

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 25.02.2015

CORAM:

THE HONOURABLE MR.JUSTICE V.DHANAPALAN
AND
THE HONOURABLE MR.JUSTICE G.CHOCKALINGAM

W.A.No.917 of 2011

1. R.K.Ravindran
2. K.Anbu
3. V.Rajakumar
- 4.S.Alagesan

... Appellants/Petitioner

Vs.

1. The Government of Tamil Nadu,
Rep. by the Secretary,
Public Works Department,
Fort St.George, Chennai-9.
2. The Chief Engineer (G1),
Public Works Department,
PWD Campus, Chepauk,
Chennai-5.
3. V.Sathuragiri,
Assistant Executive Engineer (PWD),
O/o Executive Engineer,
Building Centre Division,
PWD Campus,
Chepauk, Chennai-600 005.
4. P.B.Mohan,
On Medical Leave,
C/o Engineer-in-Chief (Buildings)
and Chief Engineer (GL),
Public Works Department,
Chepauk, Chennai-5.
5. V.Senthilkumar,
Executive Engineer (PWD),
Ground Water Division, Vellore.

... Respondents/Respondents

Writ Appeal filed under Clause 15 of the Letters Patent against the order dated 07.04.2011 made in W.P.No.2448 of 2007 on the file of this Court.

W.P.No.2448 of 2007:

Petition under Article 226 of the Constitution of India praying for the issuance of a Writ of Certiorarified Mandamus as stated therein calling for the records pertaining to the issue of the impugned G.O(3D).No.56 Public Works (B2) Department dated 22.03.2002 on the file of the first respondent and quash the same and any further proceedings issued pursuant to the same and consequently direct the first and second respondents to reckon the third respondent as Assistant Engineer only based on the selection by Tamil Nadu Public Service Commissioner for the year 1985-86 and reckon his seniority in the category of Assistant Engineer as assigned by the Tamil Nadu Public Service Commission.

For appellants : Mr.N.Subramaniyan

For respondents : Mr.R.Rajeswaran, Spl.G.P. for RR-1 & 2
R-3 died
Mr.S.Namasivayam for RR-4 & 5

JUDGMENT

(The Judgment of the Court was delivered by V.Dhanapalan,J)

Heard Mr.N.Subramaniyan, learned counsel for the appellants, Mr.R.Rajeswaran, learned Special Government Pleader appearing for the respondents 1 and 2 and Mr.S.Namasivayam, learned counsel appearing for the respondents 4 and 5. It is represented by the learned counsel for the appellants that the third respondent died subsequent to the filing of the Writ Appeal and so, no notice is required to be sent to him.

2. This Writ Appeal is directed against the order dated 07.04.2011 passed by the learned single Judge in W.P.No.2448 of 2007, wherein as to the challenge made by the appellants/writ petitioners to G.O.(3D).No.56, Public Works (B2) Department, dated 22.03.2002 on the file of the first respondent and for consequential direction to the first and second respondents to reckon the third respondent as Assistant Engineer only based on the selection by the Tamil Nadu

Public Service Commission (for short, 'the TNPSC') for the year 1985-86 and reckon his seniority in the category of Assistant Engineer as assigned by the TNPSC, the learned single Judge, after giving due consideration to the questions raised on the issue that arose before him, dismissed the Writ Petition, upholding the impugned G.O.

3. It is seen that the appellants/writ petitioners questioned the impugned G.O.(3D).No.56, Public Works (B2) Department, dated 22.03.2002, by which the Government complied with the request of the third respondent based on the recommendation of the Chief Engineer (General) and appointed the third respondent who was holding the post of Draughtsman Grade-2 as Junior Engineer with effect from 25.08.1982 on par with his junior Thiru.B.N.Ramachandran and further ordered that he be re-designated as Assistant Engineer with effect from 13.12.1984, the date following the date of last examination leading to his acquiring B.E. Degree by recruitment by transfer for the purpose of seniority in the categories, and however, stipulated that he will not be eligible for any arrears of pay and allowances consequent on his appointment as Junior Engineer from 25.08.1982 and his re-designation as Assistant Engineer from 13.12.1984 ordered now instead of from 09.08.1986 as ordered in the letter in Lr.Ms.No.521, PWD, dated 27.03.1991, referred to in Reference No.5 therein and the Chief Engineer (General) was directed to re-fix his seniority in the categories of Junior Engineer and Assistant Engineer with reference to the order issued as above.

4. The appellants/writ petitioners and the respondents 3 to 5 were all engineering personnel in the Tamil Nadu Engineering Department, who are governed by the Special Rules to the Tamil Nadu Engineering Service as well as the Special Rules to the Tamil Nadu Engineering Subordinate Service. The category of Assistant Engineer and above up to the Chief Engineer, are covered under the Tamil Nadu Engineering Service, which is a State Service and the categories of Junior Engineer, Draughtsman and below are coming under the Tamil Nadu Engineering Subordinate Service.

