

IN THE HIGH COURT OF KARNATAKA AT BENGALURU

THE HON'BLE MR.JUSTICE R. DEVDAS

WRIT PETITION NO.26986/2018 (S-PRO)

C/ W WRIT PETITION NOs.14159/2018 (S-PRO), 1670/2020 (S-PRO) AND 42670/2019 (S-RES)

DATED: 28-01-2021

L KARTHIK AND OTHERS VS. KARNATAKA POWER TRANSMISSION CORPORATION LIMITED,
BENGALURU AND OTHERS

ORDER

The lis in these writ petitions are rival claims for promotion between two categories of employees of the Karnataka Power Transmission Corporation Limited (KPTCL), Assistant Engineers who were directly appointed and Assistant Engineers who were initially appointed as Junior Engineers, being non-graduates/Diploma holders, who later acquired B.E. or AIME (India) qualifications and ' appointed by transfer ' as Assistant Engineers.

2. The KEB Recruitment and Promotion of the Employees of the Board Service Regulations, 1969, (hereinafter referred to as ' KEB R & P Regulations ' for short) was amended as on 26.07.1986, to provide for recruitment to the post of Assistant Engineers, which till then provided for direct recruitment and by departmental promotion.By the amendment, provision was made for a Junior Engineer who had subsequently acquired B.E or AIME qualification to be appointed by transfer as Assistant Engineer.The transfer was to be effective from the date of graduation, subject to availability of vacancy without ignoring the inter se seniority among those eligible for such transfer.

At note (v) appended to Sl.No.10A of Chapter V of the Regulations, it provided that a Junior Engineer who is appointed by transfer as Assistant Engineer on or after 01.07.1976, shall be entitled to count one-third of the service rendered by him as Junior Engineer, prior to appointment as Assistant Engineer, subject to a maximum of 4 years, as if it he had been in the post of Assistant Engineer, for the purpose of consideration for promotion to the post of Assistant Executive Engineer, with two conditions stated therein.

3. The amended provision provided for retrospective seniority over and above the existing Assistant Engineers and therefore, the same was challenged before this Court in the case of M.V.Gurushripad Vs. Karnataka Electricity Board and others, in W.P.No.14622/1986.In the meanwhile, similar provisions fell for consideration before the Hon'ble Supreme Court in the case of K.Narayanan and

others Vs. State of Karnataka and others¹. While striking down the retrospective operation from 01.01.1976, note (ii) was directed to be read as providing eligibility only.

Consequently, this Court disposed of Gurushripad's case directing that note (ii) relating to weightage shall be read as providing eligibility only and the respondent Board was directed to prepare fresh gradation list in the light of the order and in the light of the observation made in the K.Narayanan's¹ case.

4. In compliance with the directions and observations made by the Hon'ble Supreme Court, the Board amended the Regulations on two occasions, i.e., on 16.08.1996 and 27.12.1996. By amendment dated 16.08.1996, Note (v) of para- 2 provided that a Junior Engineer (Electrical) who is appointed by transfer as Assistant Engineer (Electrical) on or after 26.07.1986, shall be entitled to count one-third of the service rendered by him as Junior Engineer (Electrical), prior to appointment as Assistant Engineer (Electrical), subject to a maximum of 4 years for the purpose of consideration of his eligibility for promotion to the post of Assistant Executive Engineer (Electrical). It provided that the seniority of Junior Engineer (Electrical) who is appointed as Assistant Engineer (Electrical) shall be fixed in the category of Assistant Engineer (Electrical) from the date of transfer.

Further, it provided that a Junior Engineer (Electrical) who is appointed as Assistant Engineer (Electrical) shall put in a minimum service of TWO years on duty as Assistant Engineer (Electrical) after such appointment and a total minimum service of FIVE years inclusive of the service given as weightage as aforesaid to become eligible for promotion to the cadre of Assistant Executive Engineer (Electrical).

