
(2010) 07 AHC CK 0348
In the Allahabad High Court

Dileep Kumar Srivastava

APPELLANT

Vs

State of U.P. and Others

RESPONDENT

Date of Decision : 13-07-2010

Acts Referred:

Constitution of India, 1950 — Article 309, 372

Citation : (2011) 1 AWC 125

Hon'ble Judges : Virendra Singh, J; Ashok Bhushan, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

Ashok Bhushan, J.—Heard learned Counsel for the parties.

2. This special appeal has been filed against the judgment and order dated 15.6.2007, passed by Hon"ble Single Judge, dismissing the writ petition No. 18182 of 2006, filed by the petitioner appellant. Brief facts necessary for deciding the issues raised in the writ petition are that the appellant was appointed as class III employee in the judgeship of Mirzapur on 15.12.1975 in the payscale of Rs. 354-550. The appellant was confirmed on 30.4.1982. The appellant made a request for his transfer from Mirzapur to Allahabad Judgeship. The District Judge vide his letter dated 16.9.1984 gave consent for transfer with rider that seniority of the appellant will be determined later on. By order dated 30.9.1984, the appellant was transferred from Mirzapur to Allahabad Judgeship, who joined on 1.10.1984. The respondent No. 4, Mithilesh Kumar Srivastava was appointed as class III employee in the judgeship of Mirzapur on 17.1.1974 in the pay scale of Rs. 354-550. The respondent No. 4 was transferred from Mirzapur to Allahabad on 11.4.1974. The respondent No. 4 joined at Allahabad in the year 1974 and continuously worked thereafter. By order dated 1.2.1984, the respondent No. 4 was confirmed.

3. The appellant moved an application on 11.9.1985 for fixation of his seniority. A list of candidates in different scales as sanctioned by the Government orders

dated 28.2.1985, 2.4.1984 and 31.5.1985 for the purposes of staffing pattern was prepared by a Committee in which the petitioner's name was also included at serial No. 49. An objection was submitted by the respondent No. 6, Shafiq Ahmad to the gradation but no decision was taken by the District judge. On 26.9.1991, appellant made an application to the District Judge that his name in the gradation/ seniority list be placed at its proper place. A report was submitted by the Senior Administrative Officer on 2.11.1991 that appellant can be placed below Rama Shankar Srivastava and above Smt. Lalita Kumari. The District Judge passed the order dated 10.12.1991 placing the name of the appellant below Rama Shankar Srivastava and above Smt. Lalita Kumari. The appellant submitted a representation to the Administrative Judge. An order dated 13.2.1996 was communicated to the appellant informing that his seniority had been fixed below Raghubir Prasad Yadav and above Shafique Ahmad. After the above order dated 13.2.1996, a representation was made by respondents No. 4 and 6. Representation of Respondent No. 4, Mithilesh Kumar Srivastava was allowed by order of the Administrative Judge dated 23.1.2006, which was communicated to the District Judge vide letter dated 7.2.2006. Aggrieved by the aforesaid order dated 23.1.2006, the appellant filed a writ petition No. 18182 of 2006, praying for quashing the order dated 23.1.2006 and other consequential reliefs.

4. Hon''ble Single Judge by the impugned judgment dismissed the writ petition filed by the appellant and affirmed the order of Administrative Judge dated 23.1.2006, declaring the respondent No. 4 senior to the appellant. Hon''ble Single Judge relying on his judgment in writ petition No. 47915 of 2005, Satya Prakash Sharma v. State of U.P. and Ors., took the view that after enforcement of the U.P. Government Servants Seniority Rules, 1991, the Subordinate Civil Courts Ministerial Establishment Rules, 1947 stand impliedly repealed. Hon''ble Single Judge further relying on judgment of the apex Court in S.B. Patwardhan v. State of Maharashtra and Ors. (1997) 3 SCC 399 took the view that seniority has to be counted from the date of appointment and not according to the date of confirmation. Hon''ble Single Judge took the view that the respondent No. 4 having been appointed earlier, mere fact that appellant was confirmed earlier, is not relevant. It has further been held by Hon''ble Single Judge that Rule 19 contains the word "ordinarily" which expression does not mean solely rather it is flexible which gives option to the authority to determine seniority for the purpose of promotion. Hon''ble Single Judge further held that the list prepared in the year 1985 was not the seniority list and seniority was not ever determined and the order dated 10.1.1996, which was passed by Hon''ble Administrative Judge on the representation of the appellant was ex-parte.