5. The question of re-designation of the respective categories was gone into by the learned single Judge and it was observed based on the counter affidavit filed by the first and second respondents that the question of drawing a panel in the matter of re-designation regarding the appointment of Assistant Engineer by recruitment by transfer from the post of Junior Engineer on acquiring B.E. degree, does not arise, since the individuals were allowed to work in the same station and to do the same work. Therefore, it was further observed by the learned single Judge that as per Rule 35(aa) of the General Rules of the Tamil Nadu State and Subordinate Services, when

a junior appointed by a particular method of recruitment, happened to be appointed to another service and category earlier than the senior appointed by the same method of recruitment, the senior shall be deemed to have been appointed to the service, class, category on the same day on which the junior was so appointed. It was further observed based on the counter by the learned single Judge that as per the above said provision, the third respondent was appointed as Junior Engineer with effect from 25.08.1982, that is, from the date on which his junior B.N.Ramachandran was appointed as Junior Engineer by regularising the services in the post of Junior Engineer and it was stated that the re-designation of the third respondent was in accordance with Rule 5 of the Special Rules for the Tamil Nadu Engineering Service and Rule 2 under Rule 26(a) of the Fundamental Rules. It was also observed by the learned single Judge based on counter that the inter-se seniority of the third respondent as 39A in the 1999-2000 panel fit for promotion/appointment as Assistant Executive Engineer was issued on 01.10.2002 and the copy of the order was also communicated to all senior persons to the junior most person included in the approved panel and that was also published in the Tamil Nadu Government Gazette, dated 06.11.2002, however, the writ petitioners approached this Court belatedly only in the year 2007.

6. The learned single Judge, after going through the case in its entirety, has arrived at the following conclusion:

"7. The main ground on which the petitioners who are stated to have been temporarily appointed as Assistant Engineers by the TNPSC in the year 1983-85 and the 4th petitioner who is stated to have been selected in the year 1985-86, is that the conferment of benefit on the third respondent as Junior Engineer from 25.08.1982 and Assistant Engineer from 13.12.1984, based on his junior B.N.Ramachandran, is not proper due to the reason that the said regularization of B.N.Ramachandran and his appointment as Draughtsman Grade III itself is illegal and the Government is not competent to make such illegal appointment, and therefore, according to the petitioners when the appointment of the said B.N.Ramachandran as Draughtsman Grade III is illegal, such illegal order cannot be the basis for the purpose of conferring benefits on the third respondent and therefore, the third respondent, having been selected through TNPSC in the year 1985-86 should have been fixed only as per the seniority assigned by the TNPSC and therefore, the impugned order revising the same and conferring the benefit of promotion on the third respondent as Assistant Engineer from 13.12.1984 and Junior

Engineer with effect from 25.02.1982 is not valid.

8. It is not in dispute that acquiring of B.E. degree by the petitioners was in 1984 and as per the Rules, when a Junior Engineer obtained B.E. degree, he is eligible for the post of Assistant Engineer, which fact is also not in dispute. On the face of it, I am of the considered view that the petitioners cannot question the validity or otherwise of the appointment of B.N.Ramachandran at this later point of time. B.N.Ramachandran, who is admittedly junior to the third respondent has been conferred promotion and that cannot be a ground for the petitioners to say that B.N.Ramachandran's appointment should be set aside as illegal. In any event, at this late point of time, it is certainly not open to the petitioners to question the appointment of B.N.Ramachandran at all. Moreover, as stated correctly by the respondents, the benefit conferred on the third respondent was in accordance with Rule 35(aa) of the General Rules for the Tamil Nadu State and Subordinate Services, which is a statutory rule framed under Article 309 of the Constitution of India.

9. Further, when it is the categorical case of the first and second respondents in the counter affidavit that the panel was published in the Government gazette on 06.11.2002, the petitioners cannot turn around and say that they were aware of the position of the third respondent only in the year 2000. In any event, the petitioners having been aware of the position in the year 2000, have chosen to approach this Court only in the year 2007 and there is no proper explanation offered for such delay of seven years and I am of the considered view that the delay from 2000 to 2007 has to be necessarily attributable to the conduct of the petitioners. The petitioners having not challenged the appointment of B.N.Ramachandran, as Draughtsman Grade III, cannot now question the appointment of the third respondent as illegal. In any event, the conferment of benefit given to the third respondent under the impugned order is not depending upon the validity of appointment of B.N.Ramachandran. Even assuming that the said B.N.Ramachandran has not completed four years of service, the fact remains that he is junior to the third respondent and therefore, the conferment of benefit given to the third respondent under Rule 35 (aa) of the General Rules for the Tamil Nadu State and Subordinate Services, has to be taken as a rectification of mistake as per Rule 35(f).

