

(1999) 12 AP CK 0097
In the Andhra Pradesh High Court
Case No : Writ Petition No. 25555 of 1998

Nirmal Chandra Sinha	Vs	APPELLANT
Union of India and others		RESPONDENT

Date of Decision : 14-12-1999

Acts Referred:

Constitution of India, 1950 — Article 12, 14, 16

Citation : (2000) 2 ALD 496 : (2000) 2 ALT 145

Hon'ble Judges : Y.V. Narayana, J;B. Subhashan Reddy, J

Bench : Division Bench

Advocate : Mr. Gopal Subrahmanyam for Mr. Vilas V. Afzulpurkar, for the Appellant; Mr. K.T.S. Tulsi, Addl. Solicitor General for Mr. C.V. Malla Reddy and Mr. V. Rajeswara Rao, SC for Railways, for the Respondent

Judgement

B. Subhashan Reddy, J

1. This writ petition has been filed assailing the order dated 21-7-1998 rendered by the Central Administrative Tribunal, Hyderabad Bench in OA No.312 of 1998.
2. The dispute revolves around the appointment to the post of General Manager of Railways. Few facts may be necessary to be stated.

Petitioner belongs to Indian Railway Service of Mechanical Engineers (1RSME) and joined Railways on 2-5-1958 as Special Class Apprentice. His Date of Increment on the Time Scale (DITS) is 2-5-1962. When his turn came for consideration for promotion as General Manager, he was working as Chief Mechanical Engineer of South Eastern Railway. He was promoted to the post of General Manager, Central Railway on 29-11-1996 and was transferred to South Central Railway on 27-10-1997.

3. Petitioner's grievance is that he ought to have been promoted much earlier to 29-11-1996, that all the unofficial respondents herein were juniors to him and they went up in ladder while he was stagnated in the post lower to the General Manager and that, had he been promoted as General Manager on due date

(according to him atleast immediately after 13-3-1996) he would have been promoted as Member, Railway Board and then as its Chairman and that deprivation of such higher post to him carrying higher emoluments and challenging services, had resulted in negation of the equality of opportunity in public service, which the Indian Constitution guarantees under Article 16(1).

4. Petitioner was empanelled along with respondents 3 and 4 for the year 1994-95 for the post of General Manager. He was 6th in line in the said list, but unfortunate for him all the 5 above him were from Mechanical discipline as that of the petitioner himself. This fact is relevant for the reason that the scheme under which the post of General Manager is filled up contains opportunity to the candidates in all disciplines and debars monopoly from a particular discipline. The Scheme was framed by a Notification published in the Gazette of India on 16-7-1986, which prohibited more than 6 posts of General Managers in the panel from one discipline under the theory of undue predominance. By a subsequent Notification Gazetted on 26-2-1988, the figure "6" was substituted by the figure 37.5%. As on the date of Panel of 1994-95, the number of General Managers occupied from any one discipline was not to exceed more than 37.5% of the total strength of General Managers at any time. When the turn of the petitioner came for promotion to the post of General Manager, he could not be promoted, as there were already 7 General Managers from IRSME cadre conforming to 37.5% of total strength of General Managers. Respondents 3 and 4, who were his juniors in the Panel of 1994-95, were promoted as General Managers overlooking the claim of the petitioner due to the rule of predominance. The above panel had expired on 31-10-1995 with the above appointments.

5. When a fresh Panel for 1995-96 was prepared, the petitioner had figured as No.1. The said panel was published and approved by ACC on 16-10-1996 and the petitioner was promoted as General Manager on 29-11-1996 under the Railway Board's Order. Respondent No.3, who was junior to the petitioner before he was promoted as General Manager from the Panel of 1994-95, was further promoted as Member (Staff), Railway Board, by order dated 3-9-1996.

