

IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 01.12.2016

CORAM:

THE HONOURABLE MR.JUSTICE S.MANIKUMAR
and
THE HONOURABLE MR.JUSTICE N.ATHINATHAN

W.P.No.26665 of 2014
and M.P.No.1/2014

Raj Bahadur Thappa ... Petitioner

versus

1. The Secretary,
Union of India, rep by Secretary,
Ministry of Defence,
Department of Defence Production,
New Delhi 110 001.
2. The Chairman,
Ordnance Factory Board,
No.10-A, S.K.Bose Road,
Kolkatta 700 001.
3. The General Manager,
Ordnance Clothing Factory,
Avadi, Chennai 600 054.
4. K.Arulmozhi,
UDC, Ordnance Clothing Factory,
Avadi, Chennai 600 054.
5. The Registrar,
Central Administrative Tribunal, Madras Bench,
City Civil Court Buildings,
High Court Campus,
Chennai-104. ... Respondents

Writ Petition filed under Article 226 of the Constitution of India, praying for a Writ of Certiorarified Mandamus, to call for the records leading to the issue of the impugned order of the 5th respondent, dated 15.09.2014, passed in O.A.No.458 of 2013, quash the same as illegal and void and to consequently, direct the respondents 1 to 3 to sanction the post of Telephone Operator, Grade-I, with effect from August' 2002 in the 3rd

respondent-Factory, with all attendant benefits, like, seniority, further promotion, etc.

For Petitioners : Mr.D.Muthukumar
for M/s.Paul and Paul

For Respondents 1 to 3 : Mr.Venkataswamy Babu

For 4th Respondent : No appearance

For 5th Respondent : Tribunal

ORDER

(Order of the Court was made by S.MANIKUMAR, J.)

Challenge in this writ petition is to the order, dated 15.09.2014, made in O.A.No.458 of 2013, by which, the Central Administrative Tribunal, Chennai, has declined to sanction the post of Telephone Operator Grade I, with effect from August 2002, in the 3rd respondent-Factory, instead of 21.07.2004 and direct, revision of seniority to the petitioner, with effect from August' 2002, as Telephone Operator, Grade I, with all attendant benefits, promotion etc.

2. Facts leading to the writ petition are as follows:

The petitioner was appointed as a Telephone Operator, Grade II, on 21.06.1997 and according to him, was eligible for promotion to the post of Telephone Operator, Grade I, on completion of 5 years of regular service, as Telephone Operator, Grade II. As there was no post of Grade I Telephone Operator in the 3rd respondent factory, he was not promoted and hence, he made several representations to sanction the post of Telephone Operator, Grade I, which was not considered. Thereafter, the 2nd respondent-Board approved the post of Telephone Operator Grade I, with effect from 21.07.2004, to the 3rd respondent factory and the petitioner was accommodated in that post, by way of promotion from the said date. The petitioner was re-designated as Supervisor NT/OTS in the year 2005. According to him, because of the delay in sanction of Telephone Operator Grade I post, in the year 2004, he suffered loss in seniority and consequently, promotion to the post of Chargeman NT/OTS and further promotion.

3. The petitioner has further submitted that whenever he approached the authorities, he was informed that SRO (14E) was being amended, making Supervisor alone as eligible for promotion to the post of Chargeman and UDC alone are eligible, for the post of Office Superintendent. But there was no amendment. As on

31.03.2013, there would be a vacancy in the cadre of Chargeman NT/OTS, due to superannuation of one Mr.P.Karikalan, Chargeman NT/OTS and that the post was to be given to a UDC, as per the combined seniority list.

