
(2007) 06 AHC CK 0012
In the Allahabad High Court

Dileep Kumar Srivastava

APPELLANT

Vs

State of U.P. and Mithlesh Kumar

RESPONDENT

Date of Decision : 15-06-2007

Acts Referred:

Constitution of India, 1950 — Article 16
Government of India Act, 1935 — Section 241

Citation : (2007) 7 AWC 7048

Hon'ble Judges : V.K. Shukla, J

Bench : Single Bench

Judgement

V.K. Shukla, J.—Civil Misc. Writ Petition No. 18182 of 2006 has been filed by Dileep Kumar Srivastava, an employee of Allahabad District Judgeship, assailing the validity of decision dated 23.01.2006 taken by Inspecting Judge, Allahabad, determining inter se seniority of petitioner as well as Mithlesh Kumar. Civil Misc. Writ Petition No. 23578 of 2006 has been filed by Shafiq Ahmad, another employee of Allahabad District Judgeship, for issuing a writ in the nature of mandamus commanding the respondents to consider the case of petitioner for correct fixation of seniority.

2. Brief background of the case is that Shafiq Ahmad, petitioner of Civil Misc. Writ Petition No. 23578 of 2006 was appointed in the judgeship of Allahabad as class III employee in the year 1967. Mithlesh Kumar claims to have been appointed in the Judgeship of Mirzapur on 11.04.1974, and thereafter, he was transferred to Judgeship of Allahabad on 01.10.1984. Dileep Kumar Srivastava was appointed as clerk in the Judgeship of Mirzapur on 15.12.1975, and he was also transferred to Judgeship of Allahabad on 30.09.1984. Dileep Kumar was confirmed employee while he was posted at Mirzapur, whereas Mithlesh Kumar was confirmed at Allahabad on 01.02.1985. Shafiq Ahmad was also confirmed on 01.02.1985. A three member committee was constituted, comprising Sri C.D. Jaiswal, Sri Umeshwar Pandey and Sri Y.S. Sengar, and the said committee prepared list of the candidates proposed to be put up in the scale given in the Government Orders dated 28.02.1985, 02.04.1985 and 31.05.1985 for the

purposes of staffing pattern. In the said list name of Dileep Kumar Srivastava was shown at serial No. 49 below Raghubir Prasad and above Shafiq Ahmad. Record in question reveals that at the point of time when gradation list was to be prepared, Sadar Munsarim was asked to submit report, and the report was submitted on 01.11.1985, wherein it was mentioned that seniority of Dileep Kumar Srivastava be fixed below Raghubir Prasad and above Shafiq Ahmad, and further it was also mentioned that the matter be referred to the committee for comments. Officer In-charge (accounts) was directed to submit comments. On 02.11.1985 Officer In-charge (Accounts) reported that, "from the letter dated 18.2.1985 in the file of Sri Deepak Srivastava it appears that such transferred official is to be placed at the bottom of the approved candidates. Sadar Munsarim to report in this light." Thereafter, report was submitted by Sadar Munsarim, but no final decision was taken. However, said gradation list at all point of time was used for the purposes of according promotions. Record in question further reveals that on 26.09.1991, Dileep Kumar Srivastava represented the matter claiming that his name be placed above Raghubir Prasad and Shafiq Ahmad. It was mentioned therein that Sadar Munsarim had submitted report in his favour and said recommendation was approved by the committee. The request made by Dileep Kumar Srivastava was considered by the then District Judge, Allahabad on 10.12.1991, and detailed order was passed and after report dated 02.11.1991 submitted by Senior Administrative Officer was accepted and the name of Dileep Kumar Srivastava was directed to be placed in the gradation list below Rama Shankar Srivastava and above Smt. Lalita Kumari, as Sri Rama Shankar Srivastava was the last approved candidate on the date of transfer of Dileep Kumar Srivastava. Aggrieved against the said order, Dileep Kumar Srivastava preferred representation, wherein detailed comments had been submitted, and on the administrative side decision on the appeal of Dileep Kumar Srivastava was taken and therein directives were issued for according placement to Dileep Kuamr Srivastava in between Raghubir Prasad and Shafiq Ahamd i.e. below the name of Raghubir Prasad and above the name of Shafiq Ahmad. Against the said action, Shafiq Ahamd claimed that entire proceedings were ex-parte and he represented the matter. Till date no decision has been taken on his representation. As far as Mithlesh Kumar is concerned, he represented the matter and his Appeal has been allowed by the Inspecting Judge, declaring him to be senior. At this juncture present Civil Misc. Writ Petition No. 18182 of 2006 has been filed by Sri Dileep Kumar Srivastava, and Civil Misc. Writ petition No. 23578 of 2006 by Sri Shafiq Ahmad, for giving direction to decide his matter.