10. The conduct of the petitioners in questioning the benefit conferred on the third respondent which can only

be considered as a rectification of mistake amounts to claiming negative equality, is not permissible under Article 14 of the Constitution of India. If the petitioners are entitled for certain benefits on their own right and claim right as per Article 14 of the Constitution of India, the same can be considered to be a positive equality. But, on the facts of the present case, by relying upon the appointment of some third parties, questioning the rectification of mistake done for appointment of the third respondent, in my considered view, is not correct, for the simple reason that Article 14 guarantees equality before law and not equality in subverting law and if the petitioners are entitled to, they can make a justifiable claim by positive conduct. That was also the view expressed in a land acquisition case by the Hon'ble Apex Court in *Bondu Ramaswamy Vs. Bangalore Development Authority* (2010 (7) SCC 129). Therefore, the reliance placed on the above said judgment by the learned counsel for the petitioners is not applicable to the facts of the present case. Further, one cannot presume that the appointment of B.N.Ramachandran as Draughtsman Grade III is void unless the same is declared so by the competent Court or by the Department by applying its mind.

11. On record, it is seen that the third respondent has joined the Public Works Department as Draughtsman Grade III under 10(a)(1) on 10.04.1978 and at that time, he was at 780A in seniority and he was promoted as Draughtsman Grade II on 04.09.1981. However, B.N.Ramachandran was appointed as Draughtsman Grade III on 25.08.1978 with his seniority at 883B, which is subsequent to the date of appointment of the third respondent and he was temporarily promoted on 27.6.81 as Draughtsman Grade II and after completion of four years of Draughtsman service, the said B.N.Ramachandran was regularized as Junior Engineer on 25.08.1982 while the third respondent acquired the Engineering degree on 12.12.1984 and the third respondent's appointment through TNPSC as Junior Engineer was based on the selection of the year 1984 and his posting was not given because of want of vacancy and therefore, there is no fault on the part of the respondents and therefore, the conferment of benefit given to the third respondent with effect from 12.12.1984 in the category of Assistant Engineer is based on the Rules, and he is working as Executive Engineer in the Department as on date.

12. The judgment of the Supreme Court in *Direct Recruit Class II Engineering Officers' Association Vs.*

State of Maharashtra (1990 (2) SCC 715) on which reliance was placed by the learned counsel for the petitioners, has no application to the facts of the present case. That was a case relating to inter se promotion among direct recruits and promotees and the Rule governing the said case is relating to the quota rule, which has no application to the facts of the present case at all.

13. Again, the judgment in K.Narayanan and others Vs. State of Karnataka (1994 Supp.(1) SCC 44) on which reliance was placed by the learned counsel for the petitioners, has also no application. That was a case, where the Supreme Court had considered the Karnataka Public Works Engineering Department Service (Recruitment) (Amendment) Rules, 1985, wherein the Rule in respect of Transfer Note No.(2), is as follows:

"For Transfer:

Must possess B.E., or AMIE (India) qualification in Civil Engineering, or Mechanical Engineering.

Note (1) xxxx

Note (2).- The transfer shall be effective from the date of graduation subject to the availability of vacancies without ignoring the inter se seniority among those eligible for such transfer."

The said rule was held to be the eligibility criteria. In the present case, inasmuch as it is not a question of inter se seniority between the petitioners and the third respondent, the construction of the said rule by the Supreme Court has no application to the facts of the present case.

14. Again, the judgment of the Supreme Court in M.P.Palanisamy Vs. A.Krishnan (2009 (6) SCC 428) on which reliance was placed also has no application. That was relating to the ad hoc appointment under the Tamil Nadu Public Service Commission Regulations, 1954. Considering the above said rule and also Rule 23(a)(i) of the Tamil Nadu State and Subordinate Service Rules, 1955 which speaks about the date of commencement of probation of persons from the first date of appointment temporarily, and after referring to the appointment under rule 10(a)(i), it was held as follows:

"42. We are not impressed by this, as we have already pointed out that under Rule 23(a)(i) of the Tamil Nadu State and Subordinate Services Rules, the persons who were in service, could not be rendered junior by the regularization of the ad hoc candidates

at a later stage. This GOMs.No.1813, therefore, has to be interpreted in the light of Rule 23(a)(I), which was a general rule and applicable to all the appointments. After all, when a clear reference was made to Rule 10(a)(1), which was from the General Rules, there was no reason to make any exception and not to read Rule 23(a)(i) of the General Rules. For this reason, the argument must fail."

The application of Rule 23(a)(i) is not an issue in this case and therefore, the reliance placed on the above said judgment by the learned counsel for the petitioners is totally misconceived.

15. Equally, the reliance placed on the judgment in Kalabharati Advertising Vs. Hemant Vimalnath Narichania and others (2010 (9) SCC 437) is not correct. That was a case where the Hon'ble Supreme Court was dealing with the law relating to review, and the legal issue relating to the review has been summarized by the Supreme Court in the following paragraphs:

"12. It is settled legal proposition that unless the statute/rules so permit, the review application is not maintainable in case of judicial/quasi-judicial orders. In the absence of any provision in the Act granting an express power of review, it is manifest that a review could not be made and the order in review, if passed, is ultra vires, illegal and without jurisdiction. (Vide Patel Chunibhai Dajibha Vs. Narayanrao Khanderao Jambekar (AIR 1965 SC 1457 and Harbhajan Singh Vs. Karam Singh (AIR 1966 SC 641)).

