

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ **WRIT PETITION (CIVIL) No. 12192/2015**

% **Reserved on: 25th January, 2016**
Date of Decision: 10th May, 2016

UNION OF INDIA AND OTHERSPetitioners
Through Mr. Jaswinder Singh & Ms. Shipra Shukla,
Advocates along with Mr. Rajeshwar Paul, Director
(Law).

Versus

SANDIP KUMAR ROY AND OTHERSRespondents
Through Mr. Gyan Prakash & Mr. Padmesh Kataria,
Advocates for respondent No. 1.

CORAM:
HON'BLE MR. JUSTICE SANJIV KHANNA
HON'BLE MR. JUSTICE NAJMI WAZIRI

SANJIV KHANNA, J.

Union of India, through Director General, Geological Survey of India and the Secretary to Government of India, Department of Personnel and Training, have filed this writ petition assailing the order dated 13th October, 2014 passed by the Principal Bench of the Central Administrative Tribunal, New Delhi (Tribunal, for short) in OA No. 4260/2012.

2. The impugned order directs the petitioners to consider Sandip Kumar Roy for promotion to the post of Geologist (Senior) from the date his juniors were considered by the Departmental Promotion Committee (DPC,

for short) and promoted. Sandip Kumar Roy, if found suitable would be promoted and accorded all consequential benefits, except back wages.

3. The facts are:- (a) Sandip Kumar Roy was selected as a Geologist (Junior), Group A post in the Geological Survey of India. (b) The said examination/selection was conducted by the Union Public Service Commission (c) Sandip Kumar Roy was 25th in the order of merit in the select list published in October, 1999. (d) In the year 2000, appointment letters were issued to some of the selected candidates including those junior to Sandip Kumar Roy and many of them joined and were appointed as Geologist (Junior). (e) Some Assistant Geologists seeking promotion as Geologist (Junior) filed a petition before the Lucknow Bench of the Tribunal and by interim order dated 16th October, 2000 recruitment of the selectees was interjected and stayed (f) As a result, Sandip Kumar Roy could not be appointed and join as Geologist (Junior). (g) The stay order was vacated on 6th May, 2002 and Sandip Kumar Roy was issued appointment letter dated 15th May, 2002. (h) Sandip Kumar Roy joined the post of Geologist (Junior) on 13th August, 2002.

4. The Lucknow Bench of the Tribunal conscious and aware that their stay order had grave consequences and would have adversely affected candidates and promotees whose appointments were delayed, in their order dated 16th October, 2000, while disposing of the petition observed:-

“4. Consequent to the Tribunal’s order dated 16.10.2000, 8 direct recruits of 1998 and 33 of 1999 and 8 of 2000 could not be given promotion. Now the respondents have vide order dated 22.3.2002 promoted 52 Assistant Geologist to the post of Geologist (Junior). This list includes the four applicants of the

present O.A. The order dated 22.3.2002 however, proves that the promotion will take effect from date of assumption of charge of the post of Geologist (Junior) in the GSI by the officer concerned after communication of the order. As applicant now has been promoted there would be no bar to the respondents to give appointments to the direct recruits to the post of Geologists (Junior).

5. Learned counsel for the applicant however raised a grievance of seniority w.e.f. the availability of the vacancy with consequential benefits. As the applicants have now been promoted to the post of Geologist (Junior), it would be appropriate for the respondents to consider the question of seniority of the applicant as per extant rules on the subject and thereafter to pass an appropriate order. It would be open for the applicant in case of any grievance, approach this Tribunal again. The question of seniority therefore is left for decision by the appropriate authority. The applicants may therefore, individually make detailed representation to the appropriate authority with regard to their claim of seniority which would be decided by the appropriate authority within a reasonable period of time.