5. Learned Counsel for the appellant contends that Hon''ble Single Judge erred in dismissing the writ petition. He submits that order of Administrative Judge dated 23.1.2006 declaring the respondent No. 4 senior to the appellant was an erroneous order. He submits that U.P. Government Servants Seniority Rules, 1991 is not applicable and the determination of the seniority is to be governed by

1947 Rules. He contends that in any view of the matter, 1991 Rules are prospective in nature and has no effect on inter-se determination of the seniority between the petitioner and the respondent No. 4. He submits that a person is entitled to reckon his seniority on the date when he was born in the cadre and any subsequent alteration of Rules determining the seniority has no consequence. It is contended that 1991 Rules cannot effect retrospectively the determination of seniority. He submits that gradation list prepared in 1985 was for all practical purpose a seniority list, which held the field for a quite long period and it was not open for the Administrative Judge to alter the seniority after such a long time. It is further submitted that Rule 19 of 1947 Rules having not been under challenge, the same could not have been ignored by Hon''ble Single Judge relying on judgment of the apex Court in the cases of O.P. Garg and others, Vs. State U.P. and others, Learned Counsel for the appellant has placed reliance on various judgments of this Court and the apex Court which shall be referred to while considering the submissions in details.

6. Learned Counsel for the respondents refuting the submissions of learned Counsel for the appellant contended that Hon''ble Administrative Judge has rightly determined the seniority of the petitioner and the respondent No. 4. It is submitted that the respondent No. 4 was appointed in the year 1974, whereas the appellant was appointee of subsequent batch of 1975. The fact that appellant was confirmed at Mirzapur earlier and the confirmation exercise was taken place at Allahabad in 1985, could have no effect on the seniority of the respondent No. 4, who was senior to the appellant in his appointment at Mirzapur. It is submitted that 1991 Rules are fully applicable and after enforcement of 1991 Rules, 1947 Rules are impliedly overruled and the determination of seniority shall be governed by 1991 Rules. It is submitted that no seniority list was prepared in the year 1985 as contended by learned Counsel for the appellant and list prepared in the year 1985 was only staffing pattern, which cannot be treated as seniority list. Appellant himself represented in 1991 for correct fixation of his seniority on which order was passed by Hon''ble Administrative Judge on 13.2.1986. Again the matter was represented by the respondent No. 4 on which the order was passed by Hon''ble Administrative Judge on 23.1.2006. The submission of learned Counsel for the appellant that there was a long standing seniority of the appellant is incorrect. The seniority was never determined earlier.

7. We have considered the submissions of learned Counsel for the parties and have perused the record.

8. The first submission of learned Counsel for the appellant is that 1991 Rules are general rules which shall have no effect on 1947 Rules. It is contended that 1947 Rules have been continued in force by virtue of Article 372 of the Constitution of India unless altered or repealed or amended by a competent Legislature or other competent authority. Reliance on the judgment of the apex Court in the case of Om Prakash Shukla v. Akhilesh Kumar Shukla and Ors. AIR 1986 S.C. 1043 has also been placed. Another judgment relied by learned

Counsel for the appellant is 1998(2) E.S.C. 1331 Raj Vikram Khare v. District Judge Banda and Anr., wherein it has been held that U.P. Recruitment to Services (Age Limit) Rules, 1972 shall be applicable as amended from time to time with regard to recruitment of ministerial staffs of the subordinate civil courts. The issue as to whether 1991 Rules are applicable for determination of seniority of ministerial staffs of the subordinate courts have been considered in detail in our judgment of the date in special appeal No. 147 of 2007 Omvir Sharma v. State of U.P., wherein it has been held that 1991 Rules are applicable for determination of seniority of ministerial staffs of the subordinate civil courts and after enforcement of 1991 Rules, 1947 Rules shall stand repealed. The similar submissions raised by learned Counsel for the appellant in this regard, have been considered and negatived by us in our above judgment. For the reasons given by us in the above judgment of the date, we hold that 1991 Rules are applicable for determination of seniority of ministerial staffs of the subordinate civil courts and Rule 19 of 1947 Rules is no longer in force after enforcement of 1991 Rules.