4. Before the Tribunal, he has further submitted that if the said post of Chargeman NT/OTS has to be filled by a UDC, he would not get any promotion for another 10 years for want of vacancy and that he would retire from service in the year 2024. Therefore, he gave a detailed representation, requesting for sanction for the post of Telephone Operator Grade I, with effect from 01.01.2003. As the next vacancy which would arise in the year 2015, was earmarked for direct recruitment and another vacancy, which would arise in the year 2019, was earmarked for LDCE, he would remain as a Telephone Operator Grade I NT/OTS. On the above facts, he filed O.A.No.458 of 2013, contending inter alia that the action of the respondents in not sanctioning of the post of Telephone Operator Grade I, from August 2002, is discriminatory, unreasonable and violative of Article 14 of the Constitution of India.

5. Before the Tribunal, respondents 1 to 3 have filed a detailed reply and contended that the petitioner had studied upto Xth standard and passed the final examination conducted by the Royal Telegraphic and Wireless Training Institute, Madras, held on 08.11.1991. The petitioner had completed 4 week training on PBX/EPBAX Board operators, conducted by District Telecommunication Training Centre, Department of Telecommunication, Government of India. Respondents have submitted that the petitioner was appointed as unskilled labourer on compassionate grounds, with effect from 13.05.1991 and at that time, there was no sanctioned post of Telephone Operator and PBX Exchange was manned by utilizing the services of Switch Board Attendant or other suitable manpower available, in the 3rd respondent-factory. It was further submitted that after commissioning a new EPABX with 48 internal connection, sanctioned, vide OEF Group Headquarters, Kanpur, vide letter, dated 16.01.1991, it was felt necessary, to post two telephone operators for manning the exchange round the clock. After protracted correspondence, two posts of Telephone Operator Grade II was sanctioned, by surrendering two posts of Lower Division Clerk (LDC) and it was stated that the post of the Telephone Operator Grade II should not be filled by direct recruitment.

6. The respondents have further submitted that it is the prerogative of the department/administration to decide, which post is necessary to run the factory efficiently, and therefore, by surrendering two posts of LDC, two posts of Telephone Operator Grade II were sanctioned. It was further stated that the petitioner was not re-designated as Supervisor, NT(OTS) in

the year 2005, but was promoted to the post of Telephone Operator Grade I, w.e.f. 21.07.2004 and the post of Telephone Operator Grade I was re-designated as Supervisor NT(OTS) subsequently, w.e.f. 03.10.2004. His seniority in the grade of Supervisor NT(OTS) was reckoned from 21.07.2004.

7. It was the further submission of the respondents 1 to 3 before the Tribunal that the petitioner became eligible for consideration for promotion to the post of Chargeman, NT(OTS), w.e.f. 01.01.2011, after completing six years of regular service in the post of Supervisor, NT(OTS) and his case would be considered w.e.f. 01.04.2011, as per DPC norms for the post of Chargeman, NT(OTS). It was further submitted that the 2nd respondent-Board forwarded a draft SRO for the post of Chargeman, Non-Technical, wherein, it was proposed that Supervisor alone would be eligible for promotion to the post of Chargeman and that the same is pending decision. The respondents have submitted that the case of the petitioner would be considered on 01.01.2020, as per the anticipated vacancy calculated based only on the superannuation of the existing incumbents.

8. The respondents 1 to 3 have denied the contention of the petitioner that UDCs are getting promotion, within one year, after the residual period of six years. It was further stated that the post of DEO was lying vacant, since August 2002 and that the 3rd respondent has taken up the issue of obtaining sanction for one post of Telephone Operator Grade I, by surrendering one of post of DEO in 2004, in order to benefit the petitioner. It was also submitted that the 4th respondent was selected and promoted as Chargeman/NT(OTS), since she was the senior most person in the combined seniority and therefore, the petitioner cannot dispute his position in the combined seniority list of UDC/Supervisor, published every year, in which, the petitioner was placed below the 4th respondent.

