

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE A.K.JAYASANKARAN NAMBIAR

FRIDAY, THE 31ST DAY OF JULY 2015/9TH SRAVANA, 1937

WP(C).No. 1706 of 2013 (K)

PETITIONER(S):

**GOPINADHAN NAIR P.S.
ASSISTANT EXECUTIVE ENGINEER
KERALA STATE ELECTRICITY BOARD, T.M.R.DIVISION, PALLOM
KOTTAYAM DISTRICT.**

**BY ADVS.DR.K.P.SATHEESAN (SR.)
SRI.M.R.JAYAPRASAD
SRI.P.MOHANDAS (ERNAKULAM)
SRI.ANOOP.V.NAIR
SRI.T.S.ROY
SRI.K.RAGHU VARMA
SRI.JINS N.SOMARAJ
SRI.M.RIYAZ
SRI.R.R.SAJEESH
SRI.MATHEW THOMAS**

RESPONDENT(S):

- 1. KERALA STATE ELECTRICITY BOARD
REPRESENTED BY ITS SECRETARY, VYDYUTHI BHAVAN, PATTOM
THIRUVANANTHAPURAM-695004.**
- 2. THE CHIEF ENGINEER (H.R.M.)
KERALA STATE ELECTRICITY BOARD, VYDYUTHI BHAVAN
PATTOM, THIRUVANANTHAPURAM-695004.**

R1-2 BY SRI.K.S.ANIL, SC, KSEB

**THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD ON
31-07-2015, THE COURT ON THE SAME DAY DELIVERED THE
FOLLOWING:**

APPENDIX

PETITIONER'S EXHIBITS:

EXT.P1: COPY OF THE APPOINTMENT ORDER ISSUED BY THE 2ND RESPONDENT DATED 12.8.1991.

EXT.P2: COPY OF THE ORDER ISSUED BY THE 2ND RESPONDENT DATED 25.7.1992.

EXT.P3: COPY OF THE REQUEST MADE BY THE PETITIONER TO THE EXECUTIVE ENGINEER (T.D), K.S.E.B., KALAMASSERY DATED 3.1.2001.

EXT.P4: COPY OF THE PROPOSAL FOR DECLARING THE PROBATION OF THE PETITIONER MADE BY THE ASSISTANT ENGINEER DATED 8.1.2001.

EXT.P5: COPY OF THE POSTING ORDER GIVEN TO THE PETITIONER BY THE DEPUTY CHIEF ENGINEER WHO WAS IN CHARGE OF THE 2ND RESPONDENT DATED 23.7.2002.

EXT.P6: COPY OF THE LETTER ISSUED BY THE 2ND RESPONDENT ADDRESSED TO THE EXECUTIVE ENGINEER, ELECTRICAL DIVISION, VADAKARA DATED 2.5.2003.

EXT.P7: COPY OF THE ORDER RELIEVING THE PETITIONER WITH EFFECT FROM 21.6.2003.

EXT.P8: COPY OF THE CERTIFICATE OF TRANSFER OF CHARGE PRODUCED BY THE PETITIONER BEFORE THE DEPUTY CHIEF ENGINEER, BDPP, BRAHMAPURAM DATED 20.1.2011.

EXT.P9: COPY OF THE NOTICE GIVEN BY THE 2ND RESPONDENT AS D.O.NO.EB1 (A)A.E(E)/D. ACTION/2012/115 DATED 10.10.2012.

EXT.P10: COPY OF THE EXPLANATION SUBMITTED BY THE PETITIONER DATED 22.10.2012 ALONG WITH A COVERING LETTER DATED 31.10.2012.

EXT.P11: COPY OF THE ORDER NO.EB1(A)/AE(E)/EP/213/2012 DATED 5.1.2013 ISSUED BY THE 2ND RESPONDENT.

RESPONDENTS EXHIBITS:

EXT.R2(A): COPY OF THE RELEVANT PAGES OF SERVICE BOOK.

EXT.R2(B): COPY OF THE ORDER DATED 16.8.1973.

EXT.R2(C): COPY OF THE TRANSFER ORDER DATED 11.1.2013.