13. In Patel Narshi Thakershi Vs. Pradyuman Singhji Arjunsinghji (1971) 3 SCC 844, Major Chandra Bhan Singh Vs. Latafat Ullah Khan (1979) 1 SCC 321, Kuntesh Gupta (Dr.) Vs. Hindu Kanya Mahavidyalaya (1987) 4 SCC 525, State of Orissa Vs. Commissioner of Land Records and Settlement (1998) 7 SCC 162, and Sunita Jain Vs. Pawan Kumar Jain (2008) 2 SCC 705, this Court held that the power to review is not an inherent power. It must be conferred by law either expressly/specifically or by necessary implication and in the absence of any provision in the Act/Rules, review of an earlier order is impermissible as review is a creation of statute. Jurisdiction of review can be derived only from the statute and thus, any order of review in the absence of any statutory provision for the same is a nullity, being without jurisdiction.

14. Therefore, in view of the above, the law on the point can be summarised to the effect that in the absence of any statutory provision providing for review, entertaining an application for review or under the garb of clarification/modification/correction is not permissible."

16. On the facts of the present case, it is not as if the case of the third respondent was reviewed and it is a case of rectification of mistake which has been crept in especially when the Government found that the third respondent was entitled for the benefit of appointment, and the conferment of such benefit by rectifying the mistake cannot be said to be outside the purview of the powers of the Government.

In such view of the matter, looking into any angle, I am of the considered view that there is no illegality or perversity in the impugned Government Order. Accordingly, the writ petition fails and the same is dismissed. No costs. Connected miscellaneous petitions are closed."

7. We have heard the learned counsel appearing for the parties and perused the material documents available on record.

8. Before dealing with the matter, it is relevant to consider that a similarly placed person, namely B.Thirumal has earlier litigated the matter up to the Supreme Court, as he was a Junior Engineer (Electrical) in the Tamil Nadu Public Works Department and he was appointed to the said post by direct recruitment through the TNPSC in the year 1984-85 and was governed by the Special Rules applicable to Tamil Nadu Engineering Subordinate Service; aggrieved by the prevalent practice of Assistant Engineers (Electrical) being empanelled for promotion to the post of Assistant Executive Engineer (Electrical) against 25% quota reserved for members of the said Subordinate Engineering Service, the said Thirumal moved the Department for discontinuation of the said practice on the ground that such empanelment and consideration of Assistant Engineers (Electrical) was contrary to Special Rules applicable to the Tamil Nadu Engineering Service, which is a State Service; the Chief Engineer (General), PWD, however rejected the said request of the said Thirumal and the matter ultimately went up to the Supreme Court on appeal from the Division Bench judgment of this Court, which was appealed against the order of the learned single Judge, and in the above context, the Supreme Court laid down the following ratio in its

judgment in Civil Appeal Nos.10660-10662 of 2013, dated 27.11.2013, which is reported in 2013 (8) MLJ 478 (SC):

"13. Time now to refer to the provisions of 'Branch V-Electrical' of the Special Rules applicable to State Engineering Service which recognises three categories of officers, namely, Electric Engineers in Category-I, Assistant Executive Engineers (Electrical) in Category-II and Assistant Engineers (Electrical) comprising Category-III. Rule 2 and the Table below the same prescribe the category and the method of recruitment. It reads:

"2 Appointment:- (a) Appointment to the categories specified in column (1) of the Table below shall be made by the methods specified in column (2) thereof:-

TABLE

	Category (1)	Method of recruitment (2)
1	Electrical Engineer	(i) By promotion from Assistant Executive Engineer (Electrical) in Category 2. (ii) By recruitment by transfer from the category of Electrical Inspector in the Tamil Nadu Electrical Inspectorate Service.
2	Assistant Executive Engineer (Electrical)	(i) By promotion from Assistant Engineer (Electrical) in category 3; or (ii) By recruitment by transfer from the category of Junior Engineer (Electrical) in the Tamil Nadu Engineering Subordinate Service or from the category of Assistant Electrical Inspector in the Tamil Nadu Electrical Inspectorate Service; or (iii) By direct recruitment, if qualified hands are not available for appointment by the above methods.

	Category (1)	Method of recruitment (2)
3	Assistant Engineer (Electrical)	(i) By direct recruitment; or (ii) By recruitment by transfer from the category of Junior Engineer (Electrical) in the Tamil Nadu Engineering Subordinate Service who possess a Degree in Electrical Engineering; or from the category of Junior Electrical Inspectors in the Tamil Nadu Electrical Inspectorate Service.

(b) Promotion to the category of Electrical Engineer shall be made on grounds of merit and ability, seniority being considered only where merit and ability are approximately equal.

(c) So far as qualified and suitable candidates are available out of every four vacancies successively arising in the category of a Assistant Executive Engineer (Electrical), the first three vacancies shall be filled in or reserved to be filled in by promotion from among the category to Assistant Engineer possessing B.E.degree (Electrical) and the fourth vacancy shall be filled in or reserved to be filled by recruitment by transfer from the category of Junior Engineer (Electrical) possessing the diploma in Electrical Engineering."

