

IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT:

THE HONOURABLE MR. JUSTICE A.V.RAMAKRISHNA PILLAI

TUESDAY, THE 26TH DAY OF MAY 2015/5TH JYAISHTA, 1937

WP(C).No. 21339 of 2013 (N)

PETITIONER:

**M.S.SAJEEV, AGED 42 YEARS, S/O.SURENDRAN,
EXCISE DUTY INSPECTOR, RUBBER BOARD SUB OFFICE,
BANGALORE, RESIDING AT MAPPLILASSERIL,
MARARKULAM NORTH P.O., ALAPPUZHA.**

**BY ADVS.SRI.K.RAMAKUMAR (SR.)
SRI.S.M.PRASANTH
SMT.ASHA BABU
SMT.G.ASHWINI
SRI.M.MANOJKUMAR (CHELAKKADAN)
SMT.AMMU CHARLES**

RESPONDENT(S)/RESPONDENTS:

- 1. UNION OF INDIA,
REPRESENTED BY THE SECRETARY TO GOVERNMENT,
MINISTRY OF COMMERCE & INDUSTRY,
DEPARTMENT OF COMMERCE, GOVERNMENT OF INDIA,
UDYOG BHAVAN, NEW DELHI-110107.**
- 2. THE RUBBER BOARD,
P B. NO 1122, SUB JAIL ROAD, KOTTAYAM,
PIN-686002, REP BY ITS SECRETARY.**
- 3. SHRI. K B GOPAKUMAR,
EXCISE DUTY INSPECTOR , RUBBER BOARD SUB OFFICE, NO 69,
CHOWRANGHEE ROAD, KOLKATTA-700 020.**

R1 BY ADV. SRI.N.NAGARESH, ASSISTANT SOLICITOR GENERAL

R2 BY ADVS. SRI.ABRAHAM VARGHESE THARAKAN

SRI.V.ABRAHAM MARKOS

SRI.BINU MATHEW

SRI.TOM THOMAS (KAKKUZHIYIL)

SRI.ABRAHAM JOSEPH MARKOS

R3 BY ADV. SRI.S.P.PARAVINDAKSHAN PILLAY

**THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD ON 25-03-2015,
THE COURT ON 26-05-2015, DELIVERED THE FOLLOWING:**

APPENDIX

PETITIONER(S)' EXHIBITS

- P1:- TRUE COPY OF ORDER NO 23/90/EST DTD 30/4/1990 ISSUED BY R2
- P2:- TRUE COPY OF CIRCULAR DTD 27/8/2003 ISSUED BY R2
- P3:- TRUE COPY OF OFFICE MEMORANDUM DTD 6/2/2004 OF THE 2ND RESPONDENT
- P4:- TRUE COPY OF THE OFFICE MEMORANDUM DTD 21/4/2004 OF THE 2ND RESPONDENT
- P5:- TRUE COPY OF THE PROCEEDINGS OF THE 2ND RESPONDENT OBTAINED BY THE PETITIONER UNDER THE RIGHT TO INFORMATION ACT
- P6:- TRUE COPY OF OFFICE MEMORANDUM DTD 14/11/2005
- P7:- TRUE COPY OF THE OFFICE MEMORANDUM 1-4-2008
- P8:- TRUE COPY OF OFFICE, MEMORANDUM DTD 27/2/2008
- P9:- TRUE COPY OF THE REPRESENTATION DTD 6/6/2008 SUBMITTED BY THE PETITIONER BEFORE THE CHAIRMAN
- P10:- TRUE COPY OF THE MEMO DTD 1/7/2009
- P11:- TRUE COPY OF THE REPRESENTATION DTD 4/2/2011 SUBMITTED BY THE PETITIONER BEFORE THE CHAIRMAN
- P12:- TRUE COPY OF THE REPRESENTATION DTD 7/8/2011 SUBMITTED BY THE 3RD RESPONDENT BEFORE THE CHAIRMAN
- P13:- TRUE COPY OF THE OFFICE MEMORANDUM DTD 15/12/2011
- P14:- TRUE COPY OF THE OFFICE MEMORANDUM DTD 1/6/2012
- P15:- TRUE COPY OF THE APPEAL DTD 6/1/2012 SUBMITTED BY THE 3RD RESPONDENT BEFORE R1
- P16:- TRUE COPY OF THE COMMUNICATION DTD 31/5/2012 SUBMITTED BY R2 BEFORE R1
- P17:- TRUE COPY OF THE ORDER DTD 2/4/2013 PASSED BY R1
- P18:- TRUE COPY OF THE NOTING OF R1
- P19:- TRUE COPY OF OFFICE, MEMORANDUM DTD 13/5/2013
- P20:- TRUE COPY MARK LIST OF THE CANDIDATES TO THE POST OF EXCISE DUTY INSPECTOR ISSUED BY THE RUBBER BOARD.