EXT.R2(D): COPY OF THE CERTIFICATE OF TRANSFER OF CHARGE.

//TRUE COPY//

P.S. TO JUDGE

A.K.JAYASANKARAN NAMBIAR, J.

W.P.(C).NO.1706 OF 2013 (K)

Dated this the 31st day of July, 2015

J U D G M E N T

The petitioner is presently working as Assistant Executive Engineer under the respondent Board. He entered the service of the respondent Board as Sub Engineer with effect from 14.8.1991 having been recruited through the Kerala Public Service Commission [PSC]. As per the conditions of appointment, he was to be on probation for six months and extended by a further period of six months. As per the Rules prevailing in the respondent Board, the declaration of probation had to be by an express order of the respondent Board. It is the case of the petitioner that he had completed the specified period of six months probation within a continuous period of one year on 13.2.1992, and he was under the bona fide belief that, in the absence of any written confirmation with regard to declaration of probation, he had successfully completed the probation period. On 28.7.1992, the petitioner applied for leave without allowance for a period of 10 years. The said leave was sanctioned by the respondent Board by Ext.P2 order dated 25.7.1992. In Ext.P2 order, it is clearly mentioned that,

inasmuch as the petitioner had not completed the probation in the entry grade, he would have to start afresh his probation, on return from leave without allowance. It was also clarified that the petitioner would forfeit the service benefits that had accrued to him prior to his proceeding on leave and would be deemed as a new entrant to the Board's service on return from leave. The petitioner, thereafter, proceeded on leave and rejoined duty only with effect from 29.7.2002. By Ext.P7 proceedings dated 21.6.2003, the petitioner was promoted as an Assistant Engineer under the respondent Board. Still later, with effect from 20.1.2011, he was promoted as Assistant Executive Engineer under the respondent Board, which is evidenced by Ext.P8 communication. While he was continuing as an Assistant Executive Engineer, he was served with Ext.P9 notice dated 10.10.2012 proposing to cancel his promotions as Assistant Engineer and Assistant Executive Engineer, respectively, and to confer him seniority in the post of Sub Engineer only with effect from 29.7.2002, as was envisaged in Ext.P2 letter that sanctioned leave without allowance that was applied for by the petitioner. Faced with Ext.P9 notice, the petitioner approached the respondent Board with Ext.P10 reply, wherein, it was categorically stated that, inasmuch as a long

period of almost 10 years had elapsed since the petitioner returned from leave, and further, the petitioner had, during the aforesaid period of 10 years, been promoted as an Assistant Engineer and thereafter as an Assistant Executive Engineer, under the respondent Board, the action now proposed against him was wholly inequitable, if not, illegal. By Ext.P11 order dated 5.1.2013, the respondent Board rejected the explanation of the petitioner, and directed that he would be treated as a new entrant in the cadre of Sub Engineer with effect from 27.9.2002 and he could not claim seniority from the initial advice date of the PSC. It was found that the inclusion of the petitioner for promotion with effect from 23.6.2003, taking his seniority from the date of initial advice, by the PSC, was not in order. Thus, by Ext.P11 order, the consequential benefits flowing to the petitioner, in the cadre of Sub Engineer (Electrical), with effect from the date of initial advice, were taken away. In the writ petition, the petitioner impugns Ext.P11 order inter alia on the ground that the deprivation of the benefits enjoyed by the petitioner in the services under the respondent Board, at this belated stage, would be in violation of the principles of 'sit back' as contemplated in the decision of the Hon'ble Supreme Court in **Rabindra Nath Bose and Others v. Union of**

India and Others - [AIR 1970 SC 470] and the Full Bench decision of this Court in **Sajeeve N. J. v. Union of India and Others - [2009 (4) KHC 627 (FB)]**. It is also his contention, by placing reliance on the judgment of the Supreme Court in **State of Punjab v. Rafiq Masih (White Washer) and Others - [(2015) 4 SCC 334]**, that a deprivation of the service benefits that he had enjoyed all these years, at this belated stage, would amount to an iniquitous and arbitrary action against him, in a situation where the employer would not be prejudiced by the extension of such benefits to the petitioner.