3. Counter affidavits have been filed in both the writ petitions, and therein, as far as Dileep Kumar Srivastava is concerned, categorical stand has been sought to be taken by him by mentioning that seniority stood determined in terms of Rule 19 of the Subordinate Civil Courts Ministerial Establishment Rules, 1947 and the settled seniority cannot be permitted to be reopened, and further the provisions of U.P. Government Servant Seniority Rules, 1991 are not at all applicable in respect of ministerial staff.

4. To the said counter affidavits, rejoinder affidavit have been filed, and original record in relation to dispute, which has been decided on administrative side has also been produced.

5. Sri W.H. Khan and Sri Krishna Ji Khare, Advocates, appearing for Dileep Kumar Srivastava, contended with vehemence that in the present case seniority stood determined in the year 1985, which held the field for substantially long period, and the Inspecting Judge has clearly erred in setting aside and disturbing the aforementioned seniority and in this background, the view which has been taken by means of the impugned order is against the record and coupled with this the Rules, which have been made applicable, are not at all applicable and attracted, as such impugned decision is liable to be quashed.

6. From the side of respondents, Sri K.R. Sirohi, Sri H.R. Mishra and Sri Dinesh Kuamr Srivastava, Advocates, contended with vehemence that in the present case rightful view has been taken as per U.P. Government Servant Seniority Rules, 1991 and the date of confirmation rightly has not been given any credibility, inasmuch as, it gives handle to act in arbitrary manner, and in this background, it has been contended that writ petition is liable to be dismissed.

7. Sri Amit Asthelkar, learned Counsel representing the establishment, on the other hand, contended that seniority has been rightly decided and the gradation list cannot be accepted as seniority list. Merely because it has been used for the purposes of according promotion, no benefit can be extended to Dileep Kumar Srivastava, as such writ petition deserves to be dismissed.

8. Sri K.P. Agrawal, Senior Advocate, has also entered appearance on behalf of Harish Kumar Srivastava, and contended that his client is also interested in the matter, as such while deciding writ petition, he also be heard in the matter. He submits that claim of petitioner is totally unacceptable and the writ petition is liable to be dismissed.

9. Sri Mustaqeen Ahmad, Advocate, representing Sri Shafiq Ahmad, opposed the claim of Sri Dileep Kumar Srivastava and requested that claim of his client be considered.

10. After respective arguments have been advanced, the factual position which emerges is to the effect that in the present case, it is fully substantiated from the record, which has been produced, that Shafiq Ahmad was appointed in the year 1967. Mithilesh Kumar has been appointed in the Judgeship of Mirzapur on 11.04.1974, and thereafter, he was transferred to Judgeship of Allahabad on 01.10.1984. Dileep Kumar Srivastava was appointed as clerk in the Judgeship of Mirzapur on 15.12.1975, and thereafter he was transferred to Judgeship of Allahabad on 30.09.1984, and joined on 01.10.1984. Dileep Kumar was confirmed employee while he was posted at Mirzapur, whereas Mithlesh Kumar was confirmed at Allahabad on 01.02.1985. Shafiq Ahmad was also confirmed on 01.02.1985. This is also clear and categorical that at the point of time when Dileep Kumar Srivastava was transferred from Mirzapur to Allahabad,