5. In the Board order dated 27.12.1996, the minimum period of service as qualification for appointment by transfer enhanced to 7 years of service as Junior Engineer.

6. Most importantly, the scheme of appointment by transfer of in service employees was withdrawn by Board order dated 03.06.2015. The Board accorded its approval for withdrawal with immediate effect, all orders issued from time to time relating to appointment by transfer of employees. All amendments made to the KEB R & P Regulations with regard to the appointment by transfer stood withdrawn. Approval was also accorded for processing only such of the pending instances of the claims of the employees as on 18.03.2015, seeking appointment by transfer from the cadre of Junior Engineer to the cadre of Assistant Engineer in accordance with the Rules and Regulations which were prevailing earlier to 03.06.2015.

7. The petitioners in W.P.No.26986/2018 are Assistant Engineers appointed directly. The petitioners in W.P.Nos. 14159/2018, 42670/2019 and 1670/2020 are Assistant Engineers who were initially

appointed as Junior Engineers and later appointed by transfer as Assistant Engineers. For the sake of convenience and brevity, the direct recruits shall be referred to as 'petitioners' and the Engineers appointed by transfer shall be referred to as 'respondents'.

8. There is no dispute that the petitioners were appointed on 29.06.2010 and therefore they are placed higher in the seniority list dated 27.10.2017 at Annexure ' B '. The respondents who were appointed by transfer on 07.02.2011 are placed below the petitioners in the seniority list. A communication was issued to the petitioners on 22.03.2018 calling upon them to furnish information for consideration of promotion. However, it is the contention of the petitioners that without further processing the information given by the petitioners, a subsequent communication dated 21.06.2018 was made to the respondents calling for such information.

It is at that juncture, that the petitioners filed W.P.No.26986/2018 calling in question the communication dated 21.06.2018 made to the respondents. A prayer was also made seeking direction to the respondent-Corporation to pursue the communication dated 22.03.2018 made to the petitioners, for promotion. The contention of the petitioners is that in terms of the seniority list, based on the vacancy available to the post of Assistant Executive Engineers, the candidature of the petitioners was required to be considered. On the other hand, the contention of the respondents is that the petitioners did not possess the minimum experience of 8 years for being eligible for promotion to the post of AEE and on the other hand, since one third of the service put in by the respondents as Junior Engineers, in terms of the amended Board Regulations, had to be counted and weightage was required to be given, the respondents had the requisite eligibility and therefore, the respondent-Corporation has rightly decided to consider the case of the respondents for promotion.

9. Subsequent to the filing of W.P.No.26986/2018 by the petitioners (direct recruits), the respondents (appointed by transfer) filed W.P.Nos. 14159/2018 and 42670/2019 seeking a direction to the Corporation to consider their claim for promotion in terms of the communication dated 21.06.2018.

Thereafter the Corporation amended the R & P Regulations vide notification dated 06.01.2020, reducing the percentage of posts in the cadre of Assistant Executive Engineer (Electrical) by direct recruitment from 25% to 10% from open competition and in-service employees, consequently increasing the posts to be filled up by promotion on the basis of seniority-cum-merit from 45% to 60%.

10. The crux of the matter is therefore whether weightage which was stipulated under the amended Regulations but subsequently withdrawn by order dated 03.06.2015, is required to be given to the respondents in the matter of promotion?

11. Sri P.S.Rajagopal, learned Senior Counsel appearing for the petitioners submits that when once the Scheme of Appointment by Transfer and all benefits flowing therein were withdrawn by notification dated 03.06.2015, question of considering the weightage of service which was prescribed under the Scheme of Appointment by Transfer, does not arise.

It is submitted that while withdrawing the Scheme of Appointment by Transfer, except according approval for processing only such of the pending instances of the claims of the employees as on 18.03.2015 seeking appointment by transfer from the cadre of Junior Engineer to the cadre of Assistant Engineer, all orders issued from time to time relating to appointment by transfer of employees stood specifically withdrawn. It is submitted that when the entire scheme has been withdrawn, it cannot be contended at the hands of the respondents that the weightage of service which was provided for in the earlier scheme continues to enure to the benefit of the respondents.