6. Before the preparation of panel for the post of General Manager for the year 1995-96, the post of Member (Mechanical) had become vacant. On that day, i.e., 13-3-1996, the rule of undue predominance for promotion of Mechanical Engineers to the cadre of General Manager was not operative, as the number of General Managers from the mechanical cadre were less than 37.5% of the total strength of General Managers. The case of the petitioner is that he ought to have been promoted on 13-3-1996 and had it been done so, he would have become the Member (Staff) instead of the 3rd respondent on the basis of DITS and that - would have enabled him to become the Chairman of the Railway Board as he is senior to all the Members of the Board on the basis of DITS.

7. Representation has been made by the petitioner so also reminders to promote him with effect from 13-3-1996, but there was no response. Then, he had filed OA No.312 of 1998 before the Central Administrative Tribunal, Hyderabad Bench,

taking the pleas mentioned supra. But, the Tribunal, by its judgment dated 21-7-1998, had negated the said pleas holding that the Panel of 1994-95 had lapsed on 31-10-1995, that seniority of the petitioner of his promotion from the Panel of 1995-96 cannot relate back over his juniors promoted from the panel of 1994-95 and that the seniority of the petitioner as General Manager cannot be computed from the date of occurring of the vacancy i.e., 13-3-1996, but can be computed only from the date of actual promotion i.e., 29-11-1996. Hence, this writ petition.

8. Sri Gopal Subrahmanyam, the learned senior Counsel appearing for the petitioner, strenuously contended that there was absolutely no reason or justification in not appointing the petitioner on 13-3-1996 or immediately thereafter when the vacancy occurred and appointment to the post of General Manager, which was necessary for proper and efficacious administration of Railways, need not to have waited at the whims and fancies of the Railway Board and that there was a duty cast on the Railway Board to fill up the post of General Manager on 13-3-1996 or immediately thereafter and by not doing so, the petitioner has been unduly deprived. Basing on the decision in Union of India (UOI) Vs. B.S. Agarwal and Others, , he submits that two years service, which is necessary for being appointed as a Member and again as Chairman of the Railway Board has to be reckoned from the date of occurrence of the vacancy and not from the date of appointment, as, while the date of occurrence is certain and fixed one, date of appointment depends upon the vagaries of officials and other circumstances. His other submissions are that even if the petitioner was promoted in the later panel of 1995-96, as he was senior to respondents 3 and 4, even if the latter were promoted from the Panel of 1994-95, after his later promotion on 29-11-1996 to the post of General Manager, his seniority gets restored above respondents 3 and 4 and when seniority is counted as such, he has to go up in ladder to the post of Member, Railway Board and then as its Chairman, as, admittedly he is senior to respondent No.3, who is currently holding the post of Chairman, Railway Board. For this, he relies upon Para 4.4(d) of the Scheme. He also lays stress that the Panel once prepared will subsist till it is exhausted and the petitioner ought to have been promoted from the Panel of 1994-95. He also submits that rule of 2 years is not an inflexible rule, but it is a flexible one and he cites several examples where such flexibility was shown and that even though he is entitled for such flexibility, he was discriminated against.

9. Sri K.T.S. Tulsi, the learned Additional Solicitor-General, appearing for respondents 1 and 2 counters the above arguments submitting that rule of undue predominance is based upon equal protection of laws and there is a rational classification, as the post of General Manager should be a mix-up of Officers from several disciplines for effective administration of Railways in all Fields and that there was no arbitrary action on the part of the Railways in the matter relating to promotion of the petitioner as General Manager. The Scheme for appointment to the post of General Manager was strictly followed and it is rather unfortunate that the petitioner even though meritorious and is senior to