a categorical mention was made that his seniority would be determined subsequent to the same. The question is as to whether his seniority has ever been determined or not. Record in question reveals that for the purposes of according scale and for the purposes of staffing pattern as given in the Government Orders dated 28.02.1985, 02.04.1985 and 31.05.1985, list was published and the same list was prepared by three-member committee. Said list as is clear from its purpose, had been prepared to put up the candidate in the scale given in the Government Orders dated 28.02.1985, 02.04.1985 and 31.05.1985 for the purposes of staffing pattern. The said list, by no means, can be said to be seniority list, inasmuch as, in case it had been seniority list, then it ought to have been circulated amongst the candidates inviting their objections with regard to seniority, so that it may be finalized. Record in question further reveals that Dileep Kumar Srivastava represented on 11.09.1985, and on the said representation, Sadar Munsarim was asked to submit report, and the report was submitted on 01.11.1985, wherein it was mentioned that seniority of Dileep Kumar Srivastava be fixed below Raghubir Prasad and above Shafiq Ahmad, and further it was also mentioned that the matter be referred to the Committee for comments. However, the same was referred to Officer In-charge (accounts) who was directed to submit comments. On 02.11.1985 Officer In-charge (Accounts) reported that, " from the letter dated 18.2.1985 in the file of Sri Deepak Srivastava it appears that such transferred official is to be placed at the bottom of the approved candidates. Sadar Munsarim to report in this light." Record in question further reveals that said matter was further pursued and it nowhere indicates that report of the Sadar Munsarim was ever approved by the Committee as stated by Dileep Kumar Srivastava. On representation moved by Dileep Kumar Srivastava for, determining his seniority on 10.12.1991, his claim had been rejected and against the same he had filed representation. Said representation was allowed on 10.01.1996 by the Inspecting Judge, and the prayer was accepted that he be placed between Raghubir Prasad and Shafiq Ahmad i.e. below the name of Raghubir Prasad and above the name of Shafiq Ahmad. Against the said action, Mithlesh Kumar as well as Shafiq Ahmad have represented. As far as Mithlesh Kumar is concerned, his representation has been allowed, but as far as Shafiq Ahmad is concerned, till date his matter has not been decided. Record in question also clearly reveals that order which was passed by the Inspecting Judge on 10.01.1996 on the representation of Dileep Kumar Srivastava, same was ex parte order, inasmuch as at no point of time either Mithlesh Kumar or shafiq Ahmad had ever been heard. Once there was an order dated 10.12.1991 by the District Judge, Allahabad rejecting the claim of Dileep Kumar Srivastava, and thereafter, in the matter of seniority if any adjudication was to be made, then rule of fair play clearly demanded that opportunity of hearing be afforded to the incumbents, whose seniority was to be affected on account of the order being passed by this Court on administrative side in the year 1996, which is an ex parte order determining the seniority of Dileep Kumar Srivastava directing his placement in between Raghubir Prasad and Shafiq Ahmad. Thus, record clearly reveals that as far as seniority is concerned,

it had never been determined and it was always an issue, which was engaging attention of the authorities in one way or the other. In this background, statement which has been made by Dileep Kumar Srivastava that seniority stood determined in 1985, is incorrect statement, inasmuch as said Committee never approved the same. Much reliance has been placed on the fact that said gradation list at all point of time had been used for the purposes of according promotion and same is reflective of seniority status as such same should not have been touched. Merely because the said gradation list had been used in the matter of according promotion and all promotions had been accorded as per the same, same will not make it conclusive for the simple reason that seniority had never been determined as per Rules, after inviting objections from respective incumbents. Said list had been prepared for specific purpose, and said list had been used in the matter of promotion, but as far as question of seniority is concerned, no seniority was ever determined. In the present case, this fact is being emphasized by Dileep Kumar Srivastava that his date of confirmation is at earlier point of time, and in terms of Subordinate Civil Courts Ministerial Establishment Rules, 1947, in all eventuality, he has to be accepted as senior, as seniority has to be determined on the basis of Rules, which was in existence when incumbent became member of the cadre.

11. Hon'ble Apex Court in the case of P. Mohan Reddy v. E.A.A. Charles and Ors. AIR (2) 2001 SC 10 has taken the view that an incumbent has the right of his seniority being determined in accordance with the Rules which remained in force at the time when he was born in cadre. The question of redetermination of seniority in the cadre on the basis of amended criteria or Rules would arise only when the amendment in question is given a retrospective effect. Paragraphs 17 and 18 of the said judgment being relevant are quoted below:

17. A conspectus of the aforesaid decisions of this Court would indicate that even though an employee cannot claim to have a vested right to have a particular position in any grade, but all the same he has the right of his seniority being determined in accordance with the Rules which remained in force at the time when he was borne in the Cadre. The question of re-determination of the seniority in the cadre on the basis of any amended criteria or Rules would arise only when the amendment in question is given a retrospective effect. If the retrospectivity of the Rule is assailed by any person then the Court would be entitled to examine the same and decide the matter in accordance with the law. If the retrospectivity of the Rule is ultimately struck down, necessarily the question of re-drawing of the seniority list under the amended provisions would not arise, but if however, the retrospectivity is upheld by a Court then the seniority could be re-drawn up in accordance with the amended provisions of the employees who are still in the cadre and not those who have already got promotion to some other cadre by that date. Further a particular Rule of seniority having been considered by Court and some directions in relation thereto having been given, that direction has to be followed in the matter of drawing up of the seniority list until and unless a valid Rule by the Rule Making Authority comes

into existence and requires otherwise, as was done in AIR 1997 3127 (SC) It may be further stated that if any Rule or Administrative Instruction mandate drawing up of seniority list or determination of inter se seniority within any specified period then the same must be adhered to unless any valid reason is indicated for non-compliance of the same.

18. When we examine the present case from the aforesaid principles we have no doubt in our mind, that in view of the judgment of this Court in K.V. Subba Rao and Others Vs. Government of Andhra Pradesh and Others, seniority of Deputy Tehsildars appointed between the dates 10-4-1980 till September 1992 is required to be determined in accordance with pre-amended Rules which came into existence in September 1992, and even if, factually such seniority has not been drawn up then the same has to be drawn up in accordance with the criteria indicated in the pre-amended Rule and not according to the amended Rules, which came into existence in September 1992, as has been held by the High Court in the impugned judgment. The High Court, therefore, was clearly in error and the said judgment of the High Court is thus set aside. The Tribunal was fully justified in dismissing the O.As. filed by the promotee Deputy Tehsildars. In the premises, as aforesaid, the Civil Appeals by the direct recruits are allowed and the O.As. filed by the promotees before the Administrative Tribunal stand dismissed.

12. At this juncture Rules 19 and 20 of the Subordinate Civil Courts Ministerial Establishment Rules, 1947, are to be looked into. Relevant extract of Rules 19 and 20, framed in pursuance of the provisions of Clause (b) of Sub-section (1) and Clause (b) of Sub-Section (2) of Section 241 of the Government of India Act, 1935 which deal with seniority and promotion are being quoted below:

19. Seniority : Seniority in service, for the purposes of promotion shall ordinarily be determined from the date of the order of confirmation in the grade and if such date is the same in the case of more than one person then according their respective position in the next lower grade or the register of recruited candidates in the case of persons confirmed in the lowest grade.

20. Promotion : (1) The posts in judgship reserved for clerks in that judgship and promotion to higher posts shall be made from amongst them. If, however, no suitable clerk is available in the judgship for promotion to a particular post, promotion as a special case may be made from another judgship with the sanction of the High Court or the Chief Court, as the case may be.

(2) Except in case of Amins, promotion shall be made according to seniority subject to efficiency up to Rs. 80 grade in the case of persons getting pre-1931 scale of pay and the scale of Rs. 70-4-9-(Class-III) in the case of persons getting pay in the post-1931 scale of Rs. 85-6-145 in the case of persons drawing the revised 1947 scale.

(1)(3) Posts other than those mentioned in Clause (2) above, for persons in the pre-1931 scale on post 1931 scale respectively shall be treated as selection

posts, promotion to which shall be based on merit with the due regard to seniority.

Note - In passing over a person for inefficiency as well as promotion for a selection post due weight shall be given to his previous record of service and seniority should be disregarded only when the junior official promoted is of outstanding merit as compared with his seniors.

(4) Promotion to the posts of Central Nazir or Central Nazirs from one grade to another in the provinces of Agra shall be made according the rules made from time time by the High Court.

(5) In Courts subordinate to the High court, promotion of Amins from the second to the first grade shall, as a rule, be made within the local jurisdiction of a Judge upon the ground of superiority of general qualifications, irrespective of more length of service.

