IN THE HIGH COURT OF JUDICATURE AT MADRAS

Dated : 29.03.2016

Coram

The Honourable Mr.Justice R.SUDHAKAR
and
The Honourable Mr.Justice S.VAIDYANATHAN

W.P.Nos.25694 and 27114 of 2013 and
M.P.Nos.1 of 2013

W.P.No.25694 of 2013

1 UNION OF INDIA [PETITIONERS]
REP. BY ITS SECRETARY
DEPARTMENT OF TELECOMMUNICATION
SANCHAR BHAVAN, NEW DELHI.

2 THE CHAIRMAN CUM MANAGING DIRECTOR
BHARAT SANCHAR NIGAM LTD.
BSNL BHAVAN JANPATH
NEW DELHI - 110 001.

3 THE CHIEF GENERAL MANAGER
SOUTHERN TELECOM PROJECTS
BSNL 25 GREENWAYS ROAD
RAJA ANNAMALAIPURAM CHENNAI.

4 THE CHIEF GENERAL MANAGER
(MAINTENANCE)
SOUTHERN TELECOM REGION
BSNL, II LINK ROAD GANAPATHY COLONY
THIRU-VI-KA NAGAR, GUINDY, CHENNAI.

5 THE CHIEF GENERAL MANAGER
BHARAT SANCHAR NIGAM LIMITED
TAMIL NADU CIRCLE 80 ANNA SALAI CHENNAI.

6 THE CHIEF GENERAL MANAGER
CHENNAI TELEPHONES
BSNL 78 PURASAWAKKAM HIGH ROAD CHENNAI.

Vs

1 T.EDWARD RAJ
2 K. DHANAVEL
3 ARAVINDALOCHANAN
4 P.VARADHARAJAN
5 A.ANANTHARAMAN
6 A. NALLATHAMBI

7 V.VISVESWARAN
8 K.ARIVUMANI
9 R. JAYABALAN
10 M.DEVARAJAN
11 U. MUTHUSAMY
12 C.KATHIRVELU
13 K.DUSHANDAN
14 L. NATARAJAN

15 THE CENTRAL ADMINISTRATIVE
TRIBUNAL REP. BY ITS REGISTRAR
HIGH COURT
CHENNAI - 104.

[RESPONDENTS]

W.P.No.27114 of 2013

1 THE UNION OF INDIA [PETITIONERS]
REP.BY ITS SECRETARY
DEPARTMENT OF TELECOMMUNICATIONS
SANCHAR BHAWAN NEW DELHI

2 THE CHAIRMAN AND MANAGING DIRECTOR
BHARAT SANCHAR NIGAM LIMITED
STATEMENT HOUSE NEW DELHI

3 THE CHIEF GENERAL MANAGER
BSNL CHENNAI TELEPHONES
NO.78 PURASAWALKAM HIGH ROAD CHENNAI

4 THE DEPUTY GENERAL MANAGER (ADMN.)
BSNL 89 MILLERS ROAD CHENNAI

Vs

1 T.S.VISWANATHAN
2 K.M.RAJKUMAR

3 THE REGISTRAR
CENTRAL ADMINISTRATIVE TRIBUNAL
CITY CIVIL COURT BUILDING CHENNAI-104

[RESPONDENTS]

Prayer: Writ Petitions filed under Article 226 of the Constitution of India for the issuance of a writ of certiorari calling for the orders passed in TA Nos.11 & 12 of 2010 dated 1.8.2012 by the Central Administrative Tribunal Madras Bench and quash the same.

For Petitioners in both WPs : Mr.S.Udayakumar, Standing Counsel

For Respondents: R1-14-W.P.No.25694/13 R1-2 - W.P.No.27114/13 : Mr.Karthik Mukundan

Tribunal : R15 (WP 25694/13)
R3 (WP 27114/13)

C O M M ON O R D E R

(Order of the Court was made by R.SUDHAKAR,J)

Since the issue involved in both the writ petitions is one and the same, both the writ petitions are taken up together for final disposal.

