

(2013) 07 KL CK 0106

In the High Court Of Kerala

Case No : O.P (CAT) No. 3019 of 2011, O.P (CAT) 2941 of 2011, W.P. (C) No. 5406 of 2010 and W.P. (C) 26226 of 2010

K.S. Hegde and Ramesh Chandra Khuntia

APPELLANT

Vs

Union of India and Others

RESPONDENT

Date of Decision : 01-07-2013

Acts Referred:

Central Administrative Tribunal (Procedure) Rules, 1987 — Rule 17

Citation : (2013) 07 KL CK 0106

Hon'ble Judges : Manjula Chellur, C.J;K. Vinod Chandran, J

Bench : Division Bench

Advocate : M.R. Rajendran Nair, Sri. M.R. Hariraj, Sri. Suraj S., Sri. P.A. Kumaran and Sri. Nirmal V. Nair, for the Appellant; P. Parameswaran Nair, ASG of India, by R1, Sri. T.P.M. Ibrahim Khan, Asst. S.G. of India, Smt. Jebi Mather Hisham, CGC by R1, Sri. V.V. Suresh, SC, BSNL (Bharat Sanchar N.), Sri. Mathews K. Philip, SC, BSNL, by R2 and 3, Sri. S. Radhakrishnan, Sri. S. Raj Mohan, by R4-R6, R8, R9, R11, R13, R14, Sri. K.R.B. Kaimal (Sr.), Sri. B. Unnikrishna Kaimal and Sri. T. Issac, by R-12, for the Respondent

Final Decision : Dismissed

Judgement

K. Vinod Chandran, J.—The essential controversy in the above cases is with respect to the fixation of seniority in the cadre of Assistant Engineers coming within the Telecom Junior Engineering Services (Group B Posts). All the parties in the above cases were promoted from the cadre of Junior Engineers re-designated as Junior Telecom Officers and were recruited to the post of Assistant Engineers as per the Telecom Junior Engineering Services (Group B posts) Recruitment Rules, 1981, as amended in 1986 and 1987. The Central Recruitment Rules along with the amendments are produced as Ext. P1 in OP (CAT) 3019/2011; which is taken as the leading case; the documents in which are referred to by us in this judgment. The promotions were through two streams, from one source, as per Ext. P1. One, based on seniority and the other on merit. As per Ext. P1, a combined examination consisting of two parts viz: qualifying and competitive

examinations for promotion is to be held in every calendar year. 66%(rd) promotions are to be made by a duly constituted Departmental Promotion Committee (DPC) from the officials who have qualified in the Departmental Qualifying Examinations (DQE) and the balance 33%() based on relative merit in the limited departmental competitive examination (LDCE). Petitioners in O.P (CAT) Nos. 3019/2011 and 2941/2011 are among the 147 officers who were selected on the basis of merit in the LDCE conducted in the year 2003; pursuant to an order of the Central Administrative Tribunal, Cochin Bench and interim orders passed by this Court in the writ petition filed against the said order. Respondents are the Union of India, Bharat Sanchar Nigam Limited and the officers who had cleared the DQE and were promoted on the basis of the same even prior to the conduct of the aforementioned examination in 2003.

2. WP (C) No. 5406 of 2010 is filed by two persons, who, are included in the 147 officers who were meritorious in the LDCE; challenging the original order of the CAT in O.A. No. 86 of 2009. W.P. (C) No. 26226/2010 is filed by the BSNL, also, against the original order in O.A. No. 86 of 2009. The petitioners in the Original Petitions (CAT) are the LDCE promotees, and are aggrieved by the rejection of their review applications filed against the order of the Central Administrative Tribunal which overturned the seniority determined by the BSNL.

3. For better understanding, a brief history of the litigation is necessary. There were certain disputes pending with respect to the inter-se seniority of the officers, promoted as per Ext. P1 when the Telecommunication Engineering Service (Group B posts) Recruitment Rules, 1996 was promulgated; which effectively abolished the qualifying test for such promotion. The new rules were published on 27.7.1996 and the SLP pending before the Supreme Court was disposed of, on the submission of the Union of India, that the vacancies which were existing till the new rules came into force would be filled, in accordance with the rules which were in force prior to the new Rules, i.e., in accordance with Ext. P1.

The said order of the Hon"ble Supreme Court is produced as Ext. P2. As per Ext. P1, DQE and LDCE were to be conducted in a consolidated manner, every calendar year, and those qualified in DQE were, according to their seniority, promoted in the rd quota reserved in that respect. Those officers who cleared the DQE and also became successful in the LDCE were promoted in accordance with their merit to the vacancies set apart to them being 1/3rd of the total vacancies. The inter-se seniority was also fixed in the ratio of 2:1 with the officers in the 2/3rd quota being accommodated in the first two vacancies and then, one officer from the merit quota and so on and so forth.

4. An issue arose with respect to the seniority in the years 1983, 1984 and 1985 when a combined examination was held in 1986 to fill up the vacancies for the said years. The essence of the dispute was that the LDCE candidates claimed that they are to be accommodated in the respective years in which the 1/3rd vacancies fell due, while officers who cleared the DQE (seniority based) claimed

that there cannot be any carry over of vacancies as per Clause 2(ii) of Appendix III of the Recruitment Rules. By Ext. P3, the Tribunal found that the said Clause provided that no competitive list will be carried over to the next selection, meaning persons who were meritorious in the competitive examination of an year and who could not be accommodated for want of vacancies would not be entitled to seek appointment or preference in the next year on the basis of their position in the previous years competitive examinations. However, the Tribunal held that there cannot be any automatic lapse of the 1/3rd quota meant for the competitive officers for a particular year merely for reason of inadequacy of number of competitive officers in that year. Necessary directions were also issued in this respect.