6. The OA is disposed of as above without any order as to costs.”

5. In the seniority list/gradation list of Geologist (Junior) issued on 1st July, 2005, Sandip Kumar Roy was allocated seniority at serial No. 112, which was in accord with his UPSC merit list ranking at serial No. 25. Thus, Sandip Kumar Roy had not suffered loss of seniority, which was protected.

6. As per the Geological Survey of India, including Exploration Wing (Class I and Class II Posts) Recruitment Rules 1967 (1967 Rules, for short), a Geologist (Junior) with five years' service in the grade rendered after

appointment thereto on regular basis was eligible for promotion as Geologist (Senior), Group A, senior time scale. In 2007, juniors to Sandip Kumar Roy on completion of five years in the grade of Geologist (Junior) became eligible for consideration and were promoted to the post of Geologist (Senior). Sandip Kumar Roy, having joined on 13th August, 2002, after the stay order passed by the Tribunal was vacated, had not completed five years of service in the grade of Geologist (Junior). Hence, Sandip Kumar Roy was not considered eligible as he was short of the qualifying period by a few months.

7. Subsequently, on 16th January, 2009, Sandip Kumar Roy was recommended by the Departmental Promotion Committee and promoted as Geologist (Senior). Sandip Kumar Roy thereafter learnt that he would not be given his original seniority and would rank junior to others promoted in 2007. Thus, Sandip Kumar Roy had lost his seniority and had become junior in the promotional post to his juniors in the grade of Geologist (Junior).

8. Aggrieved, Sandip Kumar Roy had filed OA No. 1259/2010, which was dismissed on the ground of limitation. This order was set aside by the Delhi High Court in Writ Petition (C) No. 3661/2011 by the order dated 26th May, 2011 and remanded for a fresh decision. Liberty was given to Sandip Kumar Roy to implead his juniors as parties in the OA.

9. The impugned order on the question of limitation has referred to the order passed by the petitioner dated 16th April, 2013, declining and refusing to restore the original seniority as per the seniority position in the grade of Geologist (Junior). In the aforesaid factual background, the Tribunal held

that the cause of action had partly arisen on 16th April, 2013, when Sandip Kumar Roy's representation for restoring seniority was rejected. The Tribunal has highlighted that Sandip Kumar Roy had approached the Tribunal in the year 2010, i.e., within one year of being promoted in the year 2009 and on being informed about the loss of seniority viz. his juniors in the grade of Geologist (Junior). To this extent, the impugned order is infallible and faultless.

10. In the meanwhile, 1967 Rules were repealed and by the notification dated 29th September, 2010, Ministry of Mines, Central Geological Survey Group A Rules, 2010 (2010 Rules, for short) were enacted. The relevant Rule 8 which relates to *inter se* seniority, reads as under:-

"Rule 8. Seniority- (1) The seniority of members of the Service appointed before the commencement of these rules, to any grade or duty post, shall be governed by their relative seniority in the respective grade or duty post immediately before the date of commencement of these rules:

Provided that if the seniority of any such member had not been determined on the said date, the same shall be determined on the basis of the rules as were applicable to such member before the commencement of these rules.

(2) The seniority of persons appointed to the Service, after the commencement of these rules, in any grade or duty post shall be determined in accordance with the provisions of these rules.

(3) The fixation of inter-se seniority between the direct recruits and the officers promoted to the Junior Time Scale shall be done on pro-rata basis in the ratio of three direct recruits against one promotee.

(4) Where juniors who have completed their qualifying or eligibility service are being considered for promotion, their seniors shall also be considered provided they are not short of the requisite qualifying or

eligibility service by more than half of such qualifying or eligibility service or two years, whichever is less, and have successfully completed their probation period for promotion to the next higher grade along with their juniors who have already completed such qualifying or eligibility service.

