

(1985) 02 DEL CK 0013

In the Delhi High Court

Case No : Letter Patent Appeal No. 166 of 1980

Ajit Singh, etc.

APPELLANT

Vs

Delhi Administration, etc.

RESPONDENT

Date of Decision : 01-02-1985

Acts Referred:

Citation : (1985) 28 DLT 6 : (1985) ILR Delhi 835 : (1985) LabIC 967

Hon'ble Judges : Sunanda Bhandare, J;D.K. Kapur, J

Bench : Division Bench

Advocate : P.P. Rao, R. Venkataraman, Y.K. Sabharwal, M.M. Sudan, A.B. Saharia and S.M. Babu, for the Appellant;

Judgement

Sunanda Bhandare, J.

(1) The appellants filed a petition under Article 226 of the Constitution of India for quashing the seniority list dated 8-5-1978 issued by the Administration of the Union Territory of Delhi and also the promotion orders dated 20th April, 1978 and 20th January, 1979 promoting some of the respondents from Grade-111 to Grade-II of the Delhi Administration Subordinate (Executive) Service. The appellants contended before the learned Single Judge in the writ petition that holding of the examinations for the first time in 1973-74 after the Delhi Administration Subordinate (Ministerial/ Executive) Service Rules, 1967 had come into force, and allowing all persons to become eligible between the years 1967 to 1974 to appear for filling the posts which arose as far back as 1967-68 was illegal and contrary to Rule 6(3) read with Rule 12 of the Delhi Administration Subordinate (Ministerial/Executive) Service Rules, 1967. It was contended that the carrying forward of all the vacancies since 1967 and holding an examination in 1974 for all the vacancies and allowing all the persons with three years service by 1974 to compete for those vacancies vitiated the right to equality as it suffers for want of rational classification. The petitioners further contended that since the letter inviting applications for the competitive examinations were not circulated to the petitioners, although it was individually

circulated to 838 Grade-IV (Executive Officials), the petitioners were denied equality of opportunity in the matter of promotion to Grade-III in the competitive examination. It was urged that the names of some of the petitioners had not been included in the seniority list of Grade-III officers even though the petitioners were approved turn promotion to Grade-III of the service by a duly constituted Departmental Promotion Committee and were appointed against regular posts. It was contended that the petitioners promotion to Grade-III (Executive) was regular after selection by Departmental Promotion Committee and not fortuitous emergent appointment or a stop gap arrangement and, Therefore, the petitioners were entitled to get their seniority from the date of their initial appointment.

(2) The facts of the case lie in a very narrow compass. The appellants were appointed to posts included in Grade-IV (Executive) of the Delhi Administration Subordinate Service between the period 1958 to 1960. Respondents No. 3 to 45 were appointed to the posts included in Grade-IV from 25th August, 1962 onwards till 30th October, 1970. The Delhi Administration Subordinate (Ministerial/Executive) Service Rules, 1967 came into force on 10th February, 1967. According to Rule 6 (III) recruitment to Grade-II is to be made by promotion from Grade-IV by two methods; (a) 50 per cent on the basis of seniority subject to rejection of unfit; and (b) 50 per cent by promotion of officers of Grade-IV on the basis of merit determined through a competitive examination, Rule 6(III) (c) determined the method of promotion by way of rotation if the quota was to be operated, It provided that the first vacancy would be filled by promotion on the basis of seniority-cum-merit and the second vacancy by promotion on the basis of merit determined as a result of examination As it happened no examinations were held till the year 1973. The petitioners were promoted to Grade-III on ad hoc basis. The appointment of the petitioners were made on the recommendations of the Departmental Promotion Committee, Delhi Administration decided to hold the first examination in the year 1973 and invited particulars from Heads of Department of the Grade-IV officials desirous of sitting for the test on 16th July, 1973. Whoever had completed three years of service as on 1st August, 1973 in Grade-IV was made eligible to appear for the competitive examination. Though there is some dispute regarding circulation of the said letter to employees in Grade-IV, it is an admitted fact that the petitioners who were already officiating or working on ad hoc basis in Grade-111 did not appear at the competitive examination. In 1974 first competitive examination was held. Respondents No. 3 to 45 who appeared for the examination were promoted to Grade-111 on ad hoc basis between the period 31st July, 1974 and 29th January, 1976. On 14th October, 1976 the promotions of some of the petitioners were regularised in Grade-111 with effect from that date. As regards a few others the promotion was regularised in Grade-III on 4-11-1981 with effect from that date. On 14th October, 1976 the promotions of respondents No. 3 to 45 which was also ad hoc were also regularised from the same date. A tentative seniority list was circulated on