the other Members of the Board and even the Chairman of the Railway Board, could not be appointed because of the rule of undue predominance and that the panel is yearly made according to the Scheme and it will not last till its exhaustion and it lasts on the date set and because of some exigencies, the life of the panel for the year 1994-95 was extended till 31-10-1995 and the petitioner did not come up for consideration because of the rule of undue predominance and he was duly considered in the next Panel of 1995-96 and was appointed and even though there are some delays, such administrative delays are bound to be there and the panel cannot be thrown out on that ground and the time mentioned for preparation of panel is a directory and not mandatory and viewed in that angle, there is absolutely no arbitrariness or unjustifiable action on the part of the Railways in promoting the petitioner to the post of General Manager on 29-11-1996 and that his seniority in the cadre of General Manager is counted only from that date i.e., 29-11-1996 and in the Panel of 1995-96 he is the seniormost, but he cannot supersede the other General Managers including that of respondents 3 and 4, who were appointed in the Panel of 1994-95. Sri Tulasi contended that the words "the panel" are very significant as they connote singular and in the context of the year it lapses on the last day set for consideration of the said Panel and exhaustion of the Panel is not the criteria, but the actual selection on the last day of the Panel according to the Scheme is the criteria. Learned Additional Solicitor-General further submits that nobody can claim the right to promotion and that his name should be empanelled and even if empanelled, nobody can claim that he is bound to be appointed. He also submitted that merely because vacancy occurs, it does not mean that the candidate in waiting is automatically entitled for appointment/promotion. It is the choice of the appointing authority to exercise its discretion and even though such discretion is exercised, then at the most, the candidate aspiring for promotion may have right to be considered, but not for appointment/promotion per force and that the petitioner cannot claim as of right that he ought to have been promoted on 13-3-1996 or immediately thereafter. The learned Additional Solicitor-General also submits that there is no unfettered discretion exercised in relaxing the time limit of two years needed and flexibility was never misused or abused and that it was properly used in exigencies and that whenever occasion arose for such relaxation, it was properly exercised and vis-a-vis the petitioner and the persons in whose favour the relaxation was exercised, comparatively the petitioner was having much less service and just in months as compared to others.

10. Rule 4.4(d) of the Notification dated 30-1-1987 lays down the seniority principle, which reads :

"It is found necessary to leave out any officer borne on the Panel at the time of actual appointment in order to avoid undue predominance of any one service by holding of more than six posts of General Managers and equivalent by Officers belonging to any one service. In this event, it will be notified that the junior officer will not gain any seniority vis-a-vis his empanelled seniors."

Basing upon the said Rule, Sri Gopal Sitbrahmanyam, the learned senior Counsel appearing for the petitioner, submits that even though the petitioner was later promoted from the panel of 1995-96, he would get his seniority back in the cadre of General Manager over his juniors in the lower category, who were promoted from the panel of 1994-95. He draws support to his argument that seniority has got to be restored for the reason that the petitioner was not promoted to the post of General Manager not on account of lack of merit vis-a-vis his juniors, but because of rule of undue predominance and cites Para 2.1.3 of the Railway Board's letter dated 8-7-1987, which reads :

"In case an officer gets a General Manager's post open to more than one discipline later than an officer of another service on grounds of suitability, he will take his seniority below that officer."