(5) In cases not covered by sub-rule (1) and sub-rule (2), the seniority shall be determined by the Controlling Authority in consultation with the Commission. "

Sub rule 1 to Rule 8 deals with inter se seniority of a member of service appointed before commencement of 2010 Rules to any grade or post. It stipulates that the relative seniority fixed before commencement of the 2010 Rules would be determinative. The proviso states that if seniority has not been determined, the same will be determined on the basis of the rules as were applicable to such members before the commencement of 2010 Rules. Sub rule 5 to Rule 8 stipulates that if a case is not covered by sub rule 1 or sub rule 2, the seniority shall be determined by the Controlling Authority in consultation with the Commission i.e. the Union Public Service Commission.

Seniority of a person appointed to service after commencement of the 2010 Rules is to be determined in accordance with the said Rules. Sub-Rule (4) to Rule 8 states that where juniors, who have completed their qualifying or eligibility service are considered for promotion, then their seniors shall also be considered for promotion provided they are not short of the requisite qualifying or eligibility service by more than half of such qualifying/eligibility service, or two years, whichever is less. Further, they

should have successfully completed their probation period for promotion to the next higher grade.

11. Note V to the Schedule-II of the 2010 Rules, reads:-

“Note V: Where juniors who have completed their qualifying "or eligibility service are being considered for promotion, their seniors shall also be considered provided they are not short of the requisite qualifying or eligibility service by more than half of such qualifying or eligibility service or two years, whichever is less, and have successfully completed their probation period for promotion to the next higher grade along with their juniors who have already completed such qualifying or eligibility service.”

The Schedule-II relates to recruitment, appointment and promotion to various posts.

Thus, Note-V specifically enlists that if juniors are found to be qualified/ eligible then their seniors shall also be considered, provided they are not short of the requisite qualifying/eligibility service by more than half of such qualification/eligibility service or two years, whichever is less. This is subject to another condition that the senior should have completed the probation period for the next higher grade along-with his juniors. Note V, is therefore similar to sub-rule 4 to Rule 8 of the 2010 Rules.

12. Some more definitions and provisions of 2010 Rules may be noticed. The expression ‘duty post’ means a post included in Schedule-I and the term 'grade' means the grade of a duty post specified in Column-2 of Schedule-I. Schedule-II stipulates that selection to the post of ‘Senior Geologist’ will be by way of promotion and it is a selection post. The

minimum qualification required is Geologist with four years regular service in the grade.

13. Incorporation of sub rule 4 to Rule 8 and Note 5 have a salutary objective. Seniority and eligibility for qualification though different concepts in service law, loss of seniority in the promotional post leads to angst and despondency. OM dated 23rd October, 1989 issued by Department of Personnel and Training had addressed this issue and had asked the departments to take remedial steps. The OM reads as under:-

“D.P.T. O.M. No. 14017/82/88-East (RR) Dated: 23.10.1989

Seniors completing probation also to be considered along with Juniors with requisite qualifying service.

The undersigned is directed to refer to para 3.1.2 of Part III in this Department's OM No. AB14017/12/87-Estt. RR, dated the 18th March, 1988, wherein it was suggested that a suitable “Note” may be inserted in the recruitment rules to the effect that seniors who have completed the probation may also be considered for promotion when their juniors who have completed the requisite service are being considered.

2. It has been brought to the notice of this Department that in spite of the instructions referred to above, the proposed “Note” has not been incorporated in the recruitment rules of a number of posts. This had led to difficulties at the time of making promotions when the seniors had either to be left out or relaxation of recruitment rules had to be restored to on each occasion. In order to avoid a situation of this kind, it is requested that all the Ministries/Departments may kindly examine their recruitment rules and insert a “Note” as referred to above wherever it is considered necessary.”

14. Undoubted the petitioners had delayed incorporation of the mandate prescribed in the OM in the Recruitment Rules, for the requisite amendment was made only in 2010. Should Sandip Kumar Roy suffer for this maladroitness and apathy? For several reasons noted below, we believe and accept that Sandip Kumar Roy should be accorded indulgence to undo injustice and the wrong he would suffer on account of fortuitous circumstances and for no fault of his.