2. The writ petitions are filed challenging the common order of the Central Administrative Tribunal (hereinafter referred to as "the Tribunal") dated 01.08.2012 passed in Transferred Application Nos.11 and 12 of 2010.

3. The brief facts of the present issue for consideration are as follows:- The contesting respondents joined the Department of Posts and Telegraphs in the year 1975 as Engineering Supervisors, later re-designated as Junior Telecom Officers (in short "JTOs") in the Department of Telecommunications. With effect from 01.10.2000, Bharath Sanchar Nigam Limited (in short "BSNL") was formed as a body corporate. All the erstwhile staff of Department of Telecom in Groups "B", "C" and "D" became the employees of BSNL, pursuant to the option exercised by them on their absorption in BSNL and all the cadres of employees were fitted in correspondingly equivalent BSNL scales.

3.2 In order to encourage the lateral advancement of JTOs due to stagnation in promotion, the Government of India, Ministry of Communications, formulated a scheme to improve the service prospects of JTOs who have completed 12 years and above and a communication dated 26.06.1990 was issued in this regard providing the manner in which the scheme should be implemented, which reads as follows:-

> (i) The JTOs who have completed 12 years of service since the date of appointment in the cadre of Engineering Supervisor/JE/JTO as on 1.1.1990 and onwards will be placed in the higher scale of Rs.2000-60-2300-EB-75-3200-100-3500.

(ii) The scheme will take effect from 1.1.1990. In case of officials who have completed 12 years of service in the cadre of ES/JE/JTO before 1.1.1990, the placement in the higher scale of pay will take effect from 1.1.1990.

(iii) In case of ES/JE/JTOs who complete 12 years of service in the cadre after 1.1.1990, the lateral advancement will be given effect to from the day following the date of completion of 12 years of service.

(iv) Placement in the higher scale, as stipulated above, will be subject to fitness and vigilance clearance.

(v) On lateral placement in the scale of Rs.2000-3500/- under this scheme, pay will be fixed under the provisions of FR 22 I(a)(I) subject to the condition that, on promotion to the TES Group "B", the official will continue to draw pay in the same scale without re-fixation.

(vi) JTOs on placement in the higher scale under this scheme, will continue to perform the duties of JTOs.

(vii) The placement in the higher scale of Rs.2000-3500/- is non-functional basis and does not amount to Promotion. Reservation for SC/ST will therefore not apply in this case.

(viii) This scheme of lateral advancement is on the basis of matching savings. For lateral advancement of every 5 JTOs, one existing post of JTO will be brought under reduction. The matching savings will be made available by the cadre controlling authority in consultation with his IFA".

3.3 Similarly, the Junior Engineers (Civil and Electrical) (in short "JEs") of the same department of BSNL were given the benefit of the said scheme, whereby the JEs who have put in 5 years were given further benefits vide communication dated 09.05.1991, which reads as follows:-

"(i) The Junior Engineers (C/E) of P & T Civil Wing shall be initially appointed in the scale of pay of Rs.1400-40-1800-EB-50-2300 at the entry level. These Junior

Engineers (C/E) shall, on completion of 5 years service in the grade, be placed in the scale of pay of Rs.1640-60-2600-EB-75-2900 on the basis of seniority-cum-fitness. This higher grade shall not be treated as promotional grade but shall be a non-functional one and the benefit of FR 22(I)(a)(1) will not be admissible, while fixing the pay in the higher grade, as there shall be no change in the duties and responsibilities.

(ii) It has further been decided that the Junior Engineers (Civil/Electrical) of P&T Civil Wing who could not be promoted to the post of Asst. Engineers (C/E) in the pay scale of Rs.2000-60-2300-EB-75-3200-100-3500/- due to the non-availability of vacancies in the grade of Asst. Engineers shall be allowed the scale of Asst. Engineer, i.e., Rs.2,000-3500/- on a personal basis, after completion of 15 years of service in the grade computed from the date of entry in the basic grade of Rs.1400-2300/- on the basis of seniority-cum-fitness. As and when regular vacancies in the grade of Asst. Engineers (C/E) become available, the Junior Engineers (C/E) enjoying the personal promotion shall be adjusted against those vacancies, subject to observance of normal procedure. The benefit of fixation of pay under the provisions of FR 22(I)(a)((i) shall be allowed at the time of granting the personal scale of rs.2300-3500/-

3. The orders regarding placement in the scale of Rs.1640-2900 after 5 years of service will be effective from 1.1.1986 while those relating to placement in the pay scale of Rs.2000-3500 on personal basis after 15 years of service will be effective from 1.1.1991".