5. While so, from the year 1990, as a matter of fact, there were number of candidates who cleared the qualifying examinations and could not be accommodated in the promotion post due to want of vacancies. Hence, the official respondents suspended the conduct of the LDCE till such officers who had cleared the qualifying examinations were accommodated. From 1992 the DQE was also not conducted since the new rules were in the anvil. The entire vacancies in the cadre of Assistant Engineer's O.P. (CAT)3019/2011 and connected were filled up by officers who had cleared the DQE.

This, gave rise to a challenge by certain officers in the Kerala Circle of the Telecommunication Department; which was the employer of the party respondents before the establishment of the BSNL. The challenge was for reason of being denied the chance for accelerated promotion by way of DQE and LDCE; which remained suspended. The aforementioned officers challenged the suspension of the combined examinations, the adhoc promotion made up to the year 1996 and the attempt of the official respondents to make promotions in accordance with the new Rules promulgated in 1996. They relied on Ext. P2 to contend that the Department itself had conceded before the Supreme Court that, prior to 1996, i.e., for the period preceding the promulgation of the new rules; promotions will be conducted only in accordance with the earlier rules, i.e., Ext. P1.

6. Considering the issues raised, the Tribunal held that the Department was incompetent to take a decision cancelling the conduct of the combined examinations for two reasons, namely, that the rd set apart for the merit based candidates qualifying in the LDCE were not filled up and also for the reason that the Scheduled Caste/Scheduled Tribe candidates for filling up the vacancies were not identified. The Tribunal, hence, directed the Department to conduct the examination to fill up the vacancies prior to 1996. The official respondent challenged Ext. P4 order passed by the Central Administrative Tribunal, Ernakulam Bench in O.A. No. 1497/1996 and connected cases, before this Court in O.P. No. 37134/2001. The entire controversy now before us, starts with the order passed in O.A. No. 1497/96, i.e., Ext. P4.

7. Pursuant to the order of the CAT and the interim orders passed in the original

petition filed before this Court, the official respondents came out with Ext. P5 notification calling for candidates to appear for the Departmental qualifying-cum-competitive examination (DQE & LDCE) to be held in April 1999 as per Ext. P1 Rules. However, by paragraph 5 of the notification, the DQE was confined to Scheduled Castes/Scheduled Tribes communities and the LDCE was kept open for all. This was on the reasoning that the identification of SC/ST candidates to the promoted posts in the rd and rd quota can be effected only by conduct of the DQE. Considering the huge backlog with respect to the qualified candidates in the seniority stream being not promoted for want of vacancies; none from unreserved communities were permitted to appear for DQE, but those who were already qualified were permitted to appear for the LDCE. This, again, created resentment among officers who had not cleared the DQE and could not even appear for the examination due to cancellation of the same for a number of years. This gave rise to another litigation in O.A. No. 91/99 which concluded by Ext. P6; following which Ext. P7 order was also passed in another O.A., both by the Central Administrative Tribunal, Ernakulam Bench. Hence, the special supplementary qualifying-cum-competitive examination in continuation of the one already conducted was directed to be held for all.

8. By Ext. P10 notification, special supplementary departmental qualifying-cum-competitive examination was scheduled and applications were called for, however, on the very same terms and conditions contained in the earlier notification (Ext. P5) dated 6.11.1998. In the examination so conducted, i.e., the original examination conducted as per Ext. P5 and the supplementary examination as per Ext. P10, a common list was drawn up wherein none of the parties from the Kerala Circle who appeared for the LDCE succeeded. 147 persons came out qualified and meritorious in the LDCE and obviously, there were sufficient number of vacancies in the 1/3rd quota to accommodate them.

9. The Original Petition, filed by the department against the order of CAT, the interim order in which facilitated the conduct of the examination, was still pending. Since none of the party respondents in the said original petition had a valid claim to continue prosecuting the same for reason of they having not cleared the competitive examination, the original petition for all purposes would have stood dismissed as infructuous. However, one of the candidates who was among the 147 merit based candidates impleaded himself in the original petition and sought for a direction to consider him for promotion on the basis of the ranking obtained by him in the LDCE. Hence, this Court by Ext. P15 order directed promotions to be made against the rd quota on the basis of the results of the examinations conducted. The original petition itself was disposed of directing publication of final orders, on assignment of vacancies to the incumbents promoted as per the rank list prepared. That was carried out.

10. The first petitioner in WP (C) No. 5406/2010, then, approached this Court with a contempt; being unsatisfied with the above seniority assigned, which was disposed of by Ext. P20, holding that there is no contempt and relegating the

petitioner to take appropriate remedies before the appropriate forum if he is aggrieved by the assignment of seniority.

11. Purportedly, taking cover under Ext. P20 order in the Contempt Case, the 147 merit based candidates approached the BSNL which recast the seniority as sought for by the merit based candidates. Effectively, the merit based candidates were sought to be accommodated in the vacancies arising in the rd quota from the year 1990 onwards. This was on the premise that the promotions made filling up all the vacancies in the higher cadre were made from the seniority based candidates who had cleared the DQE and that as against the rd quota, the appointments/promotions made were only adhoc. The entire seniority list was recast and though the list originally published and also that recast have been produced herein, we are not expected to go into the individual seniority of persons shown therein. The dispute boils down to whether the seniority prior to 1994-95 could be upset. While the merit based candidates" contend for the position that the seniority has to be re-fixed right from the year in which the examination was sought to be cancelled, the seniority based candidates maintain that the examination conducted were only for the vacancies from 1994-95 up to 22.7.1996, i.e., for three years, 1994-95, 1995-96 and 1996-97.