15. The respondents have also filed before us a copy of the 1969 Rules. Post of Geologist Senior in the said Rules was a non selection post and the eligibility requirement mandated five years service in the grade of Geologist (Junior) after appointment on regular basis. It is therefore noticeable that 2010 Rules had made amendment with regard to qualifying period for promotion to the post of Geologist (Senior). Our attention was not drawn to any specific stipulation with regard to seniority etc. in the 1969 Rules. It is in the aforesaid context and Rule position that the question of seniority of Sandip Kumar Roy who was promoted as Geologist (Senior) in the year 2009, while his juniors were promoted to the same post in the year 2007, has to be examined. Further, Sandip Kumar Roy could not be promoted in 2007 on account of the fortuitous circumstance that appointments to the posts of Geologist (Junior) had become the subject matter of a restraint order passed by the Lucknow Bench of the Tribunal. Consequently some of the selectees were appointed and had joined regular service, but Sandip Kumar Roy, who had otherwise secured a higher rank in the order of merit could not join as a regular candidate. It is undisputed that Sandip Kumar Roy was not at fault and had no control over the said events.

16. Rule 13 of the 2010 Rules reads:-

Power to relax: - Where the Government is of the opinion that it is necessary or expedient to do so, it may, by an order, for reasons to be recorded in writing and in consultation with the Commission, relax any of the provisions of these rules with respect to any class or category of persons.

The government has the power to relax any of the provisions of the 2010 Rules where it is of the opinion that it is necessary and expedient to do so for the reasons to be recorded in writing and in consultation with the Commission in respect of any class or category of persons.

17. Equity and justice demand restoration of original seniority in favour of Sandip Kumar Roy. Rules, we perceive and believe cannot visualise, contemplate and deal with each and every portend. Unintended anomalous situations could mandate and justify use of power of relaxation with reference to known principles with perhaps a degree of innovativeness. The principle of 'Catching Up' was applied by the Supreme Court to deal with loss of seniority on accelerated promotions on account of reservation. The said principle could be applied in the present case for Sandip Kumar Roy was promoted in the year 2009, while his juniors were promoted in the year 2007 on account of fortuitous circumstances and the promotion was not denied on comparative merit. Till enactment of the 2010 Rules, under the 1969 Rules, the post of Geologist (Senior) was a non-selection post. Sandip Kumar Roy having secured higher marks was senior to those who were promoted earlier. Once five year service in the grade requirement was met, Sandip Kumar Roy was promoted immediately and on the very first

chance. Sandip Kumar Roy should be given the benefit of “catching up” maintaining his original seniority for he was not responsible and had no way contributed or was responsible for the delay in promotion. Restoration of seniority would be in consonance with the doctrine ‘*actus curiae neminem gravabit*’ , which means that act of the Court should not prejudice anyone. The court or Tribunal is under an obligation to undo the wrong done to a party by the act of the Court. In the present case, we have to recompense and ensure that Sandip Kumar Roy does not suffer on account of the stay order, so as to lose seniority to his juniors. This equitable doctrine was applied in ***Amarjeet Singh and Others vs. Devi Ratan and Others***, (2010) 1 SCC 417. The Supreme Court observed that the applicants therein were entitled to the relief purely on equitable grounds without going into other legal issues. The seniority list quashed by the High Court was directed to be restored. This case resolved an inter se seniority dispute for promotion to the post of the Superintendent of Excise under the UP Excise Service (Class II) Rules, 1970, which amended UP Assistant Excise Commissioners Service Rules, 1992 that stood amended with effect from 10th October, 1994 with the criteria for promotion being changed from merit to seniority subject to rejection of the unfit. It was noticed that some of the government employees had continued on a higher post for years together because of the interim orders and even after the dismissal of the petition. Others, it was observed, could not suffer for no fault of theirs or for that matter on account of the interim order passed by the Court.

