return from leave. What is protected is only their right to rejoin Government service in the same entry grade as if they were new entrants."

10. It is argued that, from the factual situation available in the case, it is evident that the petitioner was wrongly promoted to the post of Overseer. Therefore, there was nothing wrong in the department in cancelling the promotions granted to the petitioner when the matter had come to the notice of the Board. It is also argued that the principle of sit back theory will not apply to an erroneous decision without reference to the rules.

11. On the other hand Sri.P.M.Pareeth appearing on behalf of the writ petitioner submits that, even assuming for the sake of argument that there has been an erroneous decision by the Board or a mistake in promoting the petitioner to the relevant posts, petitioner had carried out the work properly for the last several years and it is not open for the Board to cancel the promotions already granted and to recover the excess pay from the petitioner and to refix the pay accordingly. He relied upon various judgments of the High Court and contended that his case is clearly covered by the “sit back theory” applied by the Courts in respect of promotions granted over a long period of time.

(i) Reference is made to the Full Bench judgment in ***Sreedharan Pillai v. State of Kerala and Others*** (1973 KLT

151) wherein Full Bench of this Court observed that it is neither just nor equitable to deprive persons who have been promoted many years ago of the rights that have accrued to them regarding their rank and seniority by purporting to conduct a review of the promotions after lapse of many years. That was a case in which a person was promoted based on an existing rule which was later on amended. Without taking note of the said amendment, promotion was effected. Subsequently, after several years, the promotions were interfered with. In the background of the aforesaid case, the Full Bench had occasion to observe that the promotions granted shall not be disturbed after a considerably long period.

(ii) Another judgment relied upon is ***Nayagarh Co-operative Central Bank Ltd. v. Narayan Rath and another*** (1977 (3) SCC 576). That was a case in which Supreme Court observed that when a person is permitted to function for over 13 years as Secretary of the Bank, it was not open for the Registrar to set aside the same on the ground that he was not qualified for the said post at the time of promotion.

(iii) Another judgment of the Supreme Court which is

referred is ***H.C.Puttaswamy and Others v. Hon'ble Chief Justice of Karnataka High Court*** (1991 Suppl. (2) SCC 421). In that case, the Supreme Court had occasion to observe on the human problems involved in a case. Para 12, 13 and 14 are relevant, which reads as under;

“12. Having reached the conclusion about the invalidity of the impugned appointments made by the Chief Justice, we cannot, however, refuse to recognise the consequence that involves on uprooting the appellants. Mr Gopal Subramaniam, counsel for the appellants while highlighting the human problems involved in the case pleaded for sympathetic approach and made an impassioned appeal for allowing the appellants to continue in their respective posts. He has also referred to us several decisions of this Court where equitable directions were issued in the interests of justice even though the selection and appointments of candidates were held to be illegal and unsupportable.

13. There is good sense in the plea put forward for the appellants. The human problem stands at the outset in these cases and it is that problem that motivated us in allowing the review petitions. It may be recalled that the appellants are in service for the past 10 years. They are either graduates or double graduates or post-graduates as against the minimum qualification of SSLC required for Second Division Clerks in which cadre they were originally recruited. Some of them seem to have earned higher qualification by hard work during their service.

Some of them in the normal course have been promoted to higher cadre. They are now overaged for entry into any other service. It seems that most of them cannot get the benefit of age relaxation under Rule 6 of the Karnataka Civil Services (General Recruitment) Rules, 1977. One could only imagine their untold miseries and of their family if they are left at the midstream. Indeed, it would be an act of cruelty at this stage to ask them to appear for written test and viva voce to be conducted by the Public Service Commission for fresh selection. (See Lila Dhar v. State of Rajasthan.)