14. A bare glance at the above would show that appointment to the category of Assistant Engineer can be made by direct recruitment or by transfer from the category of Junior Engineer (Electrical) in the Tamil Nadu Engineering Subordinate Service from among those who possess a degree in Electrical Engineering or from the Junior Electrical Inspectors to the Tamil Nadu Electrical Inspectorate Service. The question as noticed earlier is whether the re-designation of degree holder Junior Engineers was by itself tantamount to appointment by transfer to the State Engineering Service. It is common ground that no reference to the Tamil Nadu State Public Service Commission was made nor was any other process of selection undertaken for such re-designation which was based entirely on the degree qualification of the incumbent and was granted with effect from the date the

qualification was acquired. The re-designation had similarly nothing to do with the number of vacancies available in the State Engineering Service. Availability of vacancies in the cadre of Assistant Engineers was an essential condition precedent for any recruitment to that cadre whether by transfer or otherwise. Not only that, re-designation did not result in the occurrence of any vacancy in the cadre of Junior Engineers as it should ordinarily have, when someone holding the post of Junior Engineer got appointed to another service, resulting in the termination of his lien in the parent service. This implied that even though re-designated as an Assistant Engineer (Electrical) the incumbent continued to hold the post of Junior Engineer after re-designation. All this leads to the irresistible conclusion that except financial benefit and status, re-designation did not bring about any other change. If the version of the respondents is believed as we are inclined to do, even the duties of such re-designated officers remained the same as before. According to the State Government the two positions viz. Junior Engineer (Electrical) and Assistant Engineer (Electrical) are synonymous insofar as the nature of work and duties are concerned. To sum up :

(i) The re-designation comes as a natural and inexorable consequence of the higher qualification acquired by a Junior Engineer, no matter on an application filed by the incumbent.

(ii) The re-designation is granted with effect from the date the higher qualification is acquired.

(iii) The re-designation has no co-relation to the vacancies in the cadre of Assistant Engineers (Electrical). No vacancies are created to accommodate the officers being re-designated, which would be inevitable unless the vacancies equal to the officers being re-designated, were already available.

(iv) The nature of duties for the re-designated officers remained the same as for Junior Engineers.

(v) The re-designated officers continue to be considered for promotion in their parent service against 25% quota fixed for that source.

15. The cumulative effect of the above, in our opinion, is that there is no element of recruitment to the State Engineering Service by direct recruitment or by transfer. The contention that those re-designated stood appointed to the cadre of Assistant Engineers (Electrical)

in State Service must, therefore, fail. Considerable support for that conclusion is available from the decision of this Court in BSNL Vs. R.Santhakumari Velusamy & Ors. AIR 2011 SC 3793. That was a case where this Court was examining whether rules of reservation were applicable to promotions to Grade IV under the Biennial Cadre Review Scheme introduced by the Department of Telecommunications, Government of India with a view to remove stagnation of certain categories of employees serving in the said department. The Government had formulated the procedure regarding promotion to Grade IV according to which such promotions were to be granted on the basis of seniority in the basic grade from amongst the officers in Grade III subject to fitness determined in the usual manner of One Time Bound Promotion Scheme ('OTBP Scheme' for short). By a clarificatory Circular issued subsequently the Government had directed that promotions would be subject to fulfilment of other conditions and that normal rules of reservation would apply to the same. The direction regarding application of rules of reservation to promotions to Grade IV was assailed by the All India Non Schedule Caste/Schedule Tribe Telecom Employees Association on the ground that principles of reservation had no application for upgradation on existing posts which did not carry any change in duties and responsibilities. The Central Administrative Tribunal, Ahmedabad upheld that contention and directed that reservation will have no application while upgrading posts under the BCR Scheme and directed that the department shall take appropriate action for effecting promotions to the upgraded posts without applying the reservation roster. The order passed by the Tribunal was upheld by the Gujarat High Court in a writ petition filed by the Government. The matter eventually reached this Court by special leave. One of the main issues considered by this Court was whether upgradation of the posts under the BCR Scheme was tantamount to promotion. This Court upon a comprehensive review of the decisions rendered earlier including those rendered in Union of India Vs. S.S.Ranade (1995) 4 SCC 462, Union of India Vs. V.K.Sirothia (2008) 9 SCC 283 and Lalit Mohan Deb and Ors. Vs. Union of India & Ors. (1973) 3 SCC 862 formulated specific principles relating to promotion and upgradation in the following words:

"21. On a careful analysis of the principles relating to promotion and upgradation in the light of the aforesaid decisions, the following principles

emerge:

(i) Promotion is an advancement in rank or grade or both and is a step towards advancement to higher position, grade or honour and dignity. Though in the traditional sense promotion refers to advancement to a higher post, in its wider sense, promotion may include an advancement to a higher pay scale without moving to a different post. But the mere fact that both that is advancement to a higher position and advancement to a higher pay scale - are described by the common term 'promotion', does not mean that they are the same. The two types of promotion are distinct and have different connotations and consequences.