January 21, 1977 which showed higher positions to respondents No. 3 to 45. Though the final seniority list was issued on 8th May, 1978 the respondents No. 3 to II were further promoted from Grade-111 to Grade-II on purely emergent and ad hoc basis even before the seniority list of Grade-111 was issued. It is this final seniority list of 8th May, 1978 which was challenged in the writ petition. The learned Single Judge over-ruled the contentions of the petitioners and dismissed the petition. This Letters Patent Appeal is against that order of the learned Single Judge.

(3) The main contention of the appellants before the learned Single Judge as before us was that the promotions made from 1967 to 1973 to fill up clear vacancies in Grade-111 on the basis of list prepared by the Departmental Promotion Committee under Rule 12 are regular promotions falling under sub-rule (i) of Rule 6(111). The appointments of the appellants to Grade-111 were made after selection by the Departmental 840 Promotion Committee under rule 12. The appellants became temporary cadre officers on their promotion to Grade-III during the year 1967 to 1973. Consequently, they were entitled to substantive appointments to the grade under sub-rule (2) of rule 6(111) in the order of their seniority as temporary cadre officers in the grade. It was contended that the quota rule mentioned in clauses (a) and (b) of sub-rule (1) of rule 6(III) has to be applied at the stage of initial recruitment as temporary cadre officers i.e. when clear vacancies in Grade-III are filled by promotion of officers from Grade-IV by the two methods specified therein.

(4) On the other hand, it was contended by the respondents that the only way a person could become a cadre officer was by appointment under rule 6 and not under rule 19. It was contended that the appointment letter of the petitioners showed that the appointment of petitioners was under rule 19 and not under rule 6(1). For making a substantive appointment to the grade, rule 12 specified that temporary officer had to be a cadre officer. A person could be a cadre officer only if his appointment was made under rule 6(1). It was submitted that this was evident from rule 2(f) which defines "cadre officer." meaning a member of the service of that Grade who is appointed under rule 5 or 6. It was contended that the appointment of the petitioners was initially only under rule 19. The substantive appointment was made on 14-10-1976 and 4-11-1981 and. Therefore, on that date the rule of rotation could be applied without differently because both the sets of promotees were available. The seniority of the petitioners in that grade, could not be counted from the date of the appointment under rule 19. Any change in sequence would vitiate the rules themselves and a harmonious consideration of the rules has to be made. It was contended that the examinations were held in 1973-74 and the same were not challenged by the petitioners and, Therefore, they were guilty of laches and inordinate delay and could not, therefore, challenge the delay in holding the examinations and the subsequent seniority list. 841 Rules 2(f), 6(111), 12 and 19 which are relevant for re- solving the controversy read as under :- "2(f) "cadre officer" in relation to any grade of the service means a member of the service of that grade who is

appointed under rule 5 or rule 6. "6(111) Recruitment to Grade Iii : (a) 50 per cent of the vacancies in the grade shall be filled by promotion of officers of Grade-IV on the basis of seniority, subject to rejection of unfit. (b) The remaining 50 per cent of vacancies in the grade shall be filled by promotion of officers of Grade-IV on the basis of merit to be determined through a competitive examination to be held in such manner as may be prescribed by the Chief Secretary from time to time by separate orders. (e) The vacancies shall be filled in the following manner : 1st vacancy-By promotion on the basis of seniority- cum-merit 2nd vacancy-By promotion on the basis of merit determined as a result of examination. (2) Substantive appointment to the grade shall be made in the order of seniority of temporary cadre officers on the grade on the recommendations of the Departmental Promotion Committee except when, for reasons to be recorded in writing, a temporary officer is not considered fit for such appointment in his turn." "12. Condition of Eligibility and Procedure for selection (1) The Committee shall consider from time to time the cases of officers eligible under rule 6 who have served in the respective grade in accordance with 842 the provisions contained therein after taking into account the actual vacancies at the time of selection and those likely to occur during a year." "19. Officiating Appointment to Duty Post of the Service : (1) If a member of the Service is not available for holding a duty post, the post may be filled on an officiating basis- (a) by the appointment of an officer included in the list referred to in rule 12; or (b) if no such officer is available, by the appointment of an officer included in the list prepared under rule 18". Rule 2(f) defines cadre officer meaning a member of the service of that grade who is appointed under rule 5 or rule 6. Rule 12 determines the condition of eligibility and procedure for selection. Rule 19 specifies how officiating appointments to duty post of the service can be made.

