

(2003) 02 RAJ CK 0021

In the Rajasthan High Court

Case No : Civil Writ Petition No. 3751 of 1998

Banney Singh Rathore and Another

APPELLANT

Vs

State of Rajasthan and Others

RESPONDENT

Date of Decision : 11-02-2003

Acts Referred:

Rajasthan Excise Subordinate Service (General Branch) Rules, 1974 — Rule 6
Rajasthan Subordinate Service (Recruitment and Other Service Conditions) Rules,
1960 — Rule 17, 19

Citation : (2003) 3 RLW 1648 : (2003) 3 WLC 622

Hon'ble Judges : Sunil Kumar Garg, J

Bench : Single Bench

**Advocate : P.P. Choudhary, for the Appellant; Arun Bhansali, for Respondent
Nos. 1 and 2 and M.S. Singhvi, for the Respondent**

Final Decision : Dismissed

Judgement

Garg, J.—This writ petition under Article 226 of the Constitution of India has been filed by the petitioners on 21.11.1988 against the respondents with the prayer that by an appropriate writ, order or direction, the impugned orders Annex. 9 and Annex. 10 dated 10.10.1988 qua the respondents No. 3 to 7 by which the respondent No. 2 the Excise Commissioner, Rajasthan, Udaipur re-determined the seniority amongst the petitioners and the respondents No. 3 to 7 and placed the respondents No. 3 to 7 above the petitioners, be quashed and set aside.

2. The case of the petitioners as put forward by them in this writ petition is as follows :-

The petitioners were duly recruited and selected for the posts of Excise Inspectors Gr. II vide order Annex. 1 dated 24.10.1973 against the substantive posts.

The case of the petitioners is that the respondents No. 3 to 7 were appointed on

the posts of Excise Inspectors Gr. II in the year 1970 vide orders dated 22.9.1970 (Annex. R/6) and 2.11.1970 without complying with the procedure prescribed for recruitment under the Rajasthan Subordinate Service (Recruitment and other Service Conditions) Rules, 1960 (hereinafter referred to as "the Rules of 1960") and their appointments were made temporary under Rule 19 of the Rules of 1960.

The further case of the petitioners is that since the respondents No. 3 to 7 were not appointed regularly, therefore, after coming into force of the Rajasthan Excise Subordinate Service (General Branch) Rules, 1974 (hereinafter referred to as "the Rules of 1974"), the cases of the respondents No. 3 to 7 were considered by the Screening Committee and in pursuance of the recommendations of the Screening Committee under proviso (in) of Rule 6 of the Rules of 1974, the respondents No. 3 to 7 were appointed regularly as Excise Inspectors Gr. II vide order dated 23.11.1974 (Annex. 2).

According to the petitioners, a tentative seniority list of the Excise Inspectors Gr. II was issued on 30.11.1974 and in that seniority list, the petitioners were shown senior to the respondents No. 3 to 7. Another tentative seniority list was issued on 1.6.1977 in which also, the petitioners were shown senior to the respondents No. 3 to 7. However, objections were always invited against the seniority lists issued from time to time.

Again, a tentative seniority list dated 15.9.1979 of Excise Inspectors Gr. II was issued and in that seniority list also, the petitioners were also shown senior to the respondents No. 3 to 7.

Thereafter, a final seniority list Annex. 4 dated 21.6.1980 was issued and in that also, the petitioners were shown senior to the respondents No. 3 to 7.

Thereafter, another final seniority list dated 12.4.1985 (Annex. 5) was issued in which also the petitioners were shown senior to the respondents No. 3 to 7. Even in the seniority list dated 28.11.1987 (Annex. 6), the petitioners were shown senior to the respondents No. 3 to 7.

But, a tentative seniority list dated 18.8.1988 (Annex. 7) was again issued in which the petitioners names have been shown at serial Nos. 52 and 53 respectively whereas for the first time, the names of the respondents No. 3 to 7 have been shown at serial Nos. 37, 39 to 42 respectively.