12. The recast seniority was challenged by certain seniority based candidates again before the Central Administrative Tribunal, Ernakulam Bench and the Tribunal set aside the recast list by the impugned order dated 5.2.2010 in O.A. No. 86/2009. Against the order in O.A. No. 86/2009 two writ petitions were filed, one, by the BSNL, and the other by two merit based O.P. (CAT)3019/2011 and connected candidates. Some other candidates among the 147 merit based candidates filed two set of review applications before the Central Administrative Tribunal, Ernakulam Bench which was also rejected by Ext. P39 order, which is impugned in the OP's (CAT). We have heard Sri. M.R. Rajendran Nair, learned Senior Counsel in W.P. (C) No. 5406/2010 and Sri Hariraj, learned counsel for the petitioners in O.P (CAT) 3019/2011, Sri. Aravindakshan Pillai for petitioners in OP (CAT) No. 2941/2011, Sri. V.V. Suresh, counsel appearing for BSNL, Sri. K.R.B. Kaimal, learned senior counsel and Sri. S. Radhakrishnan for respective contesting respondents as also Sri. P. Parameswaran Nair, learned Additional Solicitor General for Union of India.

13. The petitioners in W.P. (C) No. 5406 of 2010 maintain that the order of the Central Administrative Tribunal in O.A. No. 86/09 is vitiated for reason only of non-impleadment of affected parties, viz: merit based candidates, even in a representative capacity and the same is to be set aside on that short ground. They urge for a remand to the CAT with consequential direction to implead all the necessary parties and proceed with the adjudication. The learned senior counsel Sri. M.R. Rajendran Nair asserts that the petitioners are aggrieved by the denial of hearing by the original court, and necessarily there should be a remand and this Court cannot arrogate to itself the powers available to the CAT. To further this contention, he places reliance on State of Uttaranchal and Another Vs.

Madan Mohan Joshi and Others, , North Delhi Power Limited Vs. Govt. of National Capital Territory of Delhi and Others, , State of Assam Vs. Union of India (UOI) and Others, and Vijay Kumar Kaul and Others Vs. Union of India (UOI) and Others, .

14. The review applicants before the Central Administrative Tribunal, i.e., the petitioners in the Original Petitions (CAT), while supporting the above stand would also argue on merits canvassing the claims raised by the merit based candidates. The BSNL, has filed the writ petition, in which we find quiet contrary stances having been taken. We notice that even at the earlier stage, in Ext. P3 order, the Tribunal had expressed its anguish in the unfortunate circumstance of the Department revealing itself to be vulnerable to the pressures from the lobby of the qualifying officers. The writ petition would only show that the official respondent is still so, but, there is shift in the vulnerability; tilting, in favour of the competitive candidates. We shall come to that later, after resolving the preliminary issue.

15. We have to first resolve the preliminary objection raised by the learned senior counsel Sri. M.R. Rajendran Nair. We notice that the petitioners in W.P. (C) No. 5406/2010 and OP (CAT) 1319/2011 were filed through the same firm of advocates. When the petitioners, two in number, in W.P. (C) 5406/2010, stick to their position and challenge the order in OA 86/2009 as being bad for non-joinder of necessary parties, some others; totalling 54 (O.P (CAT) No. 1319/2011) of the merit based candidates approached the Central Administrative Tribunal with the review application. Some other merit based candidates too, totalling 26, also approached the Central Administrative Tribunal, by way of a review, the rejection of which is impugned in OP (CAT) No. 2941/2011.

16. We have to remind ourselves, some more are waiting in the wings, watching the proceedings, to jump on at the appropriate time. We cannot, but, record our deep anguish and displeasure at such conduct. We say this, because, the matter has been raised in various Benches of the Central Administrative Tribunal in Chandigarh, Cuttack, Calcutta and the Principal Bench with varying results. We only notice the proceedings pending before the Principal Bench (Judicial I) Delhi of the Central Administrative Tribunal, in O.A. 2126/2009 wherein all the 147 merit based candidates are stated to be parties. We have been taken through the order of the Principal Bench dated 21.9.2011 wherein the proceedings pending before the various Benches were noticed, while considering the application for reference to a larger Bench. The Principal Bench has referred to OA No. 86/2009 which challenged the seniority of the 147 persons as also the stay order of this Court dated 18.2.2010. The Principal Bench in paragraph 11 held so:

Contention raised by the counsel for the respondents before us is that since two contradictory views have been expressed by different Benches of the Tribunal, namely, Ernakulam Bench and Chandigarh Bench, the matter should be referred to the Full Bench. We, however, of the opinion that even if the matter is referred to the Full Bench, no purpose would be served because ultimately this very issue

is pending before the Hon"ble High Court of Kerala. Once the Hon"ble High Court of Kerala gives its view, it would be binding not only on the parties but also on the Tribunal unless, it is upset by the Hon"ble Supreme Court or by some other High Court in some other proceedings. At that time the matter can be finally resolved.