2. A counter affidavit has been filed on behalf of the respondent Board. Therein, the sequent of events which led to the sanctioning of leave to the petitioner as also the subsequent promotions of the petitioner as Assistant Engineer and Assistant Executive Engineer, are narrated in detail. It is the specific stand of the respondent Board, placing reliance of Rule 37A of Part I of the Kerala Service Rules, that the erroneous promotion granted to the petitioner by treating his seniority in the cadre of Sub Engineer as commencing from the date of initial advice to the post of Sub Engineer, had to be corrected by reverting the petitioner to the post

of Sub Engineer. Reliance is placed on the Government decision dated 30.11.1963, which would indicate that administrative mistakes committed by the Government could be corrected at any point of time.

3. I have heard the learned counsel for the petitioner as also the learned Standing counsel for the respondents.

4. On a consideration of the facts and circumstances of the case as also the submissions made across the bar, I find that although the petitioner would contend that he had completed his probation in the post of Sub Engineer as early as on 13.2.1992, on expiry of the period of six months, and in the absence of any extension to the probation period by the respondent Board, in the absence of any specific order confirming the successful completion of the probation by the petitioner, it was not open to the petitioner to treat the period of probation as complete. That apart, in Ext.P2 order that sanctioned leave without allowance for a period of 10 years to the petitioner, it was clearly indicated that the petitioner was proceeding on leave at a time when his probation had not been declared. The said order sanctioning leave also clearly indicated that, on rejoining the post

after the leave period, the petitioner would be treated as a new entrant in the cadre of Sub Engineer. It is therefore clear that the respondents would have been justified in treating the petitioner as a new entrant in the cadre of Sub Engineer as and when the petitioner rejoined duty on 27.9.2002. The issue in the writ petition, however, is not with regard to the entitlement of the petitioner to count his seniority in the cadre of the Sub Engineer with effect from the date of initial advice by the PSC. The facts in the writ petition, which are not disputed in the counter affidavit of the respondents, would indicate that the petitioner was subsequently considered for promotion and was actually promoted to the post of Assistant Engineer, and thereafter to the post of Assistant Executive Engineer by the respondent Board. These events occurred in the years 2003 and 2011 respectively. Thus, on two occasions, the respondents had an opportunity to look into the service record of the petitioner and ascertain whether the promotional benefits given to the petitioner were in order, and after taking into account his seniority in the cadre of Sub Engineer. It is not in dispute that, on both those occasions, there was no objection against the promotion of the petitioner. For the first time, the petitioner was served with a notice dated

10.10.2012, seeking his explanation for the proposal to revert him to the post of Sub Engineer on the ground that his seniority in the post of Sub Engineer had been erroneously determined with effect from the date of his initial advice to the post of Sub Engineer. In my view, the petitioner is justified in placing reliance on the decision of the Supreme Court in **Rabindra Nath Bose and Others v. Union of India and Others - [AIR 1970 SC 470]** as also the decision of the Full Bench of this Court in **Sajeev N. J. v. Union of India and Others - [2009 (4) KHC 627 (FB)]**, both of which deal with the principle of 'sit back'. It would be apposite to refer, at this stage, to the observations of the Full bench of this Court in the judgment referred to above. At paragraph 22, the principle of 'sit back' has been explained in the following words:

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 this 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 persons 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."

5. I also take note of the decision of the Supreme Court in **State of Punjab v. Rafiq Masih (White Washer) and Others - [(2015) 4 SCC 334]**. That was a case that concerned the recovery of amounts, that were allegedly paid in excess to an employee without their being any fault on the part of the employee. After considering the plethora of case laws on the subject, the following observations were made by the Supreme Court in the said judgment.

7. Having examined a number of judgments rendered by this Court, we are of the view, that orders

passed by the employer seeking recovery of monetary benefits wrongly extended to the employees, can only be interfered with, in cases where such recovery would result in a hardship of a nature, which would far outweigh, the equitable balance of the employer's right to recovery. In other words, interference would be called for, only in such cases where, it would be iniquitous to recover the payment made. In order to ascertain the parameters of the above consideration, and the test to be applied, reference needs to be made to situations when this Court exempted employees from such recovery, even in exercise of its jurisdiction under Article 142 of the Constitution of India. Repeated exercise of such power, "for doing complete justice in any cause" would establish that the recovery being effected was iniquitous, and therefore, arbitrary. And accordingly, the interference at the hands of this Court.