Aggrieved from the said seniority list Annex. 7 dated 18.8.1988, the petitioners made a representation Annex. 8 dated 25.8.1988 and after giving due consideration to the representation Annex. 8 of the petitioners, the impugned seniority lists Annex. 9 and Annex. 10 dated 10.10.1988 were issued in which the names of the respondents No. 3 to 7 have been shown at serial Nos. 38, 40 to 43 respectively while the petitioners' names were shown at serial Nos. 53 and 54 respectively and in these seniority lists, the respondents No. 3 to 7 were shown senior to the petitioners treating them to be confirmed with effect from

the date of their initial temporary appointments.

In this writ petition, the seniority lists Annex. 9 and Annex. 10 dated 10.10.1988 have been challenged by the petitioners on various grounds and the main ground is that the appointments of the respondents No. 3 to 7 in temporary capacity were made under Rule 19 of the Rules of 1960 and therefore, since their appointments were made on temporary basis, they had to clear the screening test by the Screening Committee under proviso (iii) of Rule 6 of the Rules of 1974 and after its clearance, the respondents No. 3 to 7 should have been treated as substantively appointed and prior to that, no seniority could be conferred on them. Hence, this writ petition with the prayers as stated above.

A reply to the writ petition was filed by the respondents No. 1 and 2 and it has been submitted by them that the appointments of the respondents No. 3 to 7 were made in accordance with Rule 17 of the Rules of 1960 and not under Rule 19 of the Rules of 1960, as alleged by the petitioners.

3. The further reply of the respondents No. 1 and 2 is that before making the appointments of the respondents No. 3 to 7, an advertisement (Annex: R/1) dated 3.6.1970 was issued inviting applications for the posts of Excise Inspectors Gr. II and a requisition (Annex. R/2) alongwith proforma (Annex. R/3) for recruitment of candidates to the posts of Excise Inspectors Gr. II was sent to all the Employment Officers with a request to sent the names of five suitable candidates for interview and, thereafter, the respondents No. 3 to 7 and others were called for interview through call letters and copies of call letters issued to the respondent No. 5 Duleh Singh dated 24.7.1970 and 20.8.1970 are marked as Annex. R/4 and Annex. R/5 respectively and their interviews were taken by the Committee as provided under Rule 17 of the Rules of 1960 and, thereafter, they were given appointments as Excise Inspectors Gr. II through orders Annex. R/6 dated 22.9.1970 and 2.11.1970.

4. Thus, according to the respondents No. 1 and 2, the respondents No. 3 to 7 though appointed on temporary basis, but according to the procedure prescribed in Rule 17 of the Rules of 1960 and not appointed under Rule 19 of the Rules of 1960 and when they were not appointed under Rule 19 of the Rules of 1960, they were not required to pass the screening test by the Screening Committee under the proviso (iii) of Rule 6 of the Rules of 1974 and that exercise was wrongly done in the cases of the respondents No. 3 to 7 and since they have made representations also against the seniority lists in which they were shown junior to the petitioners, therefore, impugned seniority lists Annex. 9 and Annex. 10 were issued and the same were rightly issued. Hence, the writ petition filed by the petitioners be dismissed.

5. I have heard the learned counsel appearing for the petitioners and the learned counsel appearing for the respondents and gone through the materials available on record.

6. The case of the petitioners is that the respondents No. 3 to 7 were appointed

under Rule 19 of the Rules of 1960, while the case of the respondents is that the respondents No. 3 to 7 were appointed under Rule 17 of the Rules of 1960.

7. Thus, the question for consideration is whether the respondents No. 3 to 7 were appointed under Rule 17 of the Rules of 1960 as alleged by the respondents or under Rule 19 of the Rules of 1960, as alleged by the petitioners.

8. Before giving answer to the above question, factual position of the case may be summarised in the following manner :-

(i) That on 3.6.1970 through advertisement Annex. R/1 the respondent No. 2 advertised five vacancies of Excise Inspectors Gr. II.

(ii) That thereafter, a requisition (Annex. R/2) dt. 3.6.1970 alongwith proforma (Annex. R/3) was sent by the respondent No. 2 to all the Employment Officers with a request to send the names of five suitable candidates for interview to the posts of Excise Inspectors Gr.II.

(iii) That thereafter, interview letters were issued to the respondents No. 3 to 7 in the shape of call letter Annex. R/4 dated 24.7.1970.