9. The next submission pressed by learned Counsel for the appellant is that even after 1991 Rules are applicable, the 1991 Rules are not retrospective in operation and the seniority of the petitioner appellant and the respondent No. 4 is to be determined in accordance with 1947 Rules since the determination of seniority has to be on the date when a person was born in the cadre. Any subsequent Rules shall have no consequence. Learned Counsel for the appellant has placed reliance on the judgment of the apex Court in the case of K.V. Subba Rao and Others Vs. Government of Andhra Pradesh and Others, In the said case, the apex Court took the view that Rule 4(e) of Andhra Pradesh State and Subordinate Service Rules 1962, which provided for criteria for determination of seniority shall not have any retrospective effect and operate prospectively. Following was laid down in paragraphs 7 and 8:

7. We have already pointed out that the law is that it is open to the State to provide a rule for determining inter se seniority. Rule 4(e) of the Special Rules before amendment in 1980 had provided that the seniority of Deputy Tehsildars would be determined with reference to the date of allotment maintained and ranking assigned by the Andhra Pradesh Public Service Commission in the merit list of the particular selection. That obviously was confined to inter se seniority of direct recruits and did not cover inter se seniority between recruits of the two sources. Therefore, the General Rules had been relied upon. In 1980, by the impugned amendment to Rule 4(e) of the Special Rules, the State Government prescribed the manner of providing inter se seniority among the recruits of the two categories. The amended rule provided the date of confirmation in the substantive vacancy as the basis. Rule 3(b) fixed the reservation of direct recruits with reference to substantive vacancies at 50% and Rule 4(e), therefore, made provision with reference to the seniority in the substantive vacancies with reference to the date of confirmation. The amendment in terms is within the competency of the State Government and is not open to challenge. This is a rule made under the proviso to Article 309 of the Constitution and as settled by this

Court in exercise of that power the rule can be given retrospective operation. The impugned amendment has been given retrospective operation from 12th October, 1961. From the judgment of the Tribunal we find that the authority of the State Government to make a rule for future application was not seriously disputed but what was assailed was the retrospectivity given to the amendment.

8. Indisputably many of the promotees on the basis of seniority already assigned to them have been holding posts of Tehsildars, Deputy Collectors and Special Grade Deputy Collectors. Many have retired from service having enjoyed those promotional benefits. Promotions between 1961 and 1971 on the basis of the seniority assigned under Rule 33(a) of the General Rules is under challenge. That period is a distant one from now varying between 17 to 27 years. To allow the amendment to have retrospective operation is bound to create problems. The State Government while amending the rule should have taken into consideration the practical problems which would arise as a consequence of retrospectivity. It should have taken into account the far-reaching adverse effect which the rule, if given such retrospective effect, would bring about in regard to services of scores of employees and the disquiet it would result in by disturbing settled situations. We are, therefore, not of the view that the rules should be given retrospective effect from 1961. It would, however, be wholly justified and appropriate to give the rules prospective operation by fixing 9th October, 1980 as the date from which it should take effect. We accordingly direct that Rule 4(e) as amended on 9th October, 1980, shall not have any retrospective effect and would operate prospectively.

10. The next judgment relied by Counsel for the appellant is P. Mohan Reddy etc. Vs. E.A.A. Charles and Others etc., The apex Court in the said judgment held that no employee can claim to have a vested right to have a particular position in any grade but the right vests in accordance with the rules remaining in force at the time when he was born in cadre. After considering several earlier cases of the apex Court, following was laid down in paragraph 17:

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 redrawn 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.

11. A perusal of 1991 Rules does not indicate that Rules had been given any retrospective operation. Rule 1(2) states that they shall come into force at once. Rule 3 gives its overriding effect. 1991 Rules having not been given any retrospective operation, it shall have only prospective operation. The appellant, who was transferred from judgeship of Mirzapur to Allahabad on 1.10.1984, is claiming determination of his seniority according to Rules then existing. Learned Counsel for the appellant is right in his submission that for determination of seniority between the appellant and the respondent No. 4, after transfer of the appellant to judgeship at Allahabad, 1947 Rules are relevant and shall have application. Thus, for determination of seniority between the petitioner and the respondent No. 4, we have to look into 1947 Rules, which were applicable at the relevant time and the consideration of claim of the parties has to be in accordance with 1947 Rules. Hon'ble Single Judge in the impugned judgment has recorded finding that seniority was not determined in 1985 as claimed by the appellant and the list which has been referred as seniority list is not actual seniority list. The appellant has brought on record, the report of three members Committee dated 4.12.1985, which is said to be a gradation list, copy of which has been filed as Annexure-4 to the affidavit along with stay application. The opening part of the report is as follows.

List of candidates proposed to be put in the scale given in G.O. No. 1436/VII-A Nyaya-740/84 dated 28.2.85, G.O. No. 1480/VII-A-Nyaya-749/84 dated 2.4.84 and 2758/VIIA-Nyaya-24 Dated 31.5.85 for the purposes of staffing pattern.