14. *We may briefly touch some of the decisions referred to us by counsel for the appellants. A.K. Yadav v. State of Haryana was concerned with the selection made by the Haryana Public Service Commission for appointment to the cadre of the Haryana Civil Service by allocating 33.3 per cent for viva voce. The selection was challenged before this Court on the ground that the marks awarded for the interview was high as it would open door for arbitrariness. This Court upheld that contention and held that the marks for viva voce test should not exceed 12.2 per cent. However, the court did not set aside the appointments, instead, directed the Public Service Commission to give one more opportunity to the aggrieved candidates to appear at the competitive examinations. In State of U.P. v. Rafiquddin, the validity of selection made by the Public Service Commission of Uttar Pradesh to the cadre of Munsifs came for consideration. Here again the court refused to quash the appointment even though the selection was found to be contrary to the rules of recruitment. In*

Shainda Hasan (Miss) v. State of U.P. the legality of . appointment of a Principal of a minority college was in question. The Principal was overaged for appointment, but she was given age relaxation which was held to be arbitrary. Yet the court has declined to strike down her appointment. On the contrary, the Chancellor was directed to grant the necessary approval for her appointment with effect from the date she was holding the post of the Principal. Her continuous working as Principal in the college seems to be the only consideration that weighed with this Court for giving that relief."

(iv) Another judgment relied upon is **Rajalekshmi v. State of Kerala** (1992 (1) KLT 458) wherein this Court did not interfere with the promotion granted to the petitioner as she continued in the promoted post for more than 10 years. That was a case where after being promoted to the post of Upper Division Clerk, after 10 years, it was sought to be interfered on the ground that she did not pass the departmental test in M.O.P. The learned Single Judge observed that when the petitioner was allowed to continue in the cadre of UD Clerk for more than 10 years, it was not proper to revert her to the lower post.

(v) A similar view had been taken by another learned Single Judge in **Mohanan v. State of Kerala** (2000 (2) KLT 798).

In that case, it was observed that the power of the appointing authority to review the appointments already made, on finding of the mistake, has to be exercised within a reasonable time and it cannot be used for unsettling vested rights of others. That was a case in which the promotions granted to the petitioners were sought to be unsettled after several years. Para 14 to 16 are relevant, which reads as under;

"14. In this case the posts of Circle Inspectors of Police, Deputy Superintendents of Police and Superintendents of Police are selection posts. The Departmental Promotion Committee is to prepare the select list for promotion. The promotions of the petitioners to these posts were based on the selection by the D.P.C. They were regular promotions. Seniority in the above cadres is determined by the date of the order of promotion under R. 27 (a) of the KS & SSR. The 6th respondent therefore cannot claim any seniority over the petitioners in the above cadres. The earlier rank given to the 6th respondent over the petitioners in the cadre of Sub Inspector of Police cannot entitle the 6th respondent to get automatic promotion and seniority in preference to the petitioners who earned their regular promotion much earlier.

15. The only argument of the 6th respondent is that the Full Bench judgment referred to above has left open the question as to the power of the appointing authority to review the appointments already made if a mistake

was found out. But the above power can be exercised only within a reasonable time and it cannot have any adverse effect on the vested rights of others.

16. The principle of 'sit back theory' has been accepted by the Supreme Court long back. This Court also has followed the same in a number of decisions. The earliest decision of the Supreme Court in this respect is the one reported in Rabindra Nath Bose & Ors v. Union of India & Ors.(AIR 1970 SC 470). In that decision the Supreme Court held as follows:

"Each person ought to be entitled to sit back and consider that his appointment and promotion effected a long time ago would not be set aside after a lapse of a number of years."

The above decision was followed by this Court in 1973 KLT 151 (FB). This Court observed that no statutory appeals or revision petitions are shown to have been filed against the orders of promotion and it must be taken that those lists had become final. It is not in the interests of the maintenance of the morale, efficiency and contentment in the service to disrupt after such long lapse of time matters pertaining to vital service conditions like seniority and rank which have already become settled. Thus it is quite clear that it will be unjust to deprive persons who had been promoted many years ago of the rights that had accrued to them regarding rank and seniority by purporting to conduct a review of the promotion after the lapse of many years.