(iv) That through orders dated 22.9.1970 (Annex. R/6) and 2.11.1970, the respondents No. 3 to 7 were given appointments on the posts of Excise Inspectors Gr. II on temporary basis.

(v) That in the appointment orders of the respondents No. 3 to 7, neither it was mentioned that they were given appointments on adhoc basis nor it was mentioned that they were put on probation.

(vi) That the petitioners were appointed on the posts of Excise Inspectors Gr. II through order Annex. 1 dated 24.10.1973 meaning thereby the petitioners were appointed later on and prior to them, the respondents No. 3 to 7 were appointed through orders dated 22.9.1970 (Annex. R/6) and 2.11.1970.

(vii) That on the date when the appointments of the respondents No. 3 to 7 as well as the petitioners were made, the Rules of 1960 were in force and the Rules of 1974 came into force with effect from 30.5.74.

(viii) That after coming into the force of the Rules of 1974, no doubt the respondents No. 3 to 7 were screened by the Screening Committee under proviso (iii) of Rule 6 of the Rules of 1974 and thereafter they were treated regularly appointed after their screening with effect from the order dated 23.11.1974 (Annex. 2).

(ix) That in the seniority lists published earlier, the petitioners were shown senior to the respondents No. 3 to 7 on the ground that screening test, was cleared by the respondents No. 3 to 7 in the year 1974, while the petitioners were appointed in the year 1973.

(x) That seniority lists of the petitioners as well as the respondents No. 3 to 7 were published by the respondents No. 1 to 2 from time to time and objections

were raised from time to time by the petitioners" and the respondents No. 3 to 7 and ultimately, the respondents came to the conclusion that the appointments of the respondents No. 3 to 7, which were made in 1970, were in substantive capacity and since the respondents No. 3 to 7, which were made in 1970, were in substantive capacity and since the respondents No. 3 to 7 were appointed prior to the petitioners, therefore, they treated them senior to the petitioners.

9. To appreciate the contentions of the parties, the contents of Rules 17 and 19 of the Rules of 1960 have to be seen.

10. The relevant portion of Rule 17 of the Rules of 1960 reads as follows :-

Rule. 17 Procedure for recruitment by Appointing Authority. - The following procedure shall be followed for making direct recruitment to any post, otherwise than through the agency of the Commission ;-

(1) Applications for direct recruitment to posts in the Service, shall be invited by the Appointing Authority by advertising the vacancies to be filled, in the official gazettee or in such other manner, as may be deemed fit.

(2).....

(3)

(4) The Appointing Authority shall scrutinize the applications received by him and require as many candidates eligible for appointment under these Rules as seems to him desirable to appear before a Committee for interview. The Committee shall consist of the Head of the Department, Deputy Head of the Department and an officer nominated by the Government. The Head of Department shall preside at all meetings of the Committee.

(5) The Committee shall prepare a list of the candidates whom they consider suitable for appointment to the posts, arranged in the order of merit :

Provided that the Committee may, to the extent of 50% of the advertised vacancies, keep names of suitable candidates on the reserve list. Appointment out of this list may be made in the order of merit within six months from the date on which the original list is prepared.

Provided further that the inclusion of a candidate's name in the list confers no rights to appointment unless the Appointing Authority is satisfied after such enquiry as may be considered necessary that the candidate is suitable in all other respects for appointment to the Service.

(6)

(7)....."

11. Rule 19 of the Rules of 1960 deals with urgent temporary appointment and the proviso to that Rule clearly provides that the appointment made under Rule 19 will not be continued, beyond the period of one year without referring the

case to the Commission for concurrence.

12. Thus, from perusing the Rules 17 and 19 of the Rules of 1960, a basic distinction is visible in the manner that in Rule 17, appointment would be made directly to any post without the agency of the Commission and furthermore, advertisement shall be published and applications shall be invited and, thereafter, interview would be held by the Selection Committee and the Selection Committee shall prepared a list of candidates to whom they found suitable for appointment to the post, while in Rule 19, nothing sort of like that is there and only appointment is made on urgent temporary basis for a particular period and that appointment shall not continue beyond the period of one year while such type of conditions are not found in the appointment made under Rule 17.