(5) From rule 6, sub-rule (III) it is clear that the recruitment to Grade-111 could be made by promotion from Grade-IV by two methods : (a) 50 per cent of the vacancies to be filled in by promotion of officers on the basis of seniority alone, subject to rejection of unfit; and (b) the remaining 50 percent vacancies in the grade to be filled in by promotion of officers of Grade-IV on the basis of merit determined through a competitive examination. Rule 6 (III) (e) determines the rotation. First vacancy to be filled by seniority and second vacancy to be filled on the basis of the result in the examination. This meant that if there were four vacancies and recruitments by way of promotions were to be made to fill in these four vacancies in Grade-III, the first vacancy would be filled by promotion by way of seniority; second vacancy would be filled on the basis of examination; third vacancy would be filled on the basis of seniority; and the fourth vacancy would be filled in by promotion on the basis of competitive examination.

(6) The respondent Delhi Administration however sought to apply the quota and rate rule only in the year 1976 when both the sets of promoters were available. This resulted in the respondents who were appointed after the petitioners in Grade-III being ranked higher in seniority over the petitioners and this is the

grievance of the petitioners.

(7) From the rules it is clear that appointment to the vacant post in Grade-111 could be made under rule 6(111) or rule 19. For appointment to be made under the two rules approval of the Departmental Promotion Committee had to be obtained. The appointment, both under rule 6(III) and rule 19 could be made only from the list prepared under rule 12 on the recommendation of the Departmental Promotion Committee. Under rule 6(III)(2) substantive appointment could be made from amongst the temporary cadre, officers in the grade on the recommendation of the Departmental Promotion Committee. Even officiating appointment, under rule 19(1) had to be made from amongst the officer"s in the list prepared under rule 12. Rule 26 of the Rules reads as under :- 26. Seniority : The. inter se seniority of the members of the Service appointed to any grade substantively or in a temporary capacity under rule 5 shall be determined in accordance with the principles laid down in the Delhi Administration (Seniority) Rules, 1965." The method of seniority, Therefore, has To be determined in accordance with the Delhi Administration (Seniority) Rules, 1965. Rule 5 of these Rules determines seniority of direct recruits rule 6 of promotees and rule 7 of relative seniority of direct recruits and promotes .The rule however do not contain any provision for determining the seniority of two sets of promotees like the petitioners and the respondents i.e. promotees on the basis of seniority, subject to rejection of unfit and those promoted on the basis of merit determined through competitive examination. So far as the petitioners arc concerned there was no inter se dispute raised in the writ petition. The 844 learned Single Judge while accepting that there is no seniority rule for determining the seniority of these two sets of promotees held that the administrative technology adopted by the Delhi Administration on the analogy of rule 7 of the Service Rules which deals with the relevant seniority between direct recruits and promotees according to rotation of vacancies was lair. The learned Single Judge however drew the attention of the Delhi Administration to the omission in the rules and the necessity , framing suitable ,rules for determining relative seniority between two sets of promotees.

(8) The Supreme Court has repeatedly held that continuous officiation in a non-fortuitous vacancy ought to receive due. recognition in fixing seniority between persons who arc recruited from deferent sources so long as they belong to the same cadre. discharge same or similar factions and bear the same responsibilities

(9) In the case of Baleshwar Dass and Others Vs. State of Uttar Pradesh and Others, the Supreme Court observed as under :- "What, in the context, is a substantive capacity vis-a-vis an appointment to a post ? In our view, the emphasis imparted by the adjective "substantive." is that a thing is substantive if it is "an essential part or constituent or relating to what is essential. We may describe a capacity as substantive if it has "independent existence" or is of "considerable amount or quantity". What is independent in a substantial measure may reasonably be described as substantive. Therefore, when a post is vacant.