12. The learned Senior Counsel, while placing reliance on a decision of the Apex Court in the case of B.V.Sivaiah and Others Vs. K.Addanki Babu and Others, submits that it is a settled position of law that while applying the principle of seniority-cum merit for the purpose of promotion, the inter se seniority of the employees who are eligible is required to be considered. Such determination of seniority confers certain rights and the principle of seniority-cum-merit gives effect to such rights flowing from seniority.

13. While relying upon the case of Union of India And Others Vs. Lt. Gen. Rajendra Singh Kadyan and Another, the learned Senior Counsel submits that seniority-cum-merit postulates the requirement of certain minimum merit or satisfying a benchmark previously fixed. Most importantly, it is submitted that the Rules governing matters of promotion as on the date of promotion is required to be considered and not old Rules which have no efficacy. In this regard, reliance is placed on Deepak Agarwal And Another Vs. State of Uttar Pradesh And Others to submit that various decisions of the Apex Court have been considered and it has been held that when a conscious decision is taken to amend the rules, promotions have to be made in accordance with the rules prevalent at the time when consideration takes place. It is submitted that the decision in Deepak Agarwal has been reiterated by the Hon'ble Supreme Court in the case of State of Tripura and Others Vs. Nikhil Rajan Chakraborty And Others³ and Union of India and Others Vs. Krishna Kumar and Others ".

14. Per contra, learned Counsel Sri Vijay Kumar, appearing for the respondents submits that the respondents were given the benefit of weightage of service owing to the fact that they had to forego increments which they were legitimately entitled to, while giving their consent for appointment by transfer. It is therefore submitted that the case of the respondents has to be treated as a separate and distinct class. In this regard, the learned Counsel places reliance upon a decision of the Apex Court in the case of *Air India Vs. Nergesh Meerza and Others* ".

15. The learned Counsel submits, while placing reliance on another decision of the Apex Court in the case of *Union of India Vs. Flight Cadet Ashish Rai*³, that if the decision maker has understood correctly the law that regulates its decision making power and has given effect to it, judicial review in administrative matters are not called for.

This submission is made in order to support the decision of the respondent-Corporation in discarding its earlier communication calling upon the petitioners to furnish information for the purpose of Departmental Promotion Committee (DPC for short) and calling upon the respondents to furnish such information. In other words, it is submitted that the respondent Corporation realized its mistake in ignoring the weightage of service bestowed upon the respondents in the Board orders which enabled appointment by transfer. The respondent-Corporation also realized the fact that the petitioners had not put in the minimum service of eight years to be eligible for promotion.

16. The learned Counsel for respondents further submitted that a right has vested in the respondents which cannot be taken away by way of amendments or withdrawal of the scheme. In this regard, reliance is placed upon three decisions of the Hon'ble Supreme Court in the case of *Mst. Bibi Sayeeda and Others Vs. State of Bihar and Others* and *Andhra Pradesh Dairy Development Corporation Federation Vs. B. Narasimha Reddy and Others* and *State of Madhya Pradesh and Others Vs. Yogendra Shrivastava*¹¹.

17. The learned Counsel has also brought to the notice of this Court certain actions on the part of the respondent-Corporation which would demonstrate that that inspite inspite of the order order dated 03.06.2015, withdrawing the scheme of appointment by transfer, promotions by way of appointment by transfer have been made by the respondent-Corporation. In this regard, attention of this Court is drawn to Annexure ' Q ' which is an order dated 17.06.2019, whereby promotions have been granted invoking the provisions of appointment by transfer. It is therefore the contention of the learned Counsel for respondents that the weightage of service which stood vested in the respondents continue to hold the field, in the matter of promotion of the persons who were appointed by transfer from the post of Junior Engineers as Assistant Engineers.