WP(C).No. 21339 of 2013 (N)

RESPONDENT(S)' EXHIBITS

R2(A): TRUE COPY OF THE RECRUITMENT RULES TO THE POST OF EXCISE DUTY INSPECTOR

R2(B): TRUE COPY OF THE PROCEEDINGS DATED 29/1/04 FOR SELECTION TO THE POST OF EDI BY THE SELECTION COMMITTEE

R2(C): TRUE COPY OF THE REPRESENTATION DATED 8/5/07 SUBMITTED BY MR.C.R.PRABHAKARAN

R2(D): TRUE COPY OF OM.NO.323/1(1)/2012/EST DATED 9/11/12

R3(A): TRUE COPY OF THE NOTE NO.3/26/2007/EST DATED 22/11/2007 OF THE DEPUTY SECRETARY (P&A) OF THE RUBBER BOARD.

/ TRUE COPY /

P.S. TO JUDGE

PJ

A.V.RAMAKRISHNA PILLAI, J.

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W.P(C) No.21339 of 2013

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Dated this the 26th day of May, 2015

JUDGMENT

Ext.P17 order dated 2.4.2013 by which, the Ministry of Commerce and Industry, Government of India, has re-fixed the seniority of Excise Duty Inspectors under the respondent board and consequential order dated 13.5.2013 (Ext.P19) issued by the respondent board by which the petitioner's seniority was re-fixed are under challenge in this writ petition.

2. The petitioner is presently working as Excise Duty Inspector in the Rubber Board, Bangalore. He alleges that the respondent board has framed recruitment rules for the post of Excise Duty Inspectors and in terms of the same, the post of Excise Duty Inspectors has to be filled up by selection, by promotion from all existing employees with minimum two years of service under the respondent board. According to the petitioner, at the time of framing rules, he had worked as Junior Assistant for more than six years and was fully eligible to get selection for the post of Excise Duty Inspector. He further alleges that the rubber board invited

applications from the eligible employees by office circular in the year 2003 and a written test was conducted during November, 2003, which was followed by an interview held on 29.1.2004. The petitioner further alleges that after that he was appointed with effect from 6.2.2004. After training, he was permitted to assume duty with effect from 21.4.2004.

3. The petitioner points out that as per Ext.P1, the ranked list prepared after the examination would be valid only for a period of one year. After the expiry of the ranked list, a fresh examination has to be conducted for filling up the vacancy arising subsequently. According to the petitioner, the ranked list prepared by the selection committee on 29.1.2004 expired on 28.1.2005. The petitioner alleges that on 14.11.2005, i.e., after the expiry of the list, an O.M was issued appointing third respondent temporarily to the post of Excise Duty Inspector. Though the third respondent had made a request to rectify the anomaly by stepping up his pay in 2007, it was rejected by the rubber board by a communication stating that the post of Excise Duty Inspector held by the third respondent was ex-cadre post. Thereafter, a draft gradation list of all commercial staff was published in February, 2008, as on

31.12.2006 by which the petitioner has been ranked junior to the third respondent.

4. As the date of appointment of the petitioner was on 21.4.2004 and that of the third respondent was on 19.12.2005, the petitioner submitted a representation against his rank. The same was rejected on the ground that the petitioner is junior to the third respondent in the ranked list. Therefore, the petitioner submitted another representation to the chairman. The third respondent also submitted a representation regarding the alleged irregularity in the seniority on the basis of which, the rubber board has passed an order on 15.12.2011 holding that the petitioner is senior to the third respondent.

5. The third respondent filed appeal against the grant of seniority to the petitioner, to the Secretary, Government of India. The petitioner further alleges that even without furnishing a copy of the petition submitted by the third respondent or granting an opportunity to him, his well settled seniority has been upset. Thereafter on 2.4.2013 Ext.P17 ranked list was published by re-fixing the seniority, holding the view that the seniority is dependent on the merit list and not on the date of joining. The petitioner was

intimated the order only in May, 2013. Therefore, the petitioner is challenging the order re-fixing his seniority.

6. The second respondent filed a counter affidavit wherein it was stated that as per the recruitment rules, the post of Excise Duty Inspector is a promotion post and not a direct recruitment post. As per the reservation rules, there is no reservation in the posts meant to be filled up by promotion. Where promotions are made on the basis of selection by a DPC, the seniority of such promotees shall be in the order in which they are recommended for such promotion by the committee. Therefore, the anomaly in the fixation of seniority of Excise Duty Inspector was rectified vide Ext.P19 dated 13.5.2013, by placing the third respondent who was the 3rd rank holder originally, above the petitioner, who was the 4th rank holder, in accordance with the directions contained in Ext.P17 order.

7. The definite stand taken by them was that the petitioner has not claimed seniority above the third respondent as his rank in Ext.R2(b) select list was lower than the third respondent. The respondent board has inadvertently considered the post of Excise Duty Inspector as direct recruitment post and the petitioner was

given appointment to the said post and re-fixed his seniority accordingly. The anomaly occurred in the seniority was later rectified by Ext.P19 O.M, in accordance with the directions contained in Ext.P17. Therefore, the second respondent justified their stand.