In ***Amarjeet Singh*** (Supra), the Supreme Court has observed that law permits promotion with retrospective effect in exceptional circumstances,

for instance, in a case where there was some legal impediment in making promotion like intervention by the Court. Thus in exceptional cases like the present one, Courts do have the power to effect promotions retrospectively with effect from different dates notionally.

Similarly, in ***Balwant Singh Narwal and Ors. Vs. State of Haryana and Ors.*** (1998) 7 SCC 728, the selected candidates could not join because of the stay order and then adverse decisions. The Supreme Court reversed these decisions and upheld the selection and appointment and consequently the said selectee joined, albeit after considerable delay. Thereafter, question arose whether these selectees would retain their seniority viz. those who had joined in the interregnum when the litigation was pending. Contra contention was that the selection is recommendatory, and therefore, seniority should be counted from the date of actual appointment. Accepting that this was the general principle, the Supreme Court did not apply this precept for the selectees therein could not join on account of litigation and those who had been appointed in the interregnum were selected against subsequent vacancies. Relying on ***Surendra Narain Singh vs. State of Bihar*** (1998) 5 SCC 246, the dispute was decided, upholding the seniority of the candidates who could not earlier join in view of the stay order and adverse decisions. In ***Surendra Narain (Supra)***, the Supreme Court had upheld seniority of the candidates who were selected against the earlier vacancies but could not be appointed in the same batch due to technical difficulty. In ***Balwant Singh (Supra)***, the seniority was given, notwithstanding the fact that selectees had joined and were appointed subsequently.

18. At this stage, we would deal with the judgments relied upon by the petitioners. In ***Pawan Pratap Singh and Others vs. Reevan Singh and Others*** (2011) 3 SCC 267, the Supreme Court was dealing with the issue of inter se seniority and with reference to the rules had held that the seniority between a promotee and direct recruit would be determined from the date of substantive appointment. The year of vacancy was not relevant. In ***R. Prabha Devi and Others vs. Government of India*** (1988) 2 SCC 233 it was held that mere seniority does not entitle a person for promotion for he must meet eligibility conditions prescribed by the rule making authority and seniority cannot substitute/override eligibility in the matter of promotion to the next higher post. In this case, the Supreme Court was dealing with the quota-rota rule for fixing seniority and in the said context, it was observed that direct recruits though senior to the promotee were not eligible and therefore would not be considered for promotion if they did not fulfill the eligibility qualification of 8 years of approved service. This decision is not apposite, for the factual matrix of the present case is different and peculiar.

19. In ***Johri Singh vs. Sukh Pal Singh and Others***, AIR 1989 SC 2073, the Supreme Court accepted the principle that an act of the Court should not harass a litigant and it was/is an abundant duty of the Court that a person is not harmed by mistake of the Court. He should be restored in the position he would have occupied but for that mistake.

20. In ***Narender Chadha and Others vs. Union of India and Others*** (1986) 2 SCC 157 the Court referred to the power of the government to relax the rules to avoid unjust results. In the facts of the said case the

Supreme Court held that for the purpose of seniority, dates of selection would be ignored and for the direct recruits, seniority would be reckoned from the date from which their names were recommended by the Commission for appointment and the promotees would be granted seniority with effect from the date on which they commenced officiating continuously at the post prior to the selection.

21. In *Ashok Kumar Uppal And Ors. Vs. State of J & K & Ors.* (1998) 4 SCC 179, the Supreme Court observed that power to relax the recruitment rules or any other rules made by the State Government under Article 309 of the Constitution etc. is conferred to meet any emergent situation where injustice might have been caused or is likely to be caused to any individual or class of employees and where working of a rule might become impossible. The said power, in service jurisprudence and in administrative law is necessarily and should be conceded to the employer, particularly in the case of the Government, a model employer, who has to deal with hundreds of employees. The said judgment refers and quotes from earlier decisions and holds:

“27. In *State of Maharashtra v. Jagannath Achyut Karandikar* [1989 Supp (1) SCC 393 : 1989 SCC (L&S) 417] it was held as under: (SCC p. 398, para 12)

“The power to relax the conditions of the rules to avoid undue hardship in any case or class of cases cannot now be gainsaid. It would be, therefore, futile for the respondents to make any grievance.”