(ii) Upgradation merely confers a financial benefit by raising the scale of pay of the post without there being movement from a lower position to a higher position. In an upgradation, the candidate continues to hold the same post without any change in the duties and responsibilities but merely gets a higher pay scale.

(iii) Therefore, when there is an advancement to a higher pay scale without change of post, it may be referred to as upgradation or promotion to a higher pay scale. But there is still difference between the two. Where the advancement to a higher pay-scale without change of post is available to everyone who satisfies the eligibility conditions, without undergoing any process of selection, it will be upgradation. But if the advancement to a higher pay-scale without change of post is as a result of some process which has elements of selection, then it will be a promotion to a higher pay scale. In other words, upgradation by application of a process of selection, as contrasted from an upgradation simplicitor can be said to be a promotion in its wider sense that is advancement to a higher pay scale.

(iv) Generally, upgradation relates to and applies to all positions in a category, who have completed a minimum period of service. Upgradation, can also be restricted to a percentage of posts in a cadre with reference to seniority (instead of being made available to all employees in the category) and it will still be an upgradation simplicitor. But if there is a process of selection or consideration

of comparative merit or suitability for granting the upgradation or benefit of advancement to a higher pay scale, it will be a promotion. A mere screening to eliminate such employees whose service records may contain adverse entries or who might have suffered punishment, may not amount to a process of selection leading to promotion and the elimination may still be a part of the process of upgradation simplicitor. Where the upgradation involves a process of selection criteria similar to those applicable to promotion, then it will, in effect, be a promotion, though termed as upgradation. A

(v) Where the process is an upgradation simplicitor, there is no need to apply rules of reservation. But where the upgradation involves selection process and is therefore a promotion, rules of reservation will apply.

(vi) Where there is a restructuring of some cadres resulting in creation of additional posts and filling of those vacancies by those who satisfy the conditions of eligibility which includes a minimum period of service, will attract the rules of reservation. On the other hand, where the restructuring of posts does not involve creation of additional posts but merely results in some of the existing posts being placed in a higher grade to provide relief against stagnation, the said process does not invite reservation."

16. On a careful reading of principles (ii) and (iii) above, it is evident that upgradation which is synonymous to re-designation in the facts of this case simply confers a financial benefit by raising the scale of pay of the posts without there being movement from a lower position to a higher position. In the case of upgradation, the candidate continues to hold the same post without any change in the duties and responsibilities but merely gets a higher pay scale. Not only that, where the advancement to a higher pay-scale without change of post is available to everyone who satisfies the eligibility conditions, without undergoing any process of selection, it will be upgradation. But if advancement to a higher pay-scale without change of post is accompanied by some process which has the element of selection, then it will be a promotion to a higher pay-scale. This Court declared that upgradation in that case was not promotion, also because the

BCR Scheme did not involve creation of additional posts nor did the scheme involve consideration of inter se merit of the candidates or involve any selection process. The Court on that basis declared that BCR Scheme was only an upgradation intended to give relief against stagnation which was not tantamount to promotion. To such process of upgradation, the Reservation Rules had no application, declared this Court.

17. The rationale behind upgradation not being considered tantamount to promotion would, in our opinion, apply with full force even to a case where the upgradation/redesignation is sought to be termed as a case of recruitment by transfer. If the process of upgradation/redesignation has no correlation to the vacancies available in the State Engineering Service and if such upgradation/redesignation is granted as a matter of course without any selection process and merely on the incumbent acquiring a degree qualification, we see no reason why such upgradation/redesignation should be treated as a case of appointment to the said service by transfer. What could not constitute promotion (assuming that the post of Assistant Engineer (Electrical) was a part of the Subordinate Service) cannot obviously be considered to be a case of appointment by transfer.

18. Suffice it to say that the principles enunciated in Velusamy's case (supra) when applied to the facts of the case at hand, leave no manner of doubt that the upgradation/redesignation granted to the members of the Subordinate Engineering Service upon their acquiring a degree qualification was meant only to encourage or recognize their getting such higher qualification. Such upgradation may involve a higher designation and better emoluments for the incumbents but neither of those two benefits could constitute promotion or recruitment by transfer.

19. It is true that the State has shown the upgraded engineers in the seniority list of the Assistant Engineers (Electrical) and even considered and promoted them against vacancies available in 75% quota, meant for that source but such inclusion, consideration and promotion cannot by itself be treated to be ground for holding that the redesignation had the effect of appointing the incumbents by transfer. At any rate, there is nothing to show that the State had taken the lien of the incumbents in their parent service to have been terminated. On the contrary, the State has been considering such re-

designated officers for promotion even against 25% quota meant for the Junior Engineers serving in the Subordinate Service. The aberration of considering the redesignated officers as members of the State Service does not constitute a sufficient basis for us to depart from the legal parameters to which we have adverted earlier.