17. Hence, none can claim ignorance about the pendency of the instant proceeding before this Court. The petitioners in W.P. (C) No. 5406/2010, and those in OP (CAT) as also the balance among the 147 merit based candidates have one and the same plea. While some refused to approach the Central Administrative Tribunal by a review and claimed the original order to be vitiated for reason of affected parties not being in the party array, some others approached the CAT with a review and some more deliberately stand away from participating. This is what is termed generally and particularly in legal parlance as "sitting on the fence" which cannot be countenanced by any court and has to be deprecated in the strongest terms. It only amounts to distortion of the adjudicatory process.

18. We also have to notice that it is not as if the Central Administrative Tribunal is the fact finding authority and High Court is exercising its revisory jurisdiction. The Central Administrative Tribunal and this Court is exercising the powers of judicial review and are conferred with the very same powers and fettered by similar restrains. The Constitution Bench in L. Chandra Kumar Vs. Union of India and others, held that the Tribunals were not substitutes of the High Court, but their role was only supplemental and acts as the Courts of first instance in respect of areas of law for which they have been constituted. (Para 93) This Court is not sitting in revision from orders of the fact finding authorities to contend that this Court is arrogating to itself the powers available to the original authority.

19. We notice here, the decisions cited by the learned senior counsel. Madan Mohan Joshi (supra) differed from A. Janardhana Vs. Union of India (UOI) and Others, and relied on Prabodh Verma and Others Vs. State of Uttar Pradesh and Others, to remand the matter so that at least some of the persons affected may be impleaded in a representative capacity. In North Delhi Power Ltd. (Supra), though the appellant was not a party before the learned Single Judge, the Division Bench in extenso considered the contentions raised before it. The Supreme Court while noticing that it would have been in the fitness of things for the Division Bench to have remanded the matter; considering the fact that the issues were thrashed out minutely, it was held that no prejudice was caused to the appellant in the Division Bench itself having considered the issue. State of Assam (Supra) is a case in which the Union of India while disclaiming liability to certain employees, who according to them were employed by the State; failed to implead the State in the appeal filed by them. Vijay Kumar Kaul (Supra) also only affirmed the principle of Prabodh Verma (supra); that when there is a challenge against selection, at last some of the successful candidates, should be

impleaded at least in a representative capacity. In the instant case, though originally there were none impleaded from the merit based 147; majority of them were before the Tribunal in review and their contentions ventilated and considered.

20. What would be more apposite here, is the decision reported in *Rajeev Kumar and Another Vs. Hemraj Singh Chauhan and Others*, placed before us by the learned Senior Counsel Sri. K.R.B. Kaimal. There the appellants were never before the CAT and impleaded themselves as intervenors before the High Court. They were permitted to file affidavits and were heard by the High Court and were before the Supreme Court in appeal from the judgment of the High Court. It was held so in paragraph 14.

14. The grievances of the appellants in this appeal are that they were not made parties in proceedings before the Tribunal. But in the impleadment application filed before the High Court it was not averred by them they were not aware of the pendency of the proceedings before the Tribunal. Rather from the averments made in the impleadment petition it appears that they were aware of the pendency of the proceedings before the Tribunal. It was therefore, open for them to approach the Tribunal with their grievances. Not having done so, they cannot, in view of the clear law laid down by the Constitution Bench of this Court in *L. Chandra Kumar*, approach the High Court and treat it as the court of first instance in respect of their grievances by "overlooking the jurisdiction of the Tribunal". CAT also has the jurisdiction of review under Rule 17 of the Central Administrative Tribunal (Procedure) Rules, 1987. So, it cannot be said that the appellants were without any remedy.

21. A corollary can be drawn in the case of the two petitioners who rested contend, without approaching the Tribunal with a review, and the persons who still "sit-on-the-fence". They consciously refused to participate in the proceedings before the Tribunal, though they were aware of the review before the Tribunal. Here, they insist for a remand on the ground that they could not ventilate their grievance before the Court of first instance; which according to us was due to their conscious and deliberate inaction.

They also caution us on still others among the 147, who are yet to be brought here. They too consciously and deliberately kept themselves away. Looking at the vast implication as also the need to give a quietus to the issue; it is to be noticed that the 147 merit based candidates were substantially represented before the Tribunal in the review and also herein. Those who are not in the party array cannot have any other contention and on that indubitable perception, we proceed to deal with the issue laid bare before us by the original order of the Tribunal and the order in review application.

22. In resolving the issue, we have to notice the genesis, which is Ext. P4 order. That supplies resolution of issues; to which we have to fall back upon in the background of Ext. P2 order of the Hon'ble Supreme Court. Ext. P2 order of the

Supreme Court records the submission of the counsel of the Union of India that the vacancies which were existing till the new rules coming into force would be filled up in accordance with the rules which were in force prior to the new rules. What are the existing vacancies contemplated by the Hon'ble Supreme Court and does it relate to the quota of 2:1 insisted upon by Ext. P1 rules and whether recasting of seniority has to be done from the year in which the combined examination was discontinued and the qualifying candidates were promoted to the vacancies available in the higher cadre, are the questions arising herein.

23. The controversy arising in the above cases is the ascertainment of seniority of 147 merit based candidates who have proved their merit in the LDCE as against the candidates who have been promoted on the basis of their qualifying in the DQE held by the department. As we have noticed earlier, the department conducts a comprehensive test in two stages being one qualifying and the other competitive. The ratio of qualified candidates and competitive candidates are in the ratio of 2:1 starting with those officers selected by reason of their qualifying in the test and then, by persons who stood high in the rank list of competitive candidates.