28. In *J.C. Yadav v. State of Haryana* [(1990) 2 SCC 189 : 1990 SCC (L&S) 218], it was held as under: (SCC pp. 194-95, para 6)

“The relaxation of the Rules may be to the extent the State Government may consider necessary for dealing with a particular situation in a just and equitable manner. The scope of Rule is wide enough to confer power on the State Government to relax the requirement of Rules in respect of an individual or class of individuals to the extent it may consider necessary for dealing with the case in a just and equitable manner. The power of relaxation is generally contained in the Rules with a view to mitigate undue hardship or to meet a particular situation. Many a time strict application of service rules create a situation where a particular individual or a set of individuals may suffer undue hardship and further there may be a situation where requisite qualified persons may not be available for appointment to the service. In such a situation the Government has power to relax Requirement of Rules. The State Government may in exercise of its powers issue a general order relaxing any particular rule with a view to avail the services of requisite officers. The relaxation even if granted in a general manner would ensure to the benefit of individual officers.”

29. This decision was followed in *Sandeep Kumar Sharma v. State of Punjab* [(1997) 10 SCC 298 : 1997 SCC (L&S) 1682] in which Hon'ble Punchhi, J. (as His Lordship then was), observed as under: (SCC p. 304, para 14)

“The power of relaxation even if generally included in the service rules could either be for the purpose of mitigating hardships or to meet special and deserving situations. Such rule must be construed liberally, according to the learned Judges. Of course arbitrary exercise of such power must be guarded against. But a narrow construction is likely to deny benefit to the really deserving cases. We too are of the view that the rule of relaxation must get a pragmatic construction so as to achieve effective implementation of a good policy of the Government.”

30. In view of the above, the Government can exercise the power to relax the Rules in all those cases in which hardship is caused in the implementation of those Rules to meet a particular situation or where injustice has been caused to either individual employee or class of employees. Of course, this power cannot be exercised capriciously or arbitrarily to give undue advantage or favour to an individual employee.”

22. We are conscious and aware that Courts and Tribunals do not have the power to issue directions to make appointments by way of granting relaxation of eligibility or in contravention thereof, as held in *State of M.P. Vs. Dharam Bir* (1998) 6 SCC 165 and *State of Gujarat and Ors. Vs. Arvindkumar T. Tiwari and Anr.* (2012) 9 SCC 545 and also that the power to relax should never be exercised in routine. Nevertheless, the facts of the present case are glaring and painfully reflect the necessity and need for the Government to consider and nullify hardship and injustice, which is palpable and apparent. Exercise of this power in the present case would be in furtherance of Article 14 and 16 of the Constitution. Rules and adherence thereto, ensures uniformity, transparency and curtails arbitrariness. Yet, at times, they may require relaxation, for peculiar and unattended harm and injustice must be corrected and not perpetuated. Justice and fair play is always the motive and objective when executive power is exercised. We perceive and believe that the petitioner, i.e. the Government, is not at variance and equally concerned that none of their employees should be dealt with arbitrarily so as to cause injustice and sufferance.

23. In light of the above, while accepting the writ petition, we would be failing as a Constitutional Court by not asking the Government to consider

exercise of power of relaxation in terms of Rule 13 of 2010 Rules read with the 1969 Rules. We hope and trust that the said consideration would be undertaken expeditiously and within four months from the date a copy of this order is received. The writ petition is accordingly disposed of. In the facts of the present case, there is no order as to costs.

(SANJIV KHANNA)
JUDGE

(NAJMI WAZIRI)
JUDGE

May 10th, 2016
VKR/NA/ssn