8. In the counter affidavit filed by the third respondent also, he has taken identical contentions.

9. Arguments have been heard.

10. The stand taken by the petitioner is that the third respondent was appointed only on 14.11.2005 i.e. after one year and nine months from the date of appointment of the petitioner who was appointed as Excise Duty Inspector on 6.2.2004. The petitioner further points out that though as per the recruitment rules, the ranked list prepared after the examination would be valid only for a period of one year, the respondent board instead of going for fresh recruitment extended the validity of the ranked list for unduly favouring to accommodate the third respondent.

11. The grievance of the petitioner is that the original seniority list was re-fixed vide draft gradation list circulated on 27.2.2008 without hearing the petitioner. This, according to the

petitioner, was after four years from the date of his appointment.

12. The learned counsel for the third respondent, *per contra*, would submit that the third respondent entered service of the respondent board as Junior Assistant on 9.8.2004 and being fully qualified to be appointed as Excise Duty Inspector, he submitted application pursuant to Ext.P1. The select list was prepared after the written test and interview. However, the list was not published and he was unaware of his rank in the list. By Ext.P3, the petitioner and one C.R.Prabhakaran were appointed as Excise Duty Inspectors. The learned counsel for the third respondent would contend that since the third respondent had no reason to suspect the *bonafides* of the rubber board, the third respondent was under the impression that petitioner and C.R.Prabhakaran were appointed in preference to him because they had secured higher ranks.

13. However, subsequently it came out that the petitioner was appointed by Ext.P1, that too, against the first vacancy by giving him the benefit of communal reservation, as he belonged to other backward community. In fact, he was not legally entitled to communal reservation as the appointment was not by direct recruitment. Only later it was understood that the third respondent

was assigned rank no.3 and the petitioner was assigned only rank no.4. This is evident from Exts.P16.

14. In the meanwhile, the third respondent was appointed by Ext.P6 as Excise Duty Inspector against the then existing vacancy. The said appointment could be made by virtue of the extension of the select list. Had the appointment been correctly made based on the original rank, the third respondent would have got appointment before the expiry of the selection list and in preference to the petitioner. Later, the aforesaid Prabhakaran made a representation on 13.10.2004 that though he had been the first rank holder, the name of the petitioner was placed above him and he requested to make necessary corrections in the records. However, it was not acted upon.

15. Mr.C.R.Prabhakaran submitted another representation on 8.5.2007. Based on the same, *inter se* seniority of C.R.Prabhakaran and the petitioner was reviewed. By order dated 19.7.2007, the then Chairman agreed to the proposal for re-fixing the seniority in the category of Excise Duty Inspector based on the selection list. Accordingly, the third respondent also got the benefit of such fixation. In Ext.P8, the draft gradation list, the third respondent

was assigned the due rank. It is crucial to note that even though by Ext.P9 representation dated 6.6.2008 the petitioner challenged the assignment of seniority to the third respondent above the petitioner, he did not challenge the assignment of seniority to C.R.Prabhakaran above him. In the same manner in which C.R.Prabhakaran was assigned seniority above the petitioner, the third respondent was also entitled to be assigned seniority and that was correctly assigned.

16. As rightly pointed out by the learned counsel for the third respondent, Ext.P9 dated 6.6.2008 submitted by the petitioner was rejected by Ext.P10 order dated 1.7.2009. However, the petitioner submitted Ext.P11 representation challenging the same only on 4.2.2011 which amounts to acquiescence on his part in assigning higher rank to the third respondent. Knowing that the petitioner has submitted a representation challenging the seniority assigned to the third respondent, he also submitted Ext.P12 representation on 7.8.2012 requesting that before taking any decision on the representation of the petitioner, he be afforded an opportunity of being heard. The third respondent contends that Ext.P13 order assigning the petitioner above the third respondent was issued

without affording him an opportunity of being heard. The petitioner was placed above the third respondent on the ground that he had joined duty as Excise Duty Inspector earlier in point of time.

17. It is relevant to note that the third respondent could not join duty as Excise Duty Inspector because, the petitioner was erroneously given appointment by giving him the benefit of communal reservation which he was not entitled to. Had the appointment been correctly made based on the ranked list in the selection list, the third respondent could have been given appointment by Ext.P3 enabling him to join duty in a prior point of time. Since the mistake committed by the respondent board was realised, the same was rectified and the third respondent was assigned his correct rank. Aggrieved by Ext.P13, the third respondent submitted Ext.P15 representation to the Secretary, Government of India, Ministry of Commerce, and after considering his representation, it was found that his claim was valid and legal. Accordingly, Ext.P17 was issued to the respondent board to rectify the anomaly in the selection to the post of Excise Duty Inspector. It is for the implementation of the same, Exts.P18 and P19 were issued. This Court cannot find any illegality in Exts.P17 and P19

orders issued.

18. Though it was strenuously argued that the petitioner was not afforded an opportunity of being heard when Ext.P17 order was passed, it would not have made any difference because of the indisputable position that the petitioner is not entitled to the benefit of 'the doctrine of sit back', in the facts and circumstances of the present case.

19. On a consideration of the entire materials placed on record, this Court of the definite view that the petitioner is not entitled to the reliefs prayed for.

Therefore, the writ petition fails and accordingly, it is dismissed.

Sd/-

A.V.RAMAKRISHNA PILLAI
JUDGE

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