24. The contention of the learned counsel appearing for the petitioners herein are that earlier to 1996, the entire vacancies in the promotion post being filled up by qualifying candidates, those persons appointed to the vacancies reserved for a competitive candidate (rd) should be pushed lower down to be accommodated only in the quota available for the qualifying candidates. There being no examination itself held for a certain period, the vacancies of competitive candidates which stood vacant as such, should be filled up by these 147 candidates; in the vacancies of the respective years. To buttress their contention they rely on a number of decisions of the Hon'ble Supreme Court namely, Govind Dattatray Kelkar and Others Vs. Chief Controller of Imports and Exports and Others, , P.S. Mahal and Others Vs. Union of India (UOI) and Others, , M. Subba Reddy and Another Vs. A.P. State Road Transport Corporation and Others, , Arvinder Singh Bains Vs. State of Punjab and Others, and Union of India (UOI) and Others Vs. N.R. Parmar and Others etc. etc., .

25. A Constitution Bench in Govind Dattatray (supra) considered the question of seniority wherein appointments to a particular post was in the ratio of 25%:75% for departmental promotees and direct recruits respectively. After accommodating the persons who were appointed before November 30, 1955, there was 76 posts available for recruitment and the agreed formula worked out as 19 posts to the departmental candidates and 57 for the direct recruits. Departmental candidates who were below 19 posts set apart for them, and who were promoted to the post and continued for long periods were agitating their pushing down in the seniority; placing direct recruits appointed to the 75% of the agreed formula above them. The doctrine of equality in the matter of appointment and promotion espoused by the departmental candidates was negated on the ground that the concept of equality in the matter of promotion

can be predicated only when the promotees are drawn from the same source. Here it was specifically noticed that the departmental candidates who were placed below the direct recruits were appointed only on an adhoc basis pending selection by the Union Public Service Commission. The appointment being made on an adhoc basis without consulting the UPSC; it was held that the direct recruits cannot be said to have stolen a march over the departmental candidates since seniority was assigned only as per the quota provided for each of the candidates and the appointments made in addition to the quota for departmental candidates were adhoc.

26. In P.S. Mahal and others (supra) seniority in the promotion post of Executive Engineers made from two sources of Assistant Executive Engineers and Assistant Engineers was the bone of contention. In an earlier litigation, the Supreme Court had held that the seniority in the grade of EEs was liable to be fixed on the basis of length of continuous Officiation in that grade and that the quota rule was to be applied at the stage of initial promotion in officiating capacity to the grade of EEs and not at the stage of confirmation. Though the inter-se seniority was determined in accordance with the decision; later, there was carrying forward of vacancies and adjustment of Assistant Executive Engineers en-bloc above the Assistant Engineer promoted regularly within their quota, this was the basis of challenge and the decision was rendered on the basis of the earlier decision of the Supreme Court. This decision and N.R. Parmar and others (supra) decided on the basis of a number of office memoranda and the rules laid down therein cannot have any general application.

27. In M. Subba Reddy as also Arvindar Singh Beg (supra) again the issue was with respect to inter-se seniority of direct recruits and promotees. In the former three Judge Bench, by majority judgment held that the promotees, notwithstanding that they were regularised before the selection of direct recruits, could not get seniority over the direct recruits merely because inaction in making recruitment or imposition of ban on direct recruitment did not mean that the quota had broken down. The latter decision considered the rule wherein the seniority of officers appointed to the service was to be determined "in accordance with the order of appointment to their service". The learned Judges of the Supreme Court drawing a distinction between the promotion in accordance with the order of their appointment and "in accordance with the date of their appointment" found that the selection process of promotees was shorter compared to that of direct recruits. The promotees by getting appointment orders ahead of direct recruits having enjoyed the perks of higher stage earlier on cannot by reason of that alone result in further injustice to direct recruits by relegating them in the matter of seniority.

28. We have to notice that all the above cited decisions dealt with appointment from two different sources. In the instant case, the appointment is from the very same source. But a comprehensive combined test called qualifying-cum-competitive examination consisting of two parts namely, qualifying and

competitive was held to promote persons from the very same source but applying different yardsticks. While mere qualification entitles candidates to be posted against the first two vacancies in the higher cadre, the 3rd vacancy and every 3rd vacancy thereafter should go to those who stand higher in the rank obtained in the competitive examination. What led to the present controversy is the suspension of the conduct of examination from the year 1991 since there was a vast backlog of qualified candidates who could not be accommodated in the promotion post by reason of shortage of vacancies. This suspension of examinations resulted in a challenge being made by certain officers in the Kerala Circle of the Telecommunication Department, culminating in Ext. P4 judgment dated 1.5.1998.

29. It is to be specifically noticed that none of the 147 LDCE candidates challenged the action of the respondent department, the then employer, in suspending the examination as also accommodating the qualified candidates in the promotion posts. Admittedly, none of the petitioners who successfully challenged the said suspension of examination, were successful in the LDCE held pursuant to Ext. P4.

However, in any event, Ext. P4 would enure to all the employees who had competed in the examination held pursuant thereto. Hence, what is to be considered is the ramifications emanating from Ext. P4 decision of the CAT.