12. From the above, it is clear that the said report was prepared for the purpose of staffing pattern and was not a seniority list nor the procedure required to be followed for preparation and finalisation of seniority list was followed in preparing the said list. The said list cannot be said to be list determining the seniority. According to own case of the appellant, he made a representation on 26.8.1991 to the District Judge that his name be placed at correct position in the gradation list. The said representation was decided by District Judge on 10.12.1991, against which the petitioner represented to the Administrative Judge, which representation was decided on 13.2.1996. The said decision dated 13.2.1996 was ex-parte. The respondent No. 4 and other parties thereafter represented the matter to the District Judge as well as to the High Court on administrative side, on which the impugned decision dated 23.1.2006 was taken by the

Administrative Judge. Thus, the submission of the appellant cannot be accepted that seniority was finalised in 1985 and long standing seniority could not be altered by the Administrative Judge. The District Judge, while giving consent on 16.9.1984 for transfer of the appellant from Mirzapur to Allahabad Judgeship had specifically provided that seniority of the appellant shall be determined later on. No determination of seniority by the District Judge in the year 1985, as alleged has been brought on record.

13. The next submission of learned Counsel for the appellant is that Hon"ble Single Judge erred in relying on the judgments in the cases of S.B. Patwardhan and O.P. Garg (supra) for taking the view that confirmation cannot be the sole criteria for determining the seniority. He submits that aforesaid two cases were distinguishable since the dispute was between the promotee and direct recruits. Relying on the judgment of the apex Court in the case of Union of India (UOI) and Others Vs. S.K. Saigal and Others, , it has been submitted that without there being challenge to Rule 19, the said Rule 19 could not have been ignored. The submission of learned Counsel for the appellant to the extent that Rule 19 was not challenged has substance. 1947 Rules being applicable for determination of seniority till they are superseded by 1991 Rules have to be looked into for determination of seniority. In view of the above, now we proceed to consider the respective claim of the parties in accordance with Rule 19 of 1947 Rules. Rule 19 of 1947 Rules is as follows:

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.

14. Now we again revert to the relevant dates with regard to the appellant and the respondent No. 4. The respondent No. 4 was appointed on 17.1.1974 in the judgeship of Mirzapur in the scale of 354-550. The appellant was appointee of subsequent batch i.e. of 1975 batch, who joined in the same payscale on 15.12.1975. The respondent No. 4 was transferred from Mirzapur to Allahabad on 11.4.1974. The appellant was confirmed on 13.4.1983, while working at Mirzapur, whereas the respondent No. 4 was confirmed on 1.2.1985, while working at Allahabad. The appellant joined on transfer at Allahabad on 1.10.1984.

15. The Rule 19 provides that seniority in service for the purpose of promotion shall be ordinarily determined from the date of confirmation. Word "ordinarily" came for consideration before the apex Court and this Court on several occasions. The appellant himself has placed reliance on the judgment of the apex Court in Kailash Chandra Vs. Union of India (UOI), The Apex Court was considering the provisions of Railway Establishment Code Rules 2046(2)(a) where the words "should ordinarily be retained" were used. While considering the meaning of word "ordinarily", the apex Court laid down following in paragraph 8:

(8) This intention is made even more clear and beyond, doubt by the use of the word "ordinarily". "Ordinarily" means "in the large majority of cases but not invariably". This itself emphasises the fact that the appropriate authority is not bound to retain the servant after he attains the age of 55 even if he continues: to be efficient. The intention of the second Clause 1 therefore clearly is that while under the first Clause the appropriate authority has the right to route the" servant who falls within Clause (a) as soon as he attains the age of 55, it will, at that stage, consider whether or not to retain him further. This option to retain for the further Period of five years can only be exercised if the servant continues to be efficient; but in deciding whether or not to exercise this option the authority has to consider circumstances other than the question of efficiency also; in the absence of special circumstances he "should" retain the servant; but, what are special circumstances is left entirely to the authority's decision. Thus, after the age of 55 is reached by the servant the authority has to exercise" its discretion whether or not to retain the servant; and there is no right in the servant to be retained, even if, he continues to be efficient.