however designated in officials, the capacity in which the person holds the post has to be ascertained by the State. Substantive capacity refers to the capacity in which a person holds the post and not necessarily to the nature or character of the post. To approximate to the official diction used in this connection, we may well say that a person is said to hold a post in a substantive capacity when he holds it for an indefinite period especially of long duration in contradistinction to a person who holds it for a definite or temporary period or holds it on probation. subject to confirmation." If a public servant serves for a decade with distinction in a post known to be not a casual vacancy but a regular post. experimentally or otherwise kept as temporary under the time-honored classification, can it be that this long officiation turns to ashes like a Dead Sea fruit because, of a label and his counterpart equal in all functional respects but with ten years less of service steals a march over him because his recruitment is to a permanent vacancy? We cannot anathematize officiation unless there are reasonable differentiation and limitations."

(10) In more recent judgment of the Supreme Court in *G.P. Doval and Others Vs. Chief Secretary, Government of U.P. and Others*, the Supreme Court has reiterated that if there is no binding rule of seniority the length of continuous officiation prescribes a valid principle of seniority. The Supreme Court in that case has held that even if a person is appointed as a stop-gap arrangement--once he is confirmed in the post, his past service had to be given credit, he has to be assigned seniority accordingly unless there is a seniority rule to the contrary. A similar view has been expressed by the Supreme Court in *O.P. Singla and Another Vs. Union of India (UOI) and Others*, .

(11) The Supreme Court in the case of *P.S. Mahal and Others Vs. Union of India (UOI) and Others*, has held :- "We have already pointed out that there is no inherent vice in the quota rule being operated through the rotational rule of seniority. Where the rotational rule of seniority is adopted, the relative seniority of 846 promotees from different sources has to be determined on the basis of a roster maintained in accordance with the quota rule so that when promotion of an officer is regularly made within his quota, he is fitted into the vacancy reserved for promotees from his source and his seniority is reckoned from the date when such vacancy arose. But this rotational rule of seniority can work only if the quota rule is strictly implemented from year to year. Some slight deviations from the quota rule may not be material but as pointed out by Palekar, J in the *Bishan Swarup Gupta's* case. "if there is enormous deviation other considerations may arise". If the rotational rule of seniority is to be applied for determining seniority amongst officers promoted from different sources, the quota rule must be observed. The application of the rotational rule of seniority when there is large deviation from the quota rule in making promotions is bound to create hardship and injustice and result in impermissible discrimination. That is why this Court pointed out in *A. K. Subraman's* case that "when recruitment is from two or several sources, it should be observed that there is no inherent invalidity in introduction of quota system and to work it out by a rule of rotation.

The existence of a quota and rotational rule by itself will not violate Article 14 or Article 16 of the Constitution.....It is the unreasonable implementation of the same which may, in a given case, attract the frown of the equality clause". The rotational rule of seniority is inextricably linked up with the quota rule and if the quota rule is not strictly implemented and there is large deviation from it regularly from year to year. it would be grossly discriminatory and unjust to give effect to the rotational rule of seniority. We agree wholly with the observation of D. A. Desai. J. 847 in *A. Janardhana Vs. Union of India (UOI) and Others*, that "the quota rule is linked with the seniority rule; if the first breaks down or is illegally not adhered to, giving effect to the second would be unjust, iniquitous and improper." This was precisely the reason why the Court in the first *Bishan Swarup Gupta's* case held that with the collapse of the quota rule, the rule of seniority set out in R. I (f) (iii) also went."

(12) In the present case before us since no examinations were held for several years the quota could not be operated and, Therefore, the rule of rotation could not be applied at the initial stage when ad hoc promotions were made. In case it was not possible to fill in the vacancies on the basis of the quota fixed because the second category was not available then as and when the vacancy would arise the same would have had to be filled on the basis of seniority alone subject of course to rejection of unfit. By not holding the examinations for a long number of years the quota became non-operative and since the quota rule was not strictly implemented rather observed in its breach the application of rotation rule after several years would be grossly discriminatory and adjust and would not stand the test of Article 14 and 16 of the Constitution of India.