Sri K.T.S. Tulasi, the learned Additional Solicitor-General, counters the above argument stating that the seniority has to be reckoned having regard to the Panel, laying emphasis on the word "the Panel" meaning that a particular panel and there cannot be any extended meaning generalising the same and applying to "any Panel". In our considered view, the argument of the learned Additional Solicitor-General is fit to be accepted for the reason that the seniority is reckoned having regard to the panel and the persons promoted from the panel of yester years will get seniority over the promotees of the panels of later years; as otherwise, there is no meaning for preparation of panels every year. The seniority of a person, who is promoted pursuant to a panel cannot be altered later on and more so in a case like this, regardless of the fact as to whether the promotion was effected because of the rule of undue predominance. The two rules, which have been extracted above, relating to seniority in the post of General Manager of Railways, have to be read together and harmonised and if it is done so, the purport of the above is to the effect that if a person is appointed to the post of General Manager, which is a selection post, and if a junior is more meritorious than the senior from the same panel, the senior has to take his rank below that of his junior. But, if the senior is not appointed to the post of General Manager at the time when his junior is promoted to the said post because of the rule of undue predominance but has been promoted to the said post during the currency of the said panel, then he will regain his seniority over his junior even though the junior was earlier promoted, but in no circumstance the senior, who is not appointed to the post of General Manager from that particular Panel because of the rule of undue predominance, but was promoted from the panel of the subsequent year, can regain his seniority over his junior, who was promoted from an earlier Panel. In this view of the matter, we found it not necessary to deal in detail with the various judgments cited by the learned Additional Solicitor-General in P.K. Unni Vs. Nirmala Industries and others [OVERRULED], , K.M. Viswanatha Pillai Vs. K.M. Shanmugam Pillai, , British India General Insurance Co. Ltd. Vs. Captain Itbar Singh and Others, , Sri Ram Narain Medhi v. The State of Bombay, 1959 (1) SCR 489 and Shrimati Hira Devi and Others Vs. District Board, Shahjahanpur, . Concisely speaking, the proposition laid down by the

Supreme Court in the said cases was that if the words of the statute are plain, nothing more can be read into it and even if there is a lacuna, the Courts are not entitled to supply any meaning contrary to the object and intendment of the statute.

11. Another contention of Sri Gopal Subrahmanyam, the learned Counsel appearing for the petitioner, that the panel lasts till it is exhausted is also liable to be rejected for the reason that the Panel is prepared for a particular year and it expires on the last date set for the said panel. Consequently, we affirm the findings given by the Tribunal on the above aspects.

12. We now come to the last contention of Sri Gopal Subrahmanyam, i.e., computation of two years from the date of accrual of vacancy in the category of General Managers and that the delay in appointment to the said post cannot defeat the right of the petitioner for further promotional avenues. He submits that the Panel is prepared for the vacancies that will arise between 1st July of the year to 30th June of the next year and the periodicity of the meeting of the Selection Committee and formation of panel for the period has been stipulated in Para 9 of the Scheme dated 16-7-1986 and that the same ought to be followed and there is no choice for the official respondents not to follow the same and to prepare the panel as and when they felt it convenient. Learned senior Counsel appearing for the petitioner further submits that even if there was delay on the part of official respondents due to any reason, as the petitioner did not contribute to the said delay, he cannot be made responsible for the said delay and heavily relies upon the judgment of the Supreme Court in B.S. Agarwal's case (supra) and submits that the said decision has not been read and understood by the Tribunal in proper perspective and that the entire approach of the Tribunal in construing the said judgment is fallacious. On the other hand, Sri K.T.S. Tulsi, the learned Additional Solicitor-General, reiterates that the petitioner cannot impose on the official respondents to consider this case at a particular time soon after the vacancy arose and that the only right the petitioner possessed is a right to be considered and that too as and when his case was taken up for consideration and not at a particular time the petitioner wanted them to do. Learned Additional Solicitor General relies upon the judgments of the Supreme Court in Union of India (UOI) and Others Vs. Majji Jangamayya and Others, , Vinod Krishna Kaul Vs. Union of India and others, and Union of India and others Vs. S.L. Dutta and another, . He further submits that the judgment rendered by the Supreme Court in B.S. Agarwal's case (supra) has been properly considered by the Tribunal and there is no fallacy in the approach of the Tribunal.

13. With regard to preparation of panel, it is apt to extract Para 9 of the Scheme dated 16-7-1986, which reads :

"Periodicity of meeting of Selection Committee and currency of Panels --The Selection Committee shall normally meet once a year at a suitable time after 1st April as soon as the reports for the year ending March of that year are available

for consideration. They may meet at intervals of less than a year, if the circumstances so require. They will draw up a Panel, consisting of such number of names as may be necessary for appointment to the existing and anticipated vacancies in the posts of General Managers and equivalent during the period from 1st July of the year to the 30th June of the next year. The Panel drawn up by the Selection Committee shall be valid for vacancies arising during the period 1st July of that year upto 30th June of the next year."