3.4 It is to be mentioned that both the JTOs and JEs are working in the same department in different wings. While they were performing their duties in their respective wings, the Government of India, Ministry of Personnel, Public Grievances and Pensions (Department of Personnel and Training), issued an Office Memorandum on the Assured Career Progression Scheme viz., ACP Scheme for Central Government Civilian Employees, which contains 15 conditions for the grant of the benefits of the ACP Scheme. Clause 5.1 and 13 of the said Office Memorandum, which are more relevant for deciding the issue, are extracted hereunder:-

> "5.1 Two financial upgradations under the ACP Scheme in the entire Government service career of an employee shall be counted against regular promotions (including in-situ promotion and fast-track promotion availed through limited departmental competitive examination) availed from the grade in which an employee was appointed as a direct recruit. This shall mean that two financial upgradations under the ACP Scheme shall be available only if no regular promotions during the prescribed periods (12 and 24 years) have been availed by an employee. If an employee has already got one regular promotion, he shall qualify for the second financial upgradation only on completion of 24 years of regular service under the ACP Scheme. In case two prior promotions on regular basis have already been received by an employee, no benefit under the ACP Scheme shall accrue to him;
>
> ...
>
> 13. Existing time bound promotion schemes, including in-situ promotion scheme, in various Ministries/Departments may, as per choice, continue to be operational for the concerned categories of employees. However, these schemes, shall not run concurrently with the ACP Scheme. The Administrative Ministry/Department not the employees shall have the option in the matter to choose between the two schemes i.e., existing time-bound promotion scheme or the ACP Scheme, for various categories of employees. However, in case of switchover from the existing time-bound promotion scheme of the ACP Scheme, all stipulations (viz., for promotion, redistribution of posts, upgradation involving higher functional duties, etc) made under the former (existing) scheme would cease to be operative. The ACP Scheme shall have to be adopted in its totality;".

3.5. The above stated Assured Career Progression Scheme was accepted by the Government of India, Department of Tele

Communication Services on 24.11.1999 and a Circular No.4-1/99-PAT dated 24.11.1999 was issued for implementation of the said Scheme to all Telecom Circles, Project Circles, Metro Districts etc., wherein, in paragraph No.8, it is stated as follows:-

> "8. The contents of para 5.1 Annexure 1 of DoP&T office memorandum dated August 9, 1999 should be strictly followed while giving financial upgradation to an employee. The Chief General Managers should ensure that the officials who have already availed regular promotion during the prescribed period (12 and 24 years) are not given the respective financial upgradation under the ACP Scheme. The regular promotions availed from the grade in which the employee was appointed as direct recruit shall be counted for this purpose".

3.6 The Junior Engineers (Civil and Electrical), after completion of the first five year of service, under the Time bound promotion scheme, on coming into force of the ACP Scheme on 9.8.1999, were granted the benefit of the ACP Scheme, consequent to the department concerned opting to give the benefit of the ACP Scheme to such of the employees who had not got the benefit of the Time bound upgradation in terms of clause 5.1 and 13 of the Office Memorandum dated 9.8.99.

3.7 Drawing strength from the same, the contesting respondents herein, by two representatives (contesting respondents in W.P.No.27114 of 2013) made requests for such an equitable relief on the ground that similarly placed employees were granted the benefit and that was denied by the order dated 02.03.2006 in No.AST/DE/ACP/MISC/4, which reads as follows:-

> "With reference to their representations cited under reference 2 above, the under mentioned TES Gr B officers of Executive Grade are informed that in DoT order cited under reference 1 above, ACP Scheme is implemented to the cadre of Group 'C' & 'D' which are not covered by OTBP Scheme. It is also stated that the cadres of JTO/SDE Telecom, which is covered by a time bound promotion scheme, wherein the eligible officer is placed in the next higher grade after 12 years of service, the existing scheme shall continue and therefore ACP scheme shall not be made applicable to JTO/SDE cadres. Hence, their request for promotion under ACP Scheme cannot be considered".