30. A batch of original applications were disposed of by Ext. P4. The Tribunal identified two distinct groups, as major players in the controversy. The first group comprised of those Junior Engineers (JE/JTOs) who have already qualified at the prescribed qualifying examinations held up to 1991. They claimed that they are entitled to be promoted to all the vacancies arising in the promotion post up to 26.7.1996. This was on the premise that in an earlier litigation the Hon'ble Supreme Court had affirmed the decision that the seniority is determined by the year of qualification and not the initial year of recruitment. All persons in the first group having qualified prior to 1991 and the similarly placed qualified candidates being larger in number than the available vacancies in the promotion posts; it was contended that accommodating them in order of the year in which they qualified would amply result in compliance of the undertaking of the department that prior to 1996, the promotions would be made as per the then existing rules.

31. The second group comprised of those who had not qualified so far and claimed that the department ought to conduct the examinations from 1992 onwards and only then, the undertaking before the Hon'ble Supreme Court would stand satisfied. The department was found to have taken different positions at different points of time before different judicial forums in the past and that happens to be the case even at present. At the stage of Ext. P4, however, the department endorsed the view of the first group and approved the stand that no further examinations as per the pre 1996 rules need be held.

32. We notice that the specific prayer quoted in Ext. P4 (paragraph 8) was that

the qualifying examination should be held at the present point of time from the year 1992 onwards; every year, for the vacancies which existed up to July 1996; when the new rules came into effect. We have to notice that in paragraph 23, the Tribunal observed that it cannot be hoped that they can "put the clock entirely back and in all conscience order the DOT must religiously hold a combined Departmental Examination as technically required under the then Recruitment Rules i.e., pre-1996 Rules every year"(sic); to meet two legally prescribed objectives of filling up of the quota of competitive officers and identifying the SC/ST officers eligible for such promotion. The Tribunal in Paragraph 33, also took specific judicial notice of the fact that all the vacancies occurring up to 1993-94 have been filled up with the officers who had already qualified at the DQE held up to 1988-89; even though, all the officials who have qualified have not yet been fully accommodated. It was also noticed that the Department had in 1994 filled up the vacancies of TES Group B with the qualified officers (DQE) (Seniority based). The Department went ahead and filled up the vacancies of TES (Group B) with the qualified officers even though the amendment of the then recruitment rules had been under the active consideration of the department.

33. Then, it was held so in paragraph 34 and 35.

34. Therefore, the ruling by the Hon"ble Supreme Court in a case, where the concerned Department had made its intention known that pending amendment to the Recruitment Rules no further promotion to the higher posts would be made and in fact acted out that intention and therefore, the Department was justified in not filling up the vacancies occurring during that period in terms of the then unamended Recruitment Rules in force, will not be applicable here, in our opinion.

35. In sum, we direct that the Department shall fill up the vacancies arising up to 22.07.96 only with the officials of JEs/JTOs cadres who have qualified and may qualify themselves at the Qualifying Examination part of the one Combined Departmental Examination for the quota of SC/ST vacancies for the TES Group B cadre earmarked for the Qualified Officers and fill up 1/3rd quota earmarked for the competitive officers who have qualified themselves or may qualify themselves at the same combined departmental-cum-competitive examination. The posts earmarked for SC/STs in the promotional cadre of TES Group-B are directed to be filled up appropriately with the qualified SC/ST officials from the feeder cadre of JEs/JTOs based on the results of this Examination. As we have already directed, that the combined departmental examination shall be held by the D.O.T. within six months from the date of receipt of a copy of this order.

36. With the above directions, these O.As are allowed only in accordance with the directions recorded here.

34. The Tribunal held that it was not legally permissible for the department to suspend the examination from the year 1992 onwards up to 1996 since the department has specifically undertaken before the Hon"ble Supreme Court (Ext.

P1) that regular promotions would be effected in the light of the then relevant recruitment rules; to the vacancy of the TES Group B Cadre arising up to 22.7.1996. While holding so, two legally prescribed objectives of filling up of the quota for competitive officers and identification of SC/ST candidates reigned supreme. It was pithily observed by the Tribunal that "one cannot hope to put the clock entirely back". To strike a balance between the technical requirement of pre-1996 rules being complied with and administrative feasibility to achieve such objectives it was found that one examination for the entire period may be held. A rider was made in so far as recognizing the fact that the JTOs already qualified would be treated as senior to those who were qualified merely at the qualifying examination of the combined departmental examination. The Tribunal took judicial notice of the fact that all the vacancies up to 1993-94 have been filled up by the officers who had already qualified at the departmental examination held up to 1991; despite all the persons who qualified in the 1989 examination not being fully accommodated.

35. Looking at the entire findings in Ext. P4 we are of the considered opinion that the Tribunal while directing the conduct of one consolidated qualifying and competitive examination for the period between 1992-96; also took judicial notice of the fact that all the vacancies prior to 1994 were filled up by candidates who had qualified in the examination of 1989. Specific judicial notice taken of this fact and the observation that one cannot hope to put the clock back for all intents and purposes, in our considered opinion is a pointer to the fact that the Tribunal did not brook any upsetting of filling up of vacancies prior to 1994. It is also pertinent that the candidates who qualified prior to 1991 were held to be admitted seniors of those qualifying later on. Though as contended by the LDCE candidates, who are the petitioners herein, such seniority was only against the quota of qualifying candidates and did not at all affect the competitive candidates; obviously, there is no pleading that any of the petitioners or any of the 147 persons included in the list of competitive candidates had qualified and were placed high on merit in the combined examinations, held prior to 1991. A candidate qualifying in the examination acquires a right to be promoted to the available vacancy and assignment of seniority only with respect to the year of qualification. Can a person who qualified in the DQE and came out meritorious in the LDCE of a particular year, said to have acquired a right to a position prior to the year of his qualification? In the absence of any such specific rule we are unable to answer the question in the affirmative.