(6) Promotions and appointments to the posts of Amins in Court shall ordinarily be confined to person who satisfy the District Judge that they have a competent knowledge of-

(i) Urdu and Hindi

(ii) Arithmetic

(iii) Mensuration

(iv) Elementary land surveying and mapping

(v) Order XXVI of Act No. V of 1908

(vi) Rules in General Rules (Civil) relating to the work and duties of the Amins. In exceptional circumstances the District Judge may exempt an official from such qualifications if he is satisfied that the official concerned is otherwise fit to hold the appointment.

(7) An official once promoted to the post of Amin shall not, for the purposes of promotion to other posts in the general office be entitled to claim seniority by reasons of such promotion as Amin.

Punishments - (A separate set of rules regarding punishments and appeal have been issued.)

13. A bare perusal of the aforementioned provisions would go to show that same provides that seniority in service, for the purposes of promotion shall ordinarily be determined from the date of the order of confirmation in the grade and if such date is the same in the case of more than one person then according their respective position in the next lower grade or the register of recruited candidates in the case of persons confirmed in the lowest grade. The said Rule, as is reflected from the language used, is only limited for the purposes of promotion at the said point of time. Hon"ble Court in the case of S.B. Patwardhan and Another

Vs. State of Maharashtra and Others, has taken the view that seniority to be determined on the sole touchstone of confirmation seems to us indefensible. Confirmation is one of the inglorious uncertainties of government service depending neither on efficiency of the incumbent nor on the availability of substantive vacancies. It has been further mentioned that confirmation does not have to conform to any set rules and whether an employee should be confirmed or not depends on the sweet will and pleasure of the government. Paragraph 39 of the judgment being relevant is quoted below:

39. If officiating Deputy Engineers belong to Class II cadre as much as direct recruits do and if the quota system cannot operate upon their respective confirmation in that cadre is there any valid basis for applying different standards to the members of the two groups for determining their seniority? Though drawn from two different sources, the direct recruits and promotees constitute in the instant case a single integrated cadre. They discharge identical functions, bear similar responsibilities and acquire an equal amount of experience in their respective assignments. And yet Clause (iii) of Rule 8 provides that probationers recruited during any year shall in a bunch be treated as senior to promotees confirmed in that year. The plain arithmetic of this formula is that a direct recruit appointed on probation, say in 1966, is to be regarded as senior to a promotee who was appointed as an officiating Deputy Engineer, say in 1956, but was confirmed in 1966 after continuous officiation till then. This formula gives to the direct recruit even the benefit to his one year's period of training and Anr. year's period of probation for the purposes of seniority and denies to promotees the benefit of their long and valuable experience. If there was some intelligible ground for this differentiation bearing nexus with efficiency in public services, it might perhaps have been possible to sustain such a classification. It is interesting that time and again the State Governments themselves found it difficult to justify the hostile treatment accorded to the promotees. In various affidavits filed on their behalf, entirely contradictory contentions were taken, sometimes in favour of the promotees and sometimes in favour of direct recruits. Instead of adopting an intelligible differentia, Rule 8(iii) leaves seniority to be determined on the sole touchstone of confirmation which seems to us indefensible. Confirmation is one of the inglorious uncertainties of Government service depending neither on efficiency of the incumbent nor on the availability of substantive vacancies. A glaring instance widely known in a part of our country is of a distinguished member of the judiciary who was confirmed as a District Judge years after he was confirmed as a Judge of the High Court. It is on the record of these writ petitions that officiating Deputy Engineers were not confirmed even though substantive vacancies were available in which they could have been confirmed. It shows that confirmation does not have to conform to any set rules and whether an employee should be confirmed or not depends on the sweet will and pleasure of the government.

14. Said judgment of Apex Court has been followed in the case of O.P. Garg and others, Vs. State U.P. and others, by contending that once an incumbent is

appointed to a post according to rule, his seniority has to be counted from the date of his appointment and not according to the date of his confirmation. In the said judgment, it has been categorically held that under 1975 Rules, which links the seniority with the date of confirmation is on the face of it arbitrary and as such is violative of Article 16 of the Constitution. Paragraphs 26 and 27 of the said judgment is being extracted below:

26. We have given our thoughtful consideration to the arguments of the parties. This Court has time and again held that when an incumbent is appointed to a post in accordance with the Service Rules his seniority has to be counted on the basis of continuous length of service and not in reference to the date of confirmation. Even in the present case the promotees have been confirmed long after the availability of permanent vacancies. This Court in *S.B. Patwardhan and Another Vs. State of Maharashtra and Others*, observed that "confirmation is one of the inglorious uncertainties of Government service depending neither on efficiency of the incumbent nor on the availability of substantive vacancies". A Constitution Bench of this Court in *The Direct Recruit Class-II Engineering Officers' Association and others Vs. State of Maharashtra and others*, approved Patwardhan's case and laid down the following propositions in this respect:

(A) Once an incumbent is appointed to a post according to rule, his seniority has to be counted from the date of his appointment and not according to the date of his confirmation.

The corollary of the above rule is that where the initial appointment is only ad hoc and not according to rules and made as a stop-gap arrangement, the officiation in such post cannot be taken into account for considering the seniority.

(B) If the initial appointment is not made by following the procedure laid down by the rules but the appointee continues in the post uninterruptedly till the regularisation of his service in accordance with the rules, the period of officiating service will be counted.

(C) When appointments are made from more than one source, it is permissible to fix the ratio for recruitment from the different sources, and if rules are framed in this regard they must ordinarily be followed strictly.

27. Keeping in view the scheme of the 1975 rules, we are of the view that first proviso to Rule 26(1)(a) of the 1975 rules which links the seniority with the date of confirmation is on the face of it arbitrary and as such violative of Article 16 of the Constitution of India. Since the recruitment to the service is from three sources the existence of a vacancy either permanent or temporary is the sine qua non for claiming benefit of continuous length of service towards seniority. The period of officiation/service which is not against a substantive vacancy (permanent or temporary) cannot be counted towards seniority. While striking down first proviso to Rule 26(1)(a) of the 1975 rules we hold that the continuous officiation/service by a promotee shall be counted for determining his seniority only from the date when a substantive vacancy against a permanent or

temporary post is made available in his quota under the 1975 rules.

15. In the light of the decision of Hon'ble Apex Court, it is amply clear that confirmation of an incumbent in the grade cannot be linked with seniority and same cannot be determinative criteria for fixing seniority as it would be wholly arbitrary manner of fixing seniority and violative of Article 16 of the Constitution of India. Apart from this Rule 19 of 1947 Rules contains the word "ordinarily". In common parlance when expression "ordinarily" is used then it gives an option. The expression "ordinarily" means normally, but the said expression has to be understood in the context for which it has been used. "Ordinarily" may not mean "solely" or "in the name". Ordinarily implicits in itself flexibility, it does not lay down any rigid rule. In the present case once phrase "ordinarily" has been used, then it gives option to the authority to determine seniority for the purpose of promotion from the date of order of confirmation in the cadre. Thus, for specific purpose in case there is no determination of seniority, then seniority in service for promotion is to be determined. It is not perennial or permanent exercise, rather it is for specific purpose of promotion and once promotion is over, then normal rule of determination of seniority has to be followed. In case under normal rule, seniority has been determined, then the said list has to be used, but in case no seniority has been determined, then in that event, for specific purpose said rule could have been invoked and utilized but after enforcement of U.P. Government Servants Seniority Rules, 1991, even that is not permissible, as this Court has already taken the view in case of Satya Prakash Sharma v. State of U.P. and Ors. writ petition No. 47915 of 2005 that after enforcement of U.P. Government Servants Seniority Rules, 1991, Rule 19 of Subordinate Civil Courts Ministerial Establishment Rules, 1947 stands impliedly repealed. Ratio of the aforesaid judgment is fully applicable in the present case. Consequently, Civil Misc. Writ Petition No. 18182 of 2006 is dismissed. The order passed by the Inspecting Judge is confirmed.

16. As far as Civil Misc. Writ Petition No. 23578 of 2006 is concerned, Shafiq Ahmad has already represented the matter before this Court on administrative side and his representation is still pending before the Administrative Judge, as such it would be much more expedient that the matter be placed before the Administrative Judge. Registrar General of this Court is directed to place the matter before the Administrative Judge, Allahabad, with regard to representation of Shafiq Ahmad, and thereafter the said matter be dealt with at the convenience of Administrative Judge. With these observations, Civil Misc. Writ Petition No. 23578 of 2006 is disposed of.