3.8 The said order dated 02.03.2006 was challenged before the Tribunal by the contesting respondents herein in T.A.Nos.11 and 12 of 2010 on the ground that similarly placed employees like JEs (Civil and Electrical), were given the benefit under the ACP Scheme, relying upon the order of the Ministry of Communication Telecom dated 09.05.1991, in and by which the JE (Civil and Electrical) wing were given the benefits under Time Bound Promotion Scheme.

3.9 The Tribunal, on considering the submissions made by the learned counsel on either side, by order dated 01.08.2012, allowed T.A.Nos.11 and 12 of 2010 by setting aside the order dated 02.03.2006, giving direction to consider the case of the contesting respondents herein for extending the benefits under ACP Scheme and to grant them the said benefit as extended to the similarly placed employees.

3.10. The operative portion of the said order dated 01.08.2012 passed in T.A.Nos.11 and 12 of 2010 reads as follows:-

> "8. Therefore, the contention of the respondents that the JTOs Telecom (Civil) and (Electrical) Wing are governed by separate service rules is not a convincing reason for denying the benefit under the ACP Scheme to the applicants and hence the orders of the respondents denying the benefit of the ACP is liable to be set aside. Accordingly, the impugned order No.AST/DE/ACP/MISC/4 dated 2.3.2006 is set aside. The respondents are directed to consider the case of the applicants for extending the benefits under ACP Scheme and to grant them the benefit of ACP as extended to the similarly placed employees of JTO (Civil) and JTO (Electrical) Wing if they are otherwise eligible under the scheme within a period of two months from the date of receipt of a copy of this order".

Aggrieved over the said order passed, the department has preferred these writ petitions.

4. We have heard the learned counsel on either side and perused the impugned order dated 02.03.2006, which was challenged before the Tribunal.

5. There is no dispute that in respect of two wings of the same department, the Government thought it fit to extend the ACP scheme with a rider that whenever the employees did not complete the tenure under the Time Bound Promotion

scheme, the employer can opt for ACP Scheme, the discretion, however, was vested with the Employer and not the employees, which is evident from clause 13 of the Office Memorandum dated 9.8.99.

6. The department's stand that the recruitment rules for the post of J.E. (Civil and Electrical) are different from J.T.O.(Telecom Engineering) and, therefore, they cannot be placed on the same platform was rejected by the Tribunal. The Tribunal also did not find favour with the department's stand that Clause 13 of the Office Memorandum dated 9.8.1999 can be made applicable to J.E. (Civil and Electrical) and not to J.T.O. (Telecom Engineering) because, the Tribunal was of the view that J.E. (Civil and Electrical) as well as J.T.O. (Telecom Engineering) were originally under the time bound scheme, but after coming into force of the Office Memorandum dated 9.8.1999, the ACP Scheme was extended to J.E.(Civil and Electrical) because the said department opted the same for the benefit of its employees.

7. On the finding of the Tribunal, on arbitrariness in applying the provisions of Office Memorandum dated 9.8.1999, we are unable to subscribe to this view of the Tribunal because the Office Memorandum dated 9.8.99, which granted ACP, more particularly clause 13, does not specify the nature of post occupied by one or other employee for extending the benefit of ACP. All that it deals withis in respect to Group C and D employees who can get the benefit of ACP Scheme as per Office Memorandum. However, the Administrative Ministry of department concerned has to choose between the two schemes. Therefore, the discretion vests with the employer concerned. In any event, the reason given by the appellant that the J.E. (Civil and Electrical) and JTO -Telecom Engineering are governed by different recruitment rules is irrelevant to the ACP scheme. Therefore, we hold that the employer has to apply his mind and choose when there is a request by the employee requesting the employer to opt for benefits under ACP scheme, if it would be acceptable to the employer and for the welfare of its employees.