36. Pursuant to Ext. P4 order, Ext. P5 dated 6.11.1998 was issued wherein the test as stipulated by Ext. P4 order was notified. However, the said notification permitted only SC/ST candidates to appear for the qualifying examination and permitted all persons who had qualified earlier to appear in the competitive examination. Vacancies which were to be filled up where of the years 1994-95, 1995-96 and 1996-97 (up to 22.7.1996) as was specifically indicated in Clause 3(B) of the eligibility conditions as under:-

B. All qualified JTO's including TES Group "B" officers promoted against the vacancies for 1994-95, 1995-96 and 1996-97 (upto 22.7.1996) shall also be eligible for appearing in the competitive part of the combined limited departmental Examination and will be entitled for the seniority whichever is beneficial to them.

37. Again, there were a spate of litigation by persons who had not yet qualified in the combined examinations held. The examinations having been already held, it was directed by the Tribunal in that set of litigation that a supplementary examination be held. This was notified as per Ext. P10 dated 17.4.2003. Ext. P10 by Clause 8 stipulated that all other terms and conditions contained in the Office letter dated 6.11.1998 (Ext. P5) will be applicable to the proposed examination also. After conduct of the examination, as noticed above, none of the petitioners before the Tribunal qualified hence, the appeal filed by the department would have been rendered infructuous. But, one out of the 147 who came meritorious in the competitive examinations, moved an application in the appeal filed by the department wherein Ext. P15 order was passed modifying the earlier interim order and directing promotion to be made in implementation of Ext. P4 order. The original petition itself was disposed of answering the further plea made by the impleading petitioner that the stand of the department to absorb the petitioner and other similarly placed persons in the promoted posts with effect from 1.10.2000 and determination of seniority from that date is not proper in the light of the order of the Hon'ble Supreme Court (Ext. P2) and the order of the Tribunal (Ext. P4).

38. Again the specific direction in both the aforementioned orders regarding vacancies that arose before 22.7.1996 was specifically reiterated. It is to be noticed that though it is the admitted fact that from 1991 the combined examination were not held, before the Supreme Court, the submission made as per Ext. P2 on 25.10.1996 (the date of the order) was that the vacancies "which were existing till the new rules came into force" would be filled up in accordance with the rules which were in force prior to these rules.

39. Here, we have to again refer to the judicial notice taken by the Tribunal that even in the year 1994 the prior existing vacancies were filled up by the qualifying hands (DQE). Neither the department at the time of Ext. P2, intended that such appointment could be upset, nor had the Tribunal directed the recasting of vacancies existing prior to 1994. Hence, the significance of the specific direction that the vacancies existing prior to 1996 would be filled up in accordance with the pre-amended rules (pre-1996 rules). That can only be understood as being for the years 1994-95, 1995-96, 1996-97 (up to 22.7.1996). This was the specific condition of the notification for the combined examination held pursuant to Ext. P4 and the supplementary examination held thereafter. None of the review applicants before the Tribunal nor the other persons coming within the 147 competitive candidates challenged these specific conditions. In the said circumstances, there cannot be any recasting of seniority prior to 1994. The

promotions made prior to 1994 were made without any protest being made by the 147 candidates now claiming under the LDCE examination of 2003.

40. Subsequent to the examination the seniority was determined and list issued, against which again the impleading petitioner in the earlier proceedings approached this Court with a contempt case. The said contempt case was closed by Ext. P22. This Court elaborately considered the contention of the petitioner therein that the official respondents have faithfully followed the orders and directions issued by this Court in OP 37134/2001 (Ext. P17 judgment). This Court found that the provisional seniority list was issued and after considering the objections, the final list was prepared and published on 13.2.2007. It was specifically noticed so in Paragraph 11:-

In our opinion, if for any reason, the complainant was aggrieved by the ranking assigned to him in the final seniority list that was prepared and published on 13th February, 2007 by the respondents, a separate cause of action would arise for him and he can definitely question the ranking assigned to him in the final seniority list prepared as directed by this Court before an appropriate forum.

41. This Court found that there is no contempt and also negated the contention that objections were not invited before the final list was published. What was stated by this Court while closing the above contempt case was that, if at all, the petitioner has any grievance against the final list published on 13.2.2007, that would only give rise to a separate cause of action. Relying on the said observation, it is contended that, the department was approached, who re-cast the entire seniority. Whether the appropriate forum included the department, who published the final seniority list itself, is a moot question.

42. Ext. P21 is said to be the detailed consideration of the various representations made by the aggrieved parties against the seniority list. This is where the shifting stand of the official respondent becomes obvious and apparent. Even in the writ petition filed against the original order of the Tribunal in the instant proceedings the department asserts that the examination of 2000-2003 was meant to fill up the community quota vacancies for 1994-95, 1995-96 and 1996-97. It is also stated that the revised provisional seniority was published against the vacancies of the year 1990 onwards. While all along even before the Tribunal the department had maintained the position that the qualifying hands should be appointed to all the vacancies prior to 1996, here, we discern a major shift. Before the Supreme Court in Ext. P2 and in the order of the Tribunal, as we noticed earlier, there was a tacit understanding that the pre-1994 appointments would remain untouched, as the vacancies existing prior to 1994 were all filled up by the DQE candidates. The notification for the test directed as per Ext. P4 and the supplementary test also specifically mentioned the years 1994-95, 1995-96 and 1996-97 (up to 22.7.1996).