The said rule has to be followed and if the same was to be followed, the Committee ought to have met somewhere in April, 1995 and in any event not later than 30th June of the said year. The same time-frame is applicable for the subsequent Panel of 1995-96 also. We cannot countenance a contention that there are bound to be administrative delays and that the petitioner cannot insist upon preparation of Panel within the time stipulated in the rule. When the time frame is mentioned in the rule or the Scheme, as the case may be, the same indicates that it has to be followed strictly unless there are circumstances beyond the control of the official respondents. No such unavoidable circumstances are brought to our notice. The reasons stated cannot be said to be plausible, as they are mere administrative delays. The observation made by the Supreme Court in *Majji Jangamayya* 's case (supra) that "no employee has any right to have a vacancy in the higher post filled as soon as the vacancy occurs. The Government has a right to keep the vacancy unfilled as long as it chooses" cannot be construed as a sweeping statement of law and that has to be construed in the context of that case. In the said case, there was long drawn legal battle with regard to the correctness of the seniority list in the lower cadre and only after the same was approved by the Supreme Court, the said list was finalised and the above quoted observation of the Supreme Court has to be understood in view of those facts and circumstances. The decision in *Vinod Krishna Kaul*'s case (supra) also has no bearing for adjudicating the instant case. In the said case, it was held that to the post of Joint Secretary at the relevant time, the petitioner therein was not considered as he was not available at the relevant time due to exigencies of public service for being considered for the post of Joint Secretary and as such, it was held that there was no violation of Articles 14 and 16 of Constitution of India. Even the decision of the Supreme Court in *S.L. Dulla*'s case (supra) is not germane for the instant case. In *S.L. Dulta*'s case the proposition laid down was with regard to the right of the Government to frame a policy and that the policy for promotions could always be changed and that unless policy was arbitrary or mala fide, the same cannot be assailed and more so in the case of Army Services where the policy is based on technical or scientific considerations, as judicial review is not permissible in such cases. As such, we are of the considered view that there cannot be any abstract proposition that the Government being the employer, it has the choice either to fill up a post or not to fill up a post, to make a promotion or not to make a promotion and even if it makes the promotion it can do whenever it likes, even if the situation demands for filling up the post. In a case where the Government or its agencies take a

policy decision not to fill up a post, there cannot be any compulsion from any side, be it the employee-aspirant or the Courts to force the Government/its agencies to make appointments. There cannot be any force even if the Government issues a notification calling for applications and then taking a policy decision not to fill up the posts. But, it cannot be understood that the Government/its agencies have got unfettered discretion to make appointments or not even if the exigencies warrant it. In case where there are vacancies and the Government/its agencies take policy decision not to fill up the posts and when the said action is questioned, the Government/its agencies are bound to satisfy the Court that decision not to fill up the vacancies has been taken bona fide and appropriate reasons have to be stated or otherwise the said action becomes arbitrary warranting interference by the Court. It cannot be lost sight of the fact that while no person has got a right to ask to notify the vacancies or to give promotion at a particular time but when the rules prescribed the mode of such appointments or promotions, the said rule has got to be scrupulously followed and no person, who is a State within the meaning of Article 12 of Indian Constitution can be heard to say that inspite of the rule position it can act contra. It is now too well settled law that right to be considered for public employment stretches even to the promotional post/s and is a facet of fundamental right enshrined in Article 16(1) of Indian Constitution and if that be so, the same cannot be nullified by administrative delays. The process of promotion has to be finalised at the earliest and there cannot be any delay in the said process and even if there is any such delay, it cannot frustrate the promotion chances of a candidate. In fact, B.S. Agarwal's case (supra), which is a current case in which similar contention based upon the same Scheme was raised and adjudicated, is more relevant for this case and is a stare decisis on the point. The Tribunal has considered the above decision in B.S. Agarwal's case in Paragraphs 23 to 26 of its judgment. The Tribunal has understood the above decision of the Supreme Court only in the context of laying down the method of reckoning 2 year period stipulated in Para 7.3 of the Scheme, which reads "only such of the empanelled Officers would normally be appointed to posts of General Managers and equivalent as they will be able to serve for atleast 2 years on such or higher post(s)" and held that as the petitioner was promoted to the post of General Manager even though lately on 29-11-1996, the ratio laid down by the Supreme Court has been followed and that there is due diligence on the part of the official respondents in making promotions and that the decision of the Supreme Court in B.S. Agarwal's case (supra) cannot be read as laying down any principle regarding computation of seniority from accrual of vacancy in the category of General Managers and that the decision in B.S. Agarwal's case was only in the nature of advise to ensure that officers expecting promotions are not kept waiting indefinitely and it is also an advise to the Government to expedite the matters avoiding redtapsim in promotion cases and that "no further additional interpretation can be given to the views in the judgment of the Apex Court (last 2 lines in Para 25 of the judgment of the Tribunal)". We have read in depth, the judgment of the Supreme Court in B.S. Agarwal's case (supra) and we have got