(vi) The principle of sit back theory is also considered by

the Full Bench of this Court in **Sajeeve N.J. v. Union of India and others** {2009 (4) KLT SN 67 (C.No.59) (FB)}. In the said case, the Full Bench had considered the said principle and held at para 22 as under;

"22. The theory of 'sit back' has been applied almost uniformly in the context of a contention of delay and laches on the part of any person, who makes an attempt to prosecute a claim, which, if accepted, would result in a situation where inter se positions which have been settled over the years will have to be revised. These contentions have often been raised in proceedings under Articles 226 or 32 of the Constitution and therefore, the Supreme Court had taken note of the fact that though there is no statutory period of limitation applicable to proceedings under Articles 226 and 32 of the Constitution, where settled positions of seniority are sought to be questioned after a considerable lapse of time, the court would be inclined to decline jurisdiction in such cases, on the ground of delay and laches. The court would be loathe to interfere with settled affairs in matters of seniority and promotion effected in any cadre or service after a lapse of time. As observed by the Supreme Court in Rabindra Nath v. Union of India {AIR 1970 SC 470}, though the courts would not be anxious to throw out petitions on the ground of delay on the part of the petitioner in approaching the court, justice will have

to be administered in accordance with law and principles of equity, justice and good conscience, As the court observed in the said case, it would be unjust to deprive the respondents (in the said case) the rights which have accrued to them; "each person ought to be entitled to 'sit back and consider that his appointment and promotion effected a long time ago would not be set aside after the lapse of a number of years."

12. As far as the factual situation involved in the case is concerned, it is clear that the petitioner had not completed his probation before going on leave without allowance. Going by the statutory provision, there is a forfeiture by the petitioner for future promotions once he goes for alternate employment by taking leave without allowance. In other words, he having not completed probation, has to start afresh in the cadre. Under such circumstances, the Board was justified in contending that the petitioner should not have been given promotion on the dates on which he was actually promoted as the petitioner had not completed probation and he should not have been reckoned for promotion during the relevant time.

13. The only ground on which the petitioner could salvage the above situation is the delay and laches on the part of the

Board and the principle of 'sit back theory' that has been applicable to the case.

14. Therefore, the only question to be considered is whether after a long lapse of time between the date of promotion and the date of retirement when the Board sought to rectify the aforesaid mistake, the petitioner had obtained a vested right to continue in the promoted post applying the principle of sit back theory.

15. On facts, this is a case in which the petitioner did not complete his probation and he was on leave without allowance for about 9 years. Immediately after he joined duty, his probation was declared and he was promoted to the post of Sub Engineer. Further promotions also continued on that basis taking into account his date of joining without taking into consideration the 9 years' leave without allowance before completing probation. Whether the judgments relied upon by the learned counsel for the respondents relate to such factual issues is the only point to be considered. Otherwise, the appellant is justified in invoking the statutory provisions for unsettling the promotions already granted.

16. Having gone through the Full Bench judgment in **Sajeeve's case** (supra), we are of the view that the issue is substantially covered and does not require a further deliberation. In the aforesaid judgment, the Full Bench considered the "sit back theory" and its application to various factual circumstances after referring to the Constitution Bench judgment in **Rabindra Nath v. Union of India** (AIR 1970 SC 470) and other judgments wherein the Supreme Court considered the question whether the Court can interfere in a settled seniority position applying the principles of delay and laches and after referring to **K.R.Mudgal v. R.P.Singh** (AIR 1986 SC 2086), the Full Bench observed in paragraph 31 as under;

"31. We are of the view that, just as in a case where a belated challenge to a settled position of seniority or consequential orders of promotion will not be entertained by a writ court under Article 226 of the Constitution, on the principles laid down in Rabindra Nath v. Union of India {AIR 1970 SC 470} and Mudgal {AIR 1986 SC 2086}, the court should also be wary in countenancing a contention which, if accepted, would result in overturning seniority positions of long standing. Essentially, the doctrine of sit back would apply both in cases where challenge against settled positions are mounted

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belatedly and in cases where the challenge to administrative actions overturning settled seniority positions are sought to be defended".

17. When it is held that the doctrine of sit back would apply both in cases where settled seniority positions are under challenge belatedly and also applies to administrative actions overturning settled seniority positions which are sought to be defended, we are of the view that the same principles apply to the factual situation in the present case and therefore, the learned Single Judge was justified in allowing the writ petition.

18. We do not think that the grounds urged by the appellants warrant interference by this Court by exercising the appellate jurisdiction in view of the above settled position.

Sd/-
ASHOK BHUSHAN, CHIEF JUSTICE

Sd/-
A.M. SHAFFIQUE, JUDGE

Rp

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PS to Judge