20. The Division Bench of the High Court has, while dealing with the question whether Junior Engineers redesignated as Assistant Engineers could have the "best of both worlds" by availing of both the 25% and 75% quotas, upheld that practice on the ground that it only served to reward pursuit of higher studies without causing any undue disadvantage to diploma-holder Junior Engineers, or to directly recruited Assistant Engineers. The Division Bench observed:

"14. ... A Diploma-holder Junior Engineer, who on acquisition of Degree in Electrical Engineering is re-designated as Assistant Engineer, is placed below the directly recruited graduate Engineer during the year concerned. Therefore, obviously he does not steal march over such directly recruited Assistant Engineer having Degree in Engineering. Similarly it cannot be said that he is stealing march over the Diploma-holder Junior Engineers who continue as such in as much as such a person only gets a better opportunity because of his perseverance in pursuing further study and acquisition of a higher qualification subsequently adds to the quality of work done by such person. A Diploma-holder Junior Engineer, who subsequently acquires a degree in Engineering, does not become senior above any Diploma-holder Junior Engineer. While he retains his seniority, he only gets an additional avenue as he is also redesignated as Assistant Engineer. Ultimately, the benefit goes to a person who pursues higher studies. It cannot be said that there is anything inherently arbitrary in such a scenario in as much as a person ultimately gets some reward for his pursuit of higher study and because of his perseverance in obtaining a higher degree.

If a Diploma-holder Junior Engineer on acquisition of higher qualification is to be compulsorily moved out of the category of Junior Engineer, anomalous position may crop up. Since such a person would be placed below all the existing graduate Assistant Engineers, his chance of being promoted within the quota of 3/4th meant for graduate Assistant

Engineers would be practically nil. It is of course true that on being re-designated as Assistant Engineer, such a person receives higher salary, but when he is compulsorily "kicked upstairs" (if we may permitted to observe so) the Diploma-holder Junior Engineer, who were below him, would be in a better position for being promoted, even though less qualified than him. The convention which was being hitherto followed in the Department does not prejudice a graduate Engineer in the Assistant Engineer cadre nor it has the effect of blocking the promotional prospects of any Diploma-holder Junior Engineer, who was senior to such other Diploma-holder Junior Engineer who subsequently acquires the higher qualification.

Xx xx xx

19. In our considered opinion, the Junior Engineers, on acquisition of higher qualification are re-designated as Assistant Engineers, but it cannot be said that they have become full-fledged members of any other service. It is to be noticed that though technically two services may be different, the nature of the work done is the same and, since two services are essentially same, the traditional concept of losing lien in the original service while absorbed or deputed in any other service does not strictly arise for consideration.

20. The convention, which was hitherto being followed by the Department, and now approved by us, has the effect of conferring additional benefit on a person who pursues the study for acquiring higher qualification."

21. The observations made by the Division Bench in the above passages do not appear to be legally correct since an incumbent in service cannot hold lien in two different cadres at once. It is also not correct to say that the two services are in essence one. The distinction is obvious and clear enough from the rules, that provide for method of recruitment, promotion and conditions of eligibility for the two separately. That is so also because the quotas for promotion to the posts of Assistant Executive Engineers are separate for the members of the two services and one cannot be utilized for the benefit of the other. That apart, the High Court was not correct in holding as if

a degree holder could be redesignated as an Assistant Engineer against his will and only because he had acquired a degree qualification. The State has made it clear in the additional affidavit filed on its behalf that redesignation was ordered on the basis of requests made by the members of the Subordinate Engineering Service. It was, therefore, not correct to suggest as though redesignation was thrust upon unwilling members of the Subordinate Service. Suffice it to say that even the High Court has held that the redesignated Assistant Engineers did not because of redesignation become full-fledged members of the State Service. If that be so, there is no half way house, for either they are members of Subordinate Service or they are not. They cannot be members of the Subordinate Service and State Service both, at one and the same time.

22. The upshot of the above discussion is that the degree holder Junior Engineers continue to be members of the Subordinate Engineering Service even after they are redesignated as Assistant Engineers upon them getting a degree qualification. They can, therefore, be considered only against the 25% quota reserved for the Subordinate Service and not against 75% reserved for the State Service members directly recruited to that service or appointed by transfer in terms of the Rules. To the extent the redesignated Assistant Engineers have been considered in the past for promotion in the quota reserved for Assistant Engineers in the State Service, the consideration was legally bad. Having said that, we do not propose to interfere with what has been done in the past especially when there is no challenge before us to the appointment of the re-designated Assistant Engineers as Assistant Executive Engineers against vacancies falling in 75% quota. The settled position need not, therefore, be unsettled at this stage in these proceedings. With the above observations and clarification these appeals fail and are hereby dismissed, but in the circumstances without any orders as to costs."