18. On facts of the case, it was also submitted that as on the date when the communication dated 22.03.2018 was made by respondent-Corporation to the petitioners, they had not completed 8 years of service in the cadre of Assistant Engineers and in terms of the K.E.B. R & P Regulations, a person in the cadre of Assistant Engineer should have put in minimum service of 8 years to be eligible for promotion to the cadre of Assistant Executive Engineer.

On the contrary, the respondent-Corporation realized that by adding weightage of service as vested in the respondents under the ' Appointment by Transfer ' scheme, the respondents were eligible for promotion. The learned Counsel would therefore submit that the writ petitions were not maintainable since the petitioners did not have the qualification for being considered for promotion. On the other hand, the petitioners are guilty of securing an interim order at the hands of this Court denying the legitimate rights of the respondents for being considered for promotion. The learned Counsel, therefore submits that the writ petitions are required to be dismissed by imposing exemplary costs.

19. The respondent-Corporation has filed statement of objections in the writ petition filed by the respondents viz., W.P.No.1670/2020 inter alia contending that the employees have no right to promotion. An employee may have a right to be considered for promotion. Nevertheless, when once the provision for appointment by transfer stood withdrawn by Board order dated 03.06.2015, the question of considering weightage of service in respect of the respondents under a non-existent regulation, would not arise.

The learned Counsel for the respondent-Corporation has submitted that in view of the withdrawal of the provision for ' Appointment by Transfer ' and all other benefits flowing under the regulation/scheme of ' Appointment by Transfer ' having been withdrawn, there is no law or provision left with the respondents for providing weightage of service for promotion.

20. Heard learned Senior Counsel Sri P.S.Rajagopal for the petitioners, Sri Vijay Kumar, learned Counsel for the respondents and Sri Sriranga S., learned Counsel for the respondent-Corporation and perused the petition papers.

21. The validity of similar provision of ' Appointment by Transfer ', including the retrospective appointment of the Diploma Holders and seniority provided under such provisions fell for the consideration of the Hon'ble Supreme Court in the case of K.Narayanan¹. As rightly submitted by the learned Senior Counsel, while striking down the retrospective operation from 01.01.1976, Note (ii) which provided for transfer with retrospective effect from the date of the Diploma Holder acquiring Graduate Degree was directed to be read as providing eligibility only.

Appropriate changes were brought to the provision of ' Appointment by Transfer ', by Board orders dated 16.08.1996 and 27.12.1996. The respondents when appointed by transfer under the said provision, were placed below the direct recruits viz., the petitioners herein. The benefit that was left with the respondents being appointees by transfer, was entitlement to count one third of the service rendered by them as Junior Engineers, subject to a maximum of four years for the purpose of consideration of their eligibility for promotion to the post of Assistant Executive Engineers.

22. Therefore, the moot point is whether such benefit could be considered as vested right and whether such a benefit could be taken away from the respondents, by withdrawing the provision for ' Appointment by Transfer '. The decisions cited by the learned Senior Counsel on behalf of the petitioners are on the proposition as to whether promotions have to be made in accordance with the prevalent Rules at the time of promotion or in terms of the old Rules to fill up old vacancies.

In that context, it was held in the case of Deepak Agarwal that there is no rule of universal or absolute application that vacancies are to be filled invariably by the law existing on the date when the vacancy arises. The requirement of filling up old vacancies under the old rules is interlinked with the candidate having acquired a right to be considered for promotion. It was held that the right to be considered for promotion accrues on the date of consideration of the eligible candidates, unless of course, the applicable rule lays down any particular time-frame, as in the case of Y.V.Rangaiah Vs. J.Srinivasa Rao¹².