8. As between two parties, if a determination is rendered in favour of the party, which is the weaker of the two, without any serious detriment to the other (which is truly a welfare State), the issue resolved would be in consonance with the concept of justice, which is assured to the citizens of India, even in the Preamble of the Constitution of India. The right to recover being pursued by the employer, will have to be compared, with the effect of the recovery on the employee concerned. If the effect of the recovery from the employee concerned would be, more unfair, more wrongful, more improper, and more unwarranted, than the corresponding right of the employer to recover the amount, then it would be iniquitous and arbitrary, to effect the recovery. In such a situation, the employee's right would outbalance, and therefore eclipse, the right of the employer to recover.

9. The doctrine of equality is a dynamic and evolving concept having many dimensions. The embodiment of the

doctrine of equality can be found in Articles 14 to 18 contained in Part III of the Constitution of India, dealing with “fundamental rights”. These articles of the Constitution, besides assuring equality before the law and equal protection of the laws, also disallow discrimination with the object of achieving equality, in matters of employment; abolish untouchability, to upgrade the social status of an ostracised section of the society; and extinguish titles, to scale down the status of a section of the society, with such appellations. The embodiment of the doctrine of equality, can also be found in Articles 38, 39, 39-A, 43 and 46 contained in Part IV of the Constitution of India, dealing with the “directive principles of State policy”. These articles of the Constitution of India contain a mandate to the State requiring it to assure a social order providing justice – social, economic and political, by inter alia minimising monetary inequalities, and by securing the right to adequate means of livelihood, and by providing for adequate wages so as to ensure, an appropriate standard of life, and by promoting economic interests of the weaker sections.

10. In view of the aforestated constitutional mandate, equity and good conscience in the matter of livelihood of the people of this country has to be the basis of all governmental actions. An action of the State, ordering a recovery from an employee, would be in order, so long as it is not rendered iniquitous to the extent that the action of recovery would be more unfair, more wrongful, more improper, and more unwarranted, than the corresponding right of the employer, to recover the amount. Or in the other words, till such time as the recovery would have a harsh and arbitrary effect on the employee, it would be permissible in law. Orders passed in given situations repeatedly, even in exercise of the power vested in this Court under Article 142 of the Constitution of India, will

disclose the parameters of the realm of an action of recovery (of an excess amount paid to an employee) which would breach the obligations of the State, to citizens of this country, and render the action arbitrary, and therefore, violative of the mandate contained in Article 14 of the Constitution of India.”

6. Taking cue from the said judgments, I am of the view that, in the instant case, notwithstanding the fact that the promotion effected to the petitioner to the posts of Assistant Engineer and Assistant Executive Engineer may not have been in accordance with the Rules prevailing under the respondent Board, the belated action of the respondent Board cannot be justified so as to deprive the petitioner of any benefit that he would have obtained consequent to the said promotions. Accordingly, I quash Ext.P11 order of the 2nd respondent, and allow the writ petition, by clarifying that the pensionary benefits due to the petitioner, who has since retired from service, shall be computed by taking his service under the respondent Board as commencing from 12.8.1991, the date of initial advice to the post of Sub Engineer by the PSC and terminating with the date of his retirement from the respondent Board as Assistant Executive Engineer, on 31.5.2013, but by excluding the period from 28.7.1992

to 29.7.2002 when he had availed leave without allowance. The pensionary benefits due to him shall be computed by treating him as having retired from the post of Assistant Executive Engineer with all monetary benefits flowing from the said position. The retirement benefits due to the petitioner, as computed above, shall be disbursed to the petitioner, within a period of three months from the date of receipt of a copy of this judgment.

The writ petition is allowed as above.

A.K.JAYASANKARAN NAMBIAR
JUDGE

prp