different views than expressed by the Tribunal.

14. What fell for consideration in B.S. Agarwal's case (supra) was the basis for computation of 2 years tenure as referred to in Para 7.3 of the Scheme extracted above. In fact, the Supreme Court in Paragraph 24 of the judgment had clearly framed the issues as to whether the Scheme is referable to (a) the date of accrual of vacancy (b) the date of proposal for filling up such vacancy (c) the date of selection of the empanelled officers for appointment to the posts of General Managers and equivalent and (d) the date of actual appointment of the selected candidates. The Supreme Court was aware of the distinction in the language employed relating to the posts of General Managers to that of posts of Members, Railway Board. In the former, the language employed in the Scheme was that there should be tenure of 2 years service while for the latter there should be 2 years service from the date of accrual of vacancy. But, the Supreme Court, keeping in mind the equality-clause mandate in promotional avenues enshrined in Article 14 in general and Article 16 in particular of the Constitution of India, has harmonised the language used for both the posts and held positively that two years tenure required for both the posts of General Manager and Member, Railway Board, should be reckoned from the date of accrual of vacancy, even if the language used for construing the two years period for both the posts is different. The Supreme Court has also cautioned that there should be no undue delay in making appointments from the date of accrual of vacancy and in order not to defeat the intent of the Scheme that there should be two years actual service, the officials should gear up to see that there is no undue delay in making the actual appointments and that it should not exceed three months period beyond the accrual of vacancy. The Tribunal has grossly misconstrued the above judgment as to mean that it is just an advise. By the above decision, the Supreme Court had clearly ruled that the date of accrual of vacancy is clearly ascertainable leaving no option for variation and with a little effort, can be fixed, but the actual appointment is always variable, may be due to administrative delays, which either may be lethargic or with ulterior motives. Balancing the above factors, the Supreme Court has held that while the seniority should be reckoned from the date of accrual of vacancy, there shall not be any undue delay in effecting the promotions to the post of General Manager of Railways and in no event, the delay in making actual appointments should stretch beyond three months of occurring of vacancy so as to see that the "actual service" period contemplated by the Scheme is not frustrated. That has to be taken as a mandate and not as an advise.

15. In the circumstances, the service of the petitioner in the category of General Manager of Railways shall be reckoned from 13-3-1996 with all attendant/consequential benefits.

16. In view of what is stated supra, we set aside the judgment of the Central Administrative Tribunal, Hyderabad Bench, dated 21-7-1998 rendered in OA No.312 of 1998 and allow this writ petition with a direction to review the case of

the petitioner to give notional promotion to the petitioner in the post of General Manager from 13-3-1996 and then to extend consequential benefits. In the facts and circumstances of the case, we direct the parties to bear their own costs.