23. But in the present case, as noticed above, the question that requires consideration is whether the benefit of counting one third of the service rendered by the respondents in the cadre of Junior Engineers, in terms of Note (v) of the provision for ' Appointment by Transfer ', for the purpose of promotion to the post of AEE, stands vitiated by the withdrawal of such provisions as on 03.06.2015? Whether the said benefit has vested a right in favour of the respondents and if so, whether such benefit could be taken away by withdrawing the provision of law?

24. In this regard, the Apex Court in the case of Ex-Capt.K.C.Arora And Another Vs. State of Haryana and Others¹³ noticed that in the 1960s, during the Chinese aggression, the Government of India as well as the State Governments decided to give certain benefits to encourage the young energetic youth to join military service at the critical juncture of national emergency. The Government in the States and the Centre issued different Circulars and advertisements on Radio and the Press promising certain benefits to be given to young men who join the military service at the critical juncture. Later the assurances were converted into rules and one such assurance given by the Government was to give seniority by counting period of military service for the purpose of

determining seniority, increments and pension etc. Immediately on appointment of the petitioners therein as temporary Assistant Engineers they became entitled to get their seniority fixed giving them the benefit of their military service, but the gradation list prepared did not include the military service of the petitioners for the purpose of fixation of their seniority. On the contrary, amendment was brought to the relevant rules restricting the benefit 13 1984 (3) SCC 281 of military service, with retrospective effect.

The contention of the appellants/petitioners was that the rules could not be amended with retrospective effect to deprive them of the vested rights and if the appellants/petitioners are entitled to the benefits of military service perforce, they would be much more senior to others and the gradation list prepared in complete ignorance of the military service will not be according to law.

25. Considering such submissions, it was held that a cardinal principle of construction is that every statute is prima facie prospective unless it is expressly or by necessary implication made to have retrospective effect. But the rule in general is applicable where the object of the statute is to affect the vested rights or to impose new burden or to impair existing obligations. Provisions which touch a right in existence at the passing of the statute are not to be applied retrospectively in the absence of express enactment or necessary intentment. It was therefore held that the Governor, no doubt can exercise the powers under Article 309 of the Constitution to bring an amendment retrospectively or with retrospective effect.

26. However, the Apex Court noticed a decision of a Constitutional Bench of the Apex Court in the case of State of Gujarat Vs. Raman Lal Keshav Lal Soni¹⁴, wherein the Ex Municipal employees who had been allocated to the Panchayat service as Secretaries, Officers and servants of Gram and Nagar Panchayats who had achieved the status of Government servants were deprived of the said status by virtue of an amending Act. The Constitutional Bench had held that their status as Government servants could not be extinguished, so long as the posts were not abolished and their services were not terminated in accordance with the provisions of Article 311 of the Constitution. Nor was it permissible to single them out for differential treatment. That would offend Article 14 of the Constitution. Their Lordships posed a rhetoric question " can a law be made to destroy today's accrued constitutional rights by artificially reverting to a situation which existed 17 years ago? "and answered with an emphatic ' No '. Having regard to the decision of the Constitutional Bench, it was held that the Haryana Government cannot take away the accrued rights of the petitioners and the appellants by making amendment of the rules with retrospective effect.

27. In *T.R.Kapur and Others Vs. State of Haryana and Others*¹⁵ 15, it was held that the unamended Rule 6 (b) conferred a vested right on persons like the petitioners which could not be taken away by retrospective amendment of Rule 6 (b). Any rule which affects the right of a person to be considered for promotion is a condition of service although mere chance of promotion may not be. The power to frame rules to regulate the conditions of service under the proviso to Article 309 carries with it the power to amend or alter the rules with a retrospective effect. An authority competent to lay down qualifications for promotion, is also competent to change the qualifications. The rules defining qualifications and suitability for promotion are conditions of service and they can be changed retrospectively. This rule is, however, subject to a well recognized principle that the benefits acquired under the existing rules cannot be taken away by an amendment with retrospective effect, that is to say, there is no power to make such a rule under the proviso to Article 309 which affects or impairs vested rights.