9. Before the Tribunal, the respondents have further submitted that on 30.03.2013, when the DPC held a meeting to consider the proposal to fill up the post of CM/NT (OTS), which arose on account of superannuation of one Shri.P.Karikalan, on 31.03.2013, the 4th respondent was selected, as she was the senior most person, on that date, in the combined seniority list. However, she could not be promoted, as the Tribunal, vide order, dated 28.03.2013, directed the department to maintain status quo, with regard to appointment of the 4th respondent in the post of CM/NT(OTS), till further orders. Subsequently, the 4th respondent was promoted to the post of Office Superintendent, on 21.06.2013, the vacancy that arose on account of promotion of the incumbent to the post of JWM/NT (OTS).

10. According to respondents 1 to 3, the petitioner cannot be allowed to unsettle the settled matters, after so many years and he is not entitled to any relief. It was further contended that promotion cannot be claimed as a matter of right, unless it is denied at the cost of fair play, good conscience and equity. A contention has been made that creation of post falls within the executive domain of the legislature/executive and cannot be the subject matter of judicial review, unless found to be arbitrary and unreasonable.

11. The respondents 1 to 3 have further submitted that the contention of the petitioner that there would not be any vacancy for the next 10 years for Supervisor, is not correct, as the petitioner, who is the senior most Supervisor and in 8th position in the combined seniority list of UDC/Supervisor/NT (OTS), as on 01.01.2013, would be considered for promotion, as per the anticipated vacancy calculated, based only on the superannuation of existing incumbents in the post of Office Superintendent, CM/NT(OTS). However, chances of promotion may be advanced, consequent upon the elevation of the existing incumbents in the above posts to the post of JWM/NT(OTS), by promotion which is, centrally controlled by the 2nd respondent Board. In such an eventuality, chances of getting promotion by the petitioner would be more bright. They denied the contention of the petitioner that promotion as Office Superintendent takes place periodically and UDCs waiting for promotion as Office Superintendent is only one year and further contended that the 4th respondent, who was holding the post of UDC was awaiting promotion for nearly 4 years, on completion of the required residual period of six years and that she has been promoted to the post of Office Superintendent on 21.06.2013, the vacancy which arose on account of promotion of the incumbent to the post of JWM/NT (OTS).

12. After considering the rival submissions of both sides, the Central Administrative Tribunal, vide order, dated 15.09.2014, made in O.A.No.458 of 2013, dismissed the Original Application as follows:

"7. We have carefully considered the rival contentions and perused the material on record. It is clear that after sanctioning of two posts of Telephone Operator Gr. II by the 2nd respondent Board, the applicant and one Irulappan were appointed to the post of Telephone Operator Gr. II departmentally w.e.f. 21.06.1997. We do not see any merit in the contention of the applicant that the respondents ought to have obtained sanction for the post of Telephone Operator Gr. I, simultaneously while sanctioning the posts of Telephone Operator

Gr.11 as it is the prerogative of the respondent organization to determine the posts which are essential for the smooth running of the factory. It is also clear from the records that the applicant was promoted to the post of Telephone Operator Gr.I w.e.f. 21.07.2004 after the said post was sanctioned and the applicant was redesignated as Supervisor/NT (OTS) subsequently w.e.f. 03.10.2004 and his seniority was reckoned w.e.f. 21.07.2004. It is also brought out that the applicant had not filed any objection to the seniority position assigned to him in the seniority list all these years and his claim now that he should be assigned notional seniority from an earlier date is not tenable. It is seen that the 4th respondent being senior most person in the combined cadre, she was given appointment as Chargeman/ NT(OTS). The Apex Court in its judgement dated 05.09.2011 in the case of High Court of Judicature at Patna vs. Madan Mohan Prasad and ors. [Civil Appeal No. 7630 of 2011] has held that it is well settled that promotion is not a matter of right much less a fundamental right."

13. Being aggrieved by the same, the present writ petition has been filed, on the following grounds,

"(a) The Tribunal has erred in dismissing the application without properly appreciating various issues raised in the application. In as much as, the Tribunal has failed to appreciate the totality of the circumstances of the petitioner's challenge.