Position of law in respect of temporary and permanent appointments.

13. In *Baleshwar Dass v. State of U.P.* (1), the Hon''ble Supreme Court has dealt with the question as to when an appointment can be said to have been made in substantive capacity and it has been observed as under :-

"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 the appointment is to a post and the capacity in which the appointment is made is of indefinite duration, if the Public Service Commission has been consulted and has approved, if the tests prescribed have been taken and passed, if probation has been prescribed and has been approved, one may well say that the post was held by the incumbent in a substantive capacity."

14. In *State of U.P. v. M. Siddiqui and Ors.* (2), the Hon''ble Supreme Court held that a person may be appointed in substantive capacity on a permanent as well as a temporary post. In that case, the Hon''ble Supreme Court held that the appointment on a temporary post was in a substantive capacity after taking into consideration the fact that the said appointment had been made on the basis of an advertisement inviting applications and the said appointment had been made on the recommendation of the Public Service Commission. The Hon''ble Supreme Court has observed :-

"In our opinion, reading the advertisement and the manner and mode of the appointment of the appellants, it must be held that they were appointed in a substantive capacity to temporary posts which according to the advertisement were likely to continue. There does not appear to be any magical formula or special charm in the word "substantive". The mere use of the term "appointment" in a temporary vacancy by itself would not conclude the matter or lead to the irresistible inference that the appointment was not made in a substantive capacity because even a substantive appointment could be made to

a purely temporary vacancy. In order, therefore, to determine nature of the appointment we have to look to the hear and substance of the matter, the surrounding circumstance, the mode, the manner and the terms of appointment and other relevant factors. In the instant case, we cannot ignore the advertisement which forms the pivotal basis of the direct recruitment in pursuance of which the appellants were appointed. Another circumstance that supports our view is that the appellants were not appointed merely on an adhoc basis but through the Public Service Commission and in a regular way."

15. The aforesaid decisions show that for the purpose of determining whether a particular appointment was in a substantive capacity, the Court has to look into the substance of the matter, i.e. the mode of selection, the manner of selection and the nature of vacancy. The fact that the appointment was made after issuing an advertisement calling for applications from eligible candidates and the fact that a select list/merit list was prepared on the recommendations of a duly constituted Selection Committee are indicative of the appointment being a regular and substantive appointment and not merely "adhoc".

16. It may be stated here that the point from which service has to be counted is the commencement of the officiating service of the persons, who might have not secured permanent appointments in the beginning and in that sense, they may be temporary, but for all other purposes, since they have been performing the duties as such, they are to be absorbed into permanent posts or to be treated at par with permanent vacancies.

17. Applying the above test in the present case, since before making the appointments of respondents No. 3 to 7, an advertisement inviting applications for the posts of Excise Inspectors Gr. II was issued and not only this, candidates were also called for from the Employment Officers and all eligible candidates including the respondents No. 3 to 7 were called for interview before the Selection Committee and thereafter, the respondents No. 3 to 7 were appointed, therefore, in these circumstances, it can be inferred that the appointments of the respondents No. 3 to 7 were made under Rule 17 of the Rules of 1960 as the same were made after following the procedure prescribed under Rule 17 of the Rules of 1960 and their appointments should for all purposes be treated in the nature of regular substantive appointments and mere use of the word "temporary" in the appointment orders of the respondents No. 3 to 7 would make no difference.

18. Thus, it is held that the appointments of the respondents No. 3 to 7 were made under Rule 17 of the Rules of 1960 and not under Rule 19 and therefore, there was no necessity of putting them before the Screening Committee under proviso (iii) of Rule 6 of the Rules of 1974 and nature of their appointments has to be treated regular and substantive from the date of their initial appointments made in 1970

19. When this being the position, the impugned seniority lists Annex, 9 and

Annex. 10 were rightly issued by the respondent No. 2 by which the respondents No. 3 to 7 were made senior to the petitioners as the respondents No. 3 to 7 were appointed in the year 1970 while the petitioners were appointed in 1973.

20. For the reasons stated above, there is no merit in this writ petition and the same is liable to be dismissed.

Accordingly, this writ petition filed by the petitioners is dismissed. No order as to costs.