That was a case where amendment was brought to the rule to take away the eligibility of members of class-II service who are Diploma Holders for purposes of promotion to the posts of Executive Engineers in Class- I service from a backdate ranging over 20 years and thereby rendered invalid the promotions already made.

28. In *Food Corporation of India and Others Vs. Om Prakash Sharma and Others*¹⁶ 16, while addressing the contention put forth by the non-graduates, with reference to the retrospective operation of the rule and the non-applicability of the rule to non graduates, the Apex Court listed out the following five decisions of the Apex Court:

i) *T.R.Kapur Vs. State of Haryana*¹⁵ 15ii) *P.D.Aggarwal Vs. State of U.P.*¹⁷iii) *K.Narayanan Vs. State of Karnataka*^{1iv)}iv) *Union of India Vs. Tushar Ranjan Mohanty*¹⁸ 18

v) *Chairman, Rly. Board Vs. C.R.Rangadhamaiah*¹⁹ 29. Paragraph-24 of the decision of the Constitutional Bench in the case of *C.R.Rangadhamaiah* " was extracted as follows:

" 24. In many of these decisions the expressions ' vested rights ' or ' accrued rights ' have been used while striking down the impugned provisions which had been given retrospective operation so as to have an adverse effect in the matter of promotion, seniority, substantive appointment, etc., of the employees. The said expressions have been used in the context of a right flowing under the relevant rule which was sought to be altered with effect from an anterior date and thereby taking away the benefits available under the Rule in force at that time. It has been held that such an amendment having retrospective operation which has the effect of taking away a benefit already available to the

employee under the existing rule is arbitrary, discriminatory and violative of the rights guaranteed under Articles 14 and 16 of the Constitution. "

30. Even in the case of Yogendra Shrivastava ¹¹, cited by the learned Counsel for the respondents, it has been held that it is no doubt true that rules made under Article 309 can be made so as to (1997) 6 SCC 623 operate with retrospective effect. But it is well settled that rights and benefits which have already been earned or acquired under the existing rules cannot be taken away by amending the rules with retrospective effect.

31. Having regard to the above said decisions and in the light of the decisions of the Apex Court in the case of K.Narayanan¹ and P.Sudhakar Rao and Others Vs. U.Govinda Rao and Others²⁰ where the benefit flowing under the provisions of ' Appointment by Transfer ' was restricted to count one third of the service rendered by the Junior Engineers prior to appointment as Assistant Engineers, as if they had been in the post of Assistant Engineers for the purpose of consideration for promotion to the post of AEE, there can be no manner of doubt that the said benefit has stood vested in the respondents. Such vested right could not be taken away by withdrawing the provisions of ' Appointment by Transfer ' in terms of the Board order dated 03.06.2015.

Consequently, this Court proceeds to declare that the withdrawal of the provisions of ' Appointment by Transfer ' shall not take away the vested right of counting the weightage of service for the purpose of promotion, in respect of the respondents (Junior Engineers/Diploma Holders who were subsequently appointed by transfer as Assistant Engineers under the provisions of ' Appointment by Transfer ', in the service of the respondent-Corporation).

32. In the light of the above, this Court proceeds to pass the following:

ORDER

i) W.P.No.26986/2018 is hereby dismissed.

ii) W.P.Nos. 14159/2018, 42670/2019 and 1670/2020 are partly allowed.

iii) The respondent-Corporation is hereby directed to consider the claim of the petitioners in W.P.Nos. 14159/2018, 42670/2019 and 1670/2020 for promotion as Asst.Executive Engineers on the basis of the date of eligibility that was assigned to them by counting one third of service rendered by them as Junior Engineers in terms of Note (v) appended to Chapter V of KEB R & P Regulations, pursuant to the impugned communication dated 21.06.2018 issued by the Managing Director of the respondent Corporation.

No order as to costs.

In view of the disposal of the main petitions, I.A.No.1/2020 do not survive for consideration and accordingly the same stands disposed of.