(13) There is no challenge to the virus of the Rules in the writ petition and we are not called upon to decide on the validity of the Rules. We would have to decide upon the manner of implementation of the rules in such a manner that it can stand the test of Articles 14 and 16 of the Constitution of India. Though the appointment letter of the petitioners mentioned that the appointment was made under rule 19, the appointment even in that case had to be made from the list prepared under rule 12 on the recommendation of the Departmental Promotion Committee. Just because the other set of Promotees were not available, for no fault of the petitioners, because the Delhi Administration could not hold the examinations on account of 848 administrative exigencies or otherwise, the petitioners in the absence of any seniority rules could not be deprived of their seniority. The seniority between the petitioners must be determined in accordance with the respective dates of their continuous officiation in Grade-III and those of the respondents who are appointed after the petitioners so appointed, cannot rank higher in seniority over the petitioners. The petitioners who have been working for an unbroken period of over 12 to 15 years in Grade-III could not be regarded juniors to those respondents who have been appointed much later.

(14) There is no dispute that the petitioners had continuously worked in Grade-

III without a break all along and were found fit for confirmation in that grade. Mere mention of rule 19 in the appointment letter did not make it a stop-gap arrangement. The initial, appointment of the petitioners, Therefore, in Grade-III would be deemed to be regular in that grade and the petitioners have to be assigned due position in their seniority. Rule 19 has no application when there are clear vacancies either permanent or temporary which are likely to continue for long periods and there is a list of eligible officers prepared by the Departmental Promotion Committee under rule 12 available for making promotions.

(15) Article 16 Provides for equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State. This equality of opportunity must be real. Considering that average span for a citizen is 30 years, to provide for a situation where he is kept ad hoc for a period" of half his service span and then pushed below those who joined several years later, is denial of such opportunity. Apart from the denial of the fundamental rights guaranteed under Articles 14 and 16 of the Constitution of India, such a situation for which the not at fault, can only result in his demoralization and will effect his efficiency in discharge of his duties. This is certainly not conducive to public interest and the efficient working of the government or the administration. Care must, Therefore, be taken to see that rules are implemented in a manner that they do not cause any injustice and particularly infringement of fundamental rights. This is a patent case where such infringement has occurred because of non-holding of the examination for a considerably long period. We do hope that in future the long delays which keep the fate of the employees in suspense and thereafter drive them from court to court will be avoided by the administration. If the correct concept of the equality guaranteed under Articles 14 and 16(1) is understood, it should not be difficult for the administration to implement the rules so that they promote the equality of opportunities for all citizens and not result in denial of the same.

(16) In conformity with these guarantees we have interpreted the rules and have held that the appointments were valid since their inception and in the absence of any seniority rule, the golden rule of seniority on the basis of the continuous officiating service, has been applied. This has avoided any expression on our part as regards the validity of the rules.

(17) It may be pertinent to note at this stage that after the learned Single Judge dismissed the writ the 1967 Seniority Rules were amended by the Delhi Administration Subordinate Service (5th Amendment) Rules, 1980. By this amendment the two services i.e. the Delhi Administration (Executive Service) and the Delhi Administration (Ministerial Service) were merged into one service called the Delhi Administration Subordinate Service. The challenge to the merger of these two services has been upheld by this Court in Writ Petitions No. 1345 & 1354 of 1980.

(18) As regards the other contention of the respondents that petitioners are

guilty of delay and laches since the petitioners did not challenge the non-holding of examination till the final seniority list was issued is without any substance. The petitioners could not have challenged the tentative seniority list. They were making representations to the respondent-Delhi Administration even against the tentative seniority list. "It was only when the final seniority list was issued that the petitioners could file the writ petition. The final seniority list was issued on 8th May, 1978. The petitioners' representation objecting to the final seniority list was rejected on 23-8-1978 and the writ petition was filed in January, 1979. The petitioners, Therefore, could not be" said to have been guilty of delay and laches.

(19) We, Therefore, set aside the judgment of the learned Single Judge and strike down the seniority list dated 8-5-1978 and direct the Delhi Administration to revise the seniority list giving credit to the petitioners for their continuous officiation in Grade-III from the date of their initial appointment in that Grade. We hope that the new seniority list is finalised without any further delay. Parties will bear their own costs.