9. The above ratio laid down by the Supreme Court has been followed by the First Bench in the case of "K.Ravindran Vs. State of Tamil Nadu" in W.P.Nos.34276, 14865 and 24783 of 2007, dated 15.10.2014, in the Writ Petitions pertaining to the battle between two sets of Engineers of Public Works Department of the Tamil Nadu Government and one set is arrayed as Assistant Engineers who are directly appointed through TNPSC, while the other set consists of

Junior Engineers who acquired B.E. degree while in service and were designated as Assistant Engineers without any specific selection process, by reason of acquiring the degree. In that process, there was a Government Order in G.O.Ms.No.66, dated 12.03.2007, issued by the Public Works Department, which became a subject of controversy, as it prescribes the method for fixing inter-se seniority between these two categories and the abovesaid three Writ Petitions came to be filed, i.e. W.P.No.24783 of 2007 was filed by the re-designated Assistant Engineers seeking implementation of the G.O., W.P.No.34276 of 2007 was filed seeking to lay a challenge to Rule 2(e) of the Special Rules to Tamil Nadu Engineering Subordinate Service, seeking benefit of seniority from the date of the re-designation and W.P.No.14865 of 2007 was filed seeking to assail the Government Order primarily on the ground that the Special Rules do not provide for re-designation of Junior Engineers as Assistant Engineers on their acquiring the B.E. degree. The First Bench of this Court, after looking into the facts and circumstances and the ruling of the Supreme Court in the said B.Thirumal's case (cited supra), has concluded as follows in paragraphs 6 and 7:

"6. We have examined the Judgement of the Honourable Supreme Court in B.Thirumal case cited supra, which has a direct bearing on the controversy in question. As usual, there is no stand of the State Government on record. It really cannot be disputed now that acquiring of a B.E. Degree would not confer automatically on the Junior Engineers a promoted post, but only amount to re-designation of their post as Assistant Engineers. They, thus continue to be part of the Tamil Nadu Engineering Subordinate Service and can be promoted only under the 25% quota. As far as the persons who have already been erroneously promoted under the 75% quota are concerned, the order of the Honourable Supreme Court protects them to the extent, that it does not seek to set at naught what has been done in the past. It however, does not take care of the issue of inter se seniority, which would not have to be examined by the State Government in the context of those persons still being part of the Tamil Nadu Engineering Subordinate Service. There are no details as to how many posts were available at the relevant point of time when promotions took place and under which quota. The seniority list would undoubtedly have to be worked out again on the basis of the Judgement pronounced by the Honourable Supreme Court and thus, while the Judgement protects the Junior Engineers from being demoted, inter se seniority may be effected as a consequence of the ratio of the said Judgement, which we have discussed aforesaid. We, thus call

upon the State Government to apply its mind to the issue of inter se seniority in the context of the aforesaid Judgement and accordingly circulate a draft seniority list, invite objections and thereafter publish the final seniority list. This task be carried out within a maximum period of six months from today.

7. The writ petitions accordingly stand disposed of. No costs."

10. From a reading of the above decision of the First Bench of this Court, it is clear that there are no details as to how many posts were available at the relevant point of time when the promotions took place and under which quota and the seniority list would undoubtedly have to be worked out again on the basis of the judgment pronounced by the Supreme Court in the said B.Thirumal's case (cited supra) and thus, while the said judgment of the Supreme Court protected the Junior Engineers from being demoted, the inter-se seniority may be effected as a consequence of the ratio of the said judgment of the Supreme Court and therefore, the First Bench of this Court called upon the State Government to apply its mind to the issue of inter-se seniority in the context of the Supreme Court ruling in the said case and accordingly, the First Bench directed to circulate a draft seniority list, invite objections and thereafter publish the final seniority list and accordingly, gave time limit for the execution of the said task.

11. Though the learned counsel for the respondents 4 and 5 has in principle not submitted that the entire ruling of the Supreme Court in the said case is not applicable to the facts of the present case, but it would be appropriate that fixation of inter-se seniority based on the rules and practice and the ruling of the Supreme Court in the said case having a binding precedent with the respondents 1 and 2-Government and the Department concerned and taking into account the view taken by the First Bench of this Court as to the consideration of that position taking into every factor involved, we are following the said decision of the First Bench of this Court as to the issue of inter-se seniority in the context of the aforesaid judgment of the Supreme Court and direct the State Government to circulate a draft seniority list, invite objections and thereafter publish the final seniority list within a period of six months from today.

12. Accordingly, we dispose of this Writ Appeal also in the above terms of the order passed by the First Bench of this Court in W.P.Nos.34276, 14865 and 24783 of 2007, dated 15.10.2014, as the facts, questions and issues are similar in nature to the present case. No costs.

13. As far as the third respondent is concerned, it is reported that he has died during the pendency of this Writ Appeal. If any claim is to be made by the legal heirs of the deceased third respondent, it is always open for them to raise the same and claim whatever the benefits available to them and they are at liberty to approach this Court.

Sd/-
Assistant Registrar

//True Copy//

Sub Assistant Registrar

cs

Copy to

1. The Secretary,
The Government of Tamil Nadu,
Public Works Department,
Fort St.George, Chennai-9.
2. The Chief Engineer (G1),
Public Works Department,
PWD Campus, Chepauk,
Chennai-5.

+1cc to Mr.S.Namasivayam, Advocate, S.R.No.10492
+1cc to Mr.N.Subramaniyan, Advocate, S.R.No.10330
+1cc to the Government Pleader, S.R.No.10347

सत्यमेव जयते

W.A.No.917 of 2011

UG (CO)
CA(24/03/2015)

WEB COPY