8. At this juncture, it is useful to note that the Tribunal has taken note of the fact that the Administrative Department thought it fit to opt for the said scheme for the benefits to JEs (Civil and Electrical). They are employees of the other Wing of the same department. Therefore, the Administrative Department while exercising such discretion, should do so in a fair and equitable manner. This principle is highlighted in the decision of the Hon'ble Supreme Court in the case of Clariant International Ltd. and another vs. Securities and Exchange Board of India reported in (2004) 8 SCC 524, while dealing with Section 11 of the Securities and Exchange Board of India Act, 1992 and Regulation 44 of 1997, which confers discretionary jurisdiction on the Board held that the discretion must be a sound exercise in law. In

paragraph Nos.26 to 29 of the said decision, the Hon'ble Supreme Court has held as follows:-

"26. The Board, further, having a discretionary jurisdiction must exercise the same strictly in accordance with law and judiciously. Such discretion must be a sound exercise in law. The discretionary jurisdiction, it is well known, although may be of wide amplitude as the expression "as it deems fit" has been used but in view of the fact that civil consequences would ensue by reason thereof, the same must be exercised fairly and bona fide. The discretion so exercised is subject to appeal as also judicial review, and, thus, must also answer the test of reasonableness.

27. In Kruger v. Commonwealth of Australia it is stated:

"Moreover, when a discretionary power is statutorily conferred on a repository, the power must be exercised in a reasonably, for the legislature is taken to intend that the discretion be so exercised. Reasonableness can be determined only by reference to the community standards at the time of the exercise of the discretion and that must be taken to be the legislative intention...."

28. The discretionary jurisdiction has to be exercised keeping in view the purpose for which it is conferred, the object sought to be achieved and the reasons for granting such wide discretion.[See Narendra Singh vs. Chhotey Singh).

29. A discretionary jurisdiction, furthermore, must be exercised within the four corners of the statute [See Akshaibar Lal (Dr.) v. Vice Chancellor, Banaras Hindu University and also para 9-022 of de Smith, Woolf and Jowell: Judicial Review of Administrative Action, 5th Edn., p.445]". (Emphasis supplied)

9. From the above cited decision, it is clear that the option to choose a particular scheme vests with the employer. The discretion should be exercised fairly and bonafide, keeping in view the purpose for which it is conferred and the object sought to be achieved, i.e., in order to achieve the substantive object of the ACP Scheme. We therefore, hold that the direction of the Tribunal directing the authorities to extend the benefit at the request of the contesting

respondents herein may not be correct. To that extent, the department is justified in moving this Court. But, on the contrary, the direction of the Tribunal to grant the benefits of ACP as extended to the similarly placed employees of JE (Civil and Electrical) to the contesting respondents needs modification to fall in line with the Office Memorandum dated 09.08.1999 granting ACP, inasmuch as the Administrative Ministry of the department concerned shall take into consideration the object of the ACP Scheme and take a decision for and on behalf of the employees. It is for the department concerned to take into consideration the interest of the employees and decide as to whether ACP Scheme would be beneficial to them, keeping in mind their larger interest and exercise the discretion fairly and bonafide.

10. Accordingly, we direct the Department authorities to consider the request of the contesting respondents seeking the benefits under ACP Scheme, exercising its discretion if such scheme would be beneficial to the interest of the employees, in the light of what we have observed above keeping in mind clause 5.1 and 13 of the Office Memorandum dated 9.8.1999. Such exercise to be taken within a period of eight weeks from the date of receipt of a copy of this order.

The writ petitions stand ordered accordingly. No costs. Connected miscellaneous petitions are closed.

Sd/-
Assistant Registrar(CCC)

//True Copy//

Sub Assistant Registrar

rg
To

The Registrar
Central Administrative Tribunal
City Civil Court Buildings,
High Court Campus,
Chennai.

+2 ccs to Mr.S.Udayakumar, Advocate, sr.19916
+4 ccs to M/sMenan & Karthik, Mukundan & Neelakandan, Advocates, sr.19641 & 19642

W.P.Nos.25694 and 27114 of 2013

scd co
kra 22.04.2016