(b) The Tribunal has erred in dismissing the application in the face of the fact that all factories coming under the control of 2nd respondent Board have obtained simultaneous sanction of both Grade-II and Grade-I Telephone Operator posts, providing for promotional opportunity to the employees. In as much as the Tribunal has failed to appreciate that the petitioner suffered irreparable prejudice due to belated sanction of Grade-I post and which resulted in denial of promotion to the petitioner for several years.

(c) The Tribunal has erred in dismissing the application on the ground that it is prerogative of the respondent organization to determine the post which are essential for the smooth running of the factory, without appreciating the fact that the factory management itself had recommended for sanction of grade-I post and it was only because of the belated sanctioning, the petitioner's right had been infringed.

(d) The Tribunal has failed to appreciate that sanction of Grade-I Telephone Operator was obtained by surrendering the post of Data Entry Operator and the said post has been lying vacant since 2002, in the factory. If there was only proper application of mind on the part of the authorities concerned, the sanction of the posts ought to have been granted in 2002 itself in order to accommodate the petitioner in the higher post when the promotion was due to him.

(e) The Tribunal has erred in relying on the judgement of the Hon'ble Supreme Court of India as indicated in para 7 of the order without appreciating the fact that the petitioner's claim was based on peculiar set of facts and circumstances and the decision of the Apex Court cannot be if so facto applied mechanically.

(f) The Tribunal has failed to appreciate that UDCs have their own channel of promotion and therefore the right of the supervisors need to be protected, particularly while the proposed amendment was pending approval making the post of Supervisor alone eligible for promotion to Chargeman. The Tribunal overlooked broader principles and concluded against the petitioner on a narrow perspective of the issue.

(g) The Tribunal has failed to appreciate the fact that in almost in all the factories coming under the control of the 2nd respondent Board, sanction for the post of Telephone Operator Grade-I has always been accorded simultaneously while sanctioning the post of Grade-II. The Tribunal has failed to address this important issue and therefore the impugned order is liable to be interfered with.

14. The General Manager, Ordnance Factory Board, Avadi, Chennai, 3rd respondent herein, has filed a detailed counter affidavit, denying the averments and reiterated the contentions made before the Tribunal. In respect of creation of posts, the respondents have submitted that the competent authority concerned has unfettered powers, insofar as procedural aspects are concerned.

15. It is settled law that creation and abolition of posts are the prerogative of the government. Court cannot exercise judicial review by acting like an appellate authority over the decision taken by the government and substitute its views.

16. While accepting the submissions made by the respondents 1 to 3, on the powers of the Government, regarding creation and

abolition of posts, this Court deems it fit to consider few cases.

(i) In P.U.Joshi v. Accountant General reported in (2003) 2 SCC 632, the Hon'ble Supreme Court held that the creation of post, classification, amalgamation of post etc. are all Governmental function and observed thus :-

"10.We have carefully considered the submissions made on behalf of both parties. Questions relating to the constitution, pattern, nomenclature of posts, cadres, categories, their creation/ abolition, prescription of qualifications and other conditions of service including avenues of promotions and criteria to be fulfilled for such promotions pertain to the field of policy is within the exclusive discretion and jurisdiction of the State, subject, of course, to the limitations or restrictions envisaged in the Constitution of India and it is not for the statutory tribunals, at any rate, to direct the Government to have a particular method of recruitment or eligibility criteria or avenues of promotion or impose itself by substituting its views for that of the State. Similarly, it is well open and within the competency of the State to change the Rules relating to a service and alter or amend and vary by addition /subtraction the qualifications, eligibility criteria and other conditions of service including avenues of promotion, from time to time, as the administrative exigencies may need or necessitate. Likewise, the State by appropriate Rules is entitled to amalgamate departments or bifurcate departments into more and constitute different categories of posts or cadres by undertaking further classification, bifurcation or amalgamation as well as reconstitute and restructure the pattern and cadres/ categories of service, as may be required from time to time by abolishing the existing cadres/posts and creating new cadres/posts. There is no right in any employee of the State to claim that Rules governing conditions of his service should be forever the same as the one when he entered service for all purposes and except for ensuring or safeguarding rights or benefits already earned, acquired or accrued at a particular point of time, a government servant has no right to challenge the authority of the State to amend, alter and bring into force new Rules relating to even an existing service."