16. Word "ordinarily" came for consideration before this Court in *Lalit Mohan v. Secretary/General Manager, Distt. Co-op. Bank, Varanasi* (1995)¹ LBESR 298. The Court was considering Regulation 85(x) of U.P. Cooperative Society Employees Service Regulation 1975, which provides that no employee shall ordinarily remain under suspension for more than six months. Following was laid down in paragraph 9:

9. The learned Counsel for the respondents referred to various cases including the case of *Kailash Chandra Vs. Union of India (UOI)*, *Nirmal Chand Jain Vs. The District Magistrate, Jabalpur* and Another, *Krishan Dayal and Others Vs. General Manager, Northern Railway, Baroda House, New Delhi*, and the Full Bench in the case of *Aldo Maria Patroni and Another Vs. E.C. Kesavan and Others*, In the said cases, the use of the word "ordinarily" in various statutes and its implications have been considered. Considering the law laid down in the said cases and the meaning of the word "ordinarily" as given in various Dictionaries it seems that the word "ordinarily" means in the majority of cases but not invariably. Agreeing with the said view I feel that in the present rule also the word "ordinarily" means majority of cases unless there are special circumstances.

17. From the above decision, it is clear that the word "ordinarily" means majority of cases unless there are special circumstances. In the present case, Administrative Judge, while considering the inter-se seniority between the parties has taken the view that Rule 19 uses the word "ordinarily" which is applicable only to those cases where the persons appointed in a cadre or confirmed or to completion of probation without any discrimination or a person coming from outside the cadre and joining service with different attributes of confirmation. Following was the observations made by the Administrative Judge in his order dated 23.1.2006:

The confirmation is an inglorious uncertainty. The counting of seniority from the

date of confirmation leaves him at the whim of the appointment authority, who may confirm or delay the confirmation of a particular employee to give undue benefit to a favour employees. Once an employee is confirmed on a substantive post his seniority must be reckoned from the date he was substantially appointed on the post. Rule 19 as such rightly refers to word "ordinarily" and is applicable only to those cases where the persons appointed in a cadre or confirmed or to completion of probation without any discrimination or a person coming from outside the cadre and joining service with different attributes of confirmation.

18. The question to be considered is as to whether there was any exceptional circumstance in the present case due to which the confirmation in service could not be taken as basis rather length of service be taken as basis for determination of seniority. There is no dispute that the respondent No. 4 was appointed earlier to the appellant and he was transferred to Allahabad on 11.4.1974. The confirmation of the appellant was made at Mirzapur on 30.4.1983 and after his confirmation he was transferred to Allahabad on 1.10.1984. The respondent No. 4, who was transferred to Allahabad in 1974 itself continued awaiting his confirmation which was done only on 1.2.1985. There is nothing on record to indicate that at any point of time, earlier to 1.2.1985, the respondent No. 4 was considered for confirmation and was not found fit. The appellant was appointed at judgeship of Mirzapur and was confirmed in the Mirzapur Judgeship, whereas the respondent No. 4 and the employee even appointed earlier to him i.e. respondent No. 7, who was appointed as early as in 1967, were not confirmed till 1.2.1985. The present is not a case where confirmation of all the employees was taken at Allahabad. At Allahabad, the confirmation was made with great delay in the year 1985 of the respondent No. 4, who was transferred and working at Allahabad from 11.4.1974 i.e. after more than a decade, which was special feature on the basis of which Administrative Judge did not refer to or relied the determination of seniority on the basis of confirmation. The Administrative Judge has rightly held that a person with different attribute of confirmation cannot contend that error was committed in not relying on criteria of confirmation as provided under Rule 19. Rule 19 does not mandatorily provides that confirmation in service, in all cases has to be the basis for determination of seniority. It uses the word "ordinarily" which gives a flexibility and in a case where there are certain special circumstances, the criteria other than the confirmation can be adopted by the appointing authority, for determination of seniority. In the present case, the appellant was confirmed at Mirzapur judgeship where he was appointed and the respondent No. 4, who was appointed earlier to appellant at Mirzapur itself and transferred to Allahabad in the year 1974, waited for his confirmation more than a decade, which ultimately was done on 1.2.1985. The reliance on the length of service by the appointing authority cannot be said to be arbitrary or beyond the scope of Rule 19. Thus, Rule 19 itself permits in exceptional cases to rely on criteria other than confirmation and in the facts of the present case, we are satisfied that substantial justice has been done in determination of seniority of petitioner and the respondent No. 4, on the basis of

length of service.

19. For the reasons as given above, we are of the view that the order of the Administrative Judge dated 23.1.2006 deserves to be affirmed and has rightly been confirmed by the Hon''ble Single Judge in dismissing the writ petition. The appellant is not entitled for any relief.

20. The appeal is dismissed.