43. We do not see any reason to reopen the vacancies from 1990 onwards since the same were never the subject matter of litigation before any of the forums.

Obviously, by reason of the minimal vacancies as against large number of candidates qualifying; there was a decision taken by the Government to fill up the vacancies with the qualifying hands and the power to make such executive decision has been affirmed by the Tribunal in Ext. P4 itself. Hence, there were valid appointments made to the vacancies prior to 1994 from the qualified hands which cannot be upset at this stage. They cannot by any stretch be considered adhoc appointments. The ratio that inaction of the authority in making direct recruitment would not mean that quota rule is broken down, laid down by majority judgment in M. Subbareddy (supra) has been seriously deviated from in AFHQ/ISOs SOs (DP) Association and Others Vs. Union of India (UOI) and Others, .

44. AFHQ Officers Association and others (Supra) also considered inter-se seniority between direct recruits and promotees in the ratio of 75:25. The three Judge Bench set aside the order of the High Court holding that if that is given effect to, "the result thereof would be that the DR shall be permitted to be take advantage of more than 12 years antedated seniority without holding the office. (sic)"(Paragraph 38). The Court notices Suraj Parkash Gupta and Others Vs. State of Jammu & Kashmir Others, wherein it was held that " in service jurisprudence, a direct recruit can claim seniority only from the date of his regular appointment. He cannot claim seniority from a date when he was not borne in the service"(paragraph 81).

45. In considering the view taken in M. Subba Reddy (supra); again a three Judge Bench, held so:-

The majority view of this Court (M. Subba Reddy and Another Vs. A.P. State Road Transport Corporation and Others,) was that where there is inaction on the part of the Government or employer or imposed ban on direct recruitment in filling up the posts meant for direct recruits, it cannot be held that the quota has broken down. We, with respect, do not support the view of the learned Judges that in the facts and circumstances of the case the quota has not broken down because of inaction on the part of the Government in imposing ban in filling up the posts meant for direct recruits. The appellants in the said case were promoted in a regular manner having been regularised in service with retrospective effect. Their services were not regularised from the date of their initial ad hoc promotion but with effect from the date when the vacancies became available. Their services after regularisation would not be by way of a stopgap arrangement. The direct recruits who were appointed in the years 1990 and 1991, in terms of Item 3 of Annexure "A" would be considered to have been appointed only after their successful completion of training. They were borne in the cadre in the years 1990-91 and, thus, prior thereto they cannot claim seniority. The learned third Judge, dissenting with the learned two Judges, has held that the direct recruit can claim seniority from the date of his regular appointment, but he cannot claim seniority from a date when he was not borne in the service.

Thus, the direct recruits of 1990 and 1991, by reason of the impugned seniority list, could not have been placed over and above the appellant promotees because the purported quota-and-rota rule contained in Item 3 of Annexure "A" could not have been given effect to because the State Government had imposed total ban on direct recruitment from the years 1977 to 1988. In such a situation, the said quota rule became inoperative. We agree with the dissenting view of the learned Judge that in the facts of the case, the quota rule became inoperative because the direct recruits were borne in the cadre when they were appointed against the vacancies meant for them. Therefore, the majority view in *M. Subba Reddy* is of no assistance to the AFHQ Civil Service (Direct Recruits) Officers' Association as the relative seniority between the direct recruits and regularly appointed/promoted candidates within their respective quota, in the present case, shall be determined by the length of the continuous officiation in the grade of ACSOs from their respective appointment to the substantive vacancies in terms of Schedule III within their quota as held by CAT in *M.G. Bansal* case, which has attained finality after dismissal of SLPs filed against the said order of the Tribunal.

Hence, the dictum in *M. Subba Reddy* (*supra*) does not survive.

Merely because the LDCE was not held from 1989 that does not create a vested right in the 147 candidates to be assigned seniority in the 1/3rd quota of LDCE from the year 1990 onwards. We have already found that the DQE and LDCE exams held in 2000-2003 were only to the vacancies of 1994-95, 1995-96 and 1996-97 (up to 22.7.1996). The promotion to the DQE quota can only be from the year in which a candidate qualified. The promotion on the basis of the LDCE can also be only to those 1/3rd available vacancies in the year of the LDCE. The distinction is in so far as the DQE is considered to the 2/3rd quota from the year in which he qualifies vis-a-vis the seniority among the DQE candidates; and on the basis of his qualification is considered in all the subsequent years. While the LDCE is considered only to the vacancies available in that year and the rank obtained by a candidate not entitling him to be considered in any subsequent years. Hence the 147 candidates ought to be considered for the 1/3rd vacancies in 1994-95, 1995-96 and 1996-97 (up to 22.7.1996) according to their merit as also their eligibility to appear for the combined examination. The eligibility year has to be considered since, one combined examination was held for three years. A candidate entitled to appear in 1996 (by reason of completing five years of regular service in the feeder category on the 1st of the January of the year) cannot be placed in the vacancy of 1994-1995; however, high his rank may be. If the seniority list requires any recast on the above lines; obviously, the official respondent ought to do so.

In the circumstances, we do not find any reason to differ from the decision of the Tribunal impugned in the writ petitions or interfere with the dismissal of the review applications impugned in the Original Petitions (CAT). The Writ Petitions and Original Petitions (CAT) are dismissed, however, with no costs.