(ii) The Hon'ble Supreme Court in Indian Drugs and Pharmaceuticals Ltd., V. Workmen reported in 2007 (1) SCC 408, at paragraph 40 has held as follows:

"The Courts must, therefore, exercise judicial restraint, and not encroach into the executive or legislative domain. Orders for creation of posts, appointment on these posts, regularisation, fixing pay scales, continuation in service, promotions etc., are all executive or legislative functions, and it is highly improper for judges to step into this sphere except in a rare and exceptional case."

(iii) In a decision in State of Haryana and others vs. Navneet Verma, reported in 2008(2) CTC 416, the Hon'ble Supreme Court, after considering various decisions, summarised the power of the government in creating/abolishing a post as follows:

"a) the power to create or abolish a post rests with the government;

b) whether a particular post is necessary is a matter depending upon the exigencies of the situation and administrative necessity;

c) Creation and abolition of posts is a matter of government policy and every sovereign government has this power in the interest and necessity of internal administration.

d) Creation, continuation and abolition of posts are all decided by the government in the interest of administration and general public.

e) The court would be the least competent in the face of scanty material to decide whether the government had acted honestly in creating a post or refusing to create a post or its decision suffers from malafide legal or factual;

f) as long as the decision to abolish the post is taken in good faith in the absence of material, interference by the court is not warranted.

(iv) The Hon'ble Supreme Court in Union of India v. Pushpa Rani & Ors., reported in 2008 (9) SCC 242, reiterated the settled legal position with respect to the power of Government in the matter of creation and abolition of post and other areas and observed thus :-

"37. Before parting with this aspect of the case, we consider it necessary to reiterate the settled legal position that matters relating to creation and

abolition of posts, formation and structuring/restructuring of cadres, prescribing the source/mode of recruitment and qualifications, criteria of selection, evaluation of service records of the employees fall within the exclusive domain of the employer. What steps should be taken for improving efficiency of the administration is also the preserve of the employer. The power of judicial review can be exercised in such matters only if it is shown that the action of the employer is contrary to any constitutional or statutory provision or is patently arbitrary or is vitiated due to mala fides. The Court cannot sit in appeal over the judgment of the employer and ordain that a particular post be filled by direct recruitment or promotion or by transfer. The Court has no role in determining the methodology of recruitment or laying down the criteria of selection. It is also not open to the Court to make comparative evaluation of the merit of the candidates. The Court cannot suggest the manner in which the employer should structure or restructure the cadres for the purpose of improving efficiency of administration."

17. Proposals sent for creation of the post of Telephone Operator, Grade I, have fructified in 2004, and immediately thereafter, the petitioner has been accommodated in the sanctioned post. In the light of the above decisions, it is not open to him to contend that sanction should have been accorded in 2002 itself, and consequently, he is entitled for all benefits, including promotion to higher posts from 2002 onwards.

18. In view of the discussion and decisions, we do not find any infirmity or illegality in the order of the Central Administrative Tribunal, dated 15.09.2014, passed in O.A.No.458 of 2013. Hence, Writ Petition is dismissed. No costs. Consequently, connected Miscellaneous Petitions are closed.

Sd/-

Assistant Registrar(CS IV)

//True Copy//

Sub Assistant Registrar

skm
To

1. The Secretary,
Union of India,
Ministry of Defence,
Department of Defence Production,
New Delhi 110 001.
2. The Chairman,
Ordnance Factory Board,
No.10-A, S.K.Bose Road,
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+1cc to Mr.Paul & Paul, Advocates Sr.71230
+1cc to Mr.Venkataswamy Babu, Advocate Sr.71494

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