

(2008) 07 AP CK 0101

In the Andhra Pradesh High Court

Case No : Writ Petition No's. 8366 and 19905 of 2006

Government of Andhra Pradesh and Another

APPELLANT

Vs

K. Ashok Kumar, Town Planning Assistant, Municipal Corporation of Hyderabad and Another

RESPONDENT

Date of Decision : 07-07-2008

Acts Referred:

Constitution of India, 1950 — Article 16, 16(4)

Citation : (2009) 1 ALD 350 : (2009) 1 ALT 164

Hon'ble Judges : Ghulam Mohammed, J;C.V. Ramulu, J

Bench : Division Bench

Advocate : G.P. for Services I in W.P. No. 8366 of 06 and T. Suryakaran Reddy, in W.P. No. 19905 of 06, for the Appellant; G.P. for Services I for Respondent No. 1 in W.P. No. 19905 of 06, Rama Rao Mavidi, in W.P. No. 8366 of 06 and No. 2 in W.P. No. 19950 of 06, T. Suryakaran Reddy, in W.P. No. 8366 of 06 and G. Jyothi Kiran, for the Respondent

Final Decision : Allowed

Judgement

Ghulam Mohammed, J.—Since these two Writ Petitions arise out of an order dated 24.3.2006 passed by the Andhra Pradesh Administrative Tribunal, Hyderabad, in O.A. No. 1014 of 2005, they were heard together and are being disposed by this Common Order.

2. O.A. No. 1014 of 2005 was filed by one K. Ashok Kumar (Respondent No. 1 herein), who is working as Town Planning Assistant in the Municipal Corporation of Hyderabad (MCH), rejecting his claim to place him at S. No. 1 of the select list of Town Planning Assistants dated 21.12.1981 by the Government in their Memo. No. 143555/F1/2003-2 MA, dated 19.9.2003, and the consequential Memo. No. 5820/F1/2005-4, dated 22.11.2005. By the orders impugned, the Tribunal set aside both the Memos and remanded the matter to the Government for passing fresh orders within a period of four weeks from the date of receipt of a copy of the order, keeping in view the directions issued therein, and, pending passing of

the orders, directed not to make any promotions to the higher posts from the category of Town Planning Assistant/Town Planning Supervisor.

3. Aggrieved by the orders of the Tribunal, while W.P. No. 8366 of 2006 is filed by the State and the Commissioner of Municipal Corporation, W.P. No. 19905 of 2006 is filed by one S.A. Sami, Town Planning Supervisor, MCH, who is not a party to O.A. No. 1014 of 2005, after seeking leave of the Court, as he is likely to be affected by the order of the Tribunal. He also got himself impleaded as Respondent No. 2 in W.P. No. 8366 of 2006 as he will be affected by the orders passed by this Court in WVMP. No. 1213 of 2006 in W.P.M.P. No. 10696 of 2006 in W.P. No. 8366 of 2006, wherein the interim order staying the operation of the impugned order of the Tribunal was made absolute.

4. For convenience, the parties will be referred to as arrayed in W.P. No. 8366 of 2006.

5. The facts leading to the filing of these writ petitions, in nutshell, may be noted: The 1st respondent - Sri K. Ashok Kumar and the 2nd respondent S.A. Sami (petitioner in W.P. No. 19905 of 2006) were appointed as Town Planning Supervisors/Town Planning Assistants in MCH by Proceedings of the Special Officer, MCH in No. 817/G1/GB/79-81/476 dated 21.12.1981. In the said proceedings, which were issued as per roster, by following Rule 33(b) of A.P. State and subordinate Service Rules (for short "the Rules"), respondents 1 and 2 were shown at S. Nos. 9 and 8 respectively. One M. Nageshwar, who was placed at S. No. 1 of the select list appointed under BC-A category, did not join service. 1st respondent reported to duty on 24.12.1981 and the 2nd respondent reported to duty on 26.12.1981. In the provisional seniority list issued by the Chief City Planner (Town Planning Section), Hyderabad in circular Memo. No. 612/TPS/HO/MCH/95 dated 18-2/3-1995, the 1st respondent was shown at S. No. 31 and the 2nd respondent was shown at S. No. 28 and objections were called for. Again another provisional seniority list was issued by the Commissioner, MCH in Circular No. 1700/TP/OPM/99-350 dated 9.10.1999, wherein the 1st respondent was shown at S. No. 10 and the 2nd respondent was shown at S. No. 13, changing the date of joining in respect of the 1st respondent from 3.1.1982 to 24.12.1981. After considering the objections, a final seniority list of Town Planning Assistants/Town Planning Supervisors was issued by the Commissioner in circular No. 1700/TP/OP11/2005-508 dated 12.4.2000 wherein the name of the 1st respondent was shown at S. No. 14 and that of the 2nd respondent at S. No. 11.

6. Thereafter, it appears that the 1st respondent made a representation dated 18.8.2003 stating that in view of his getting highest marks, he should be placed against the O.C. vacancy, and though he belongs to BC-A category, but was shown at S. No. 9 in the proceedings dated 21.12.1981 and that since M. Nageshwar who also belongs to BC-A category and placed at S. No. 1 of the select list did not join duty, he is entitled to be placed at S. No. 1 in the place of M. Nageshwar. His further case is that though he joined the service on

24.12.1981, his date of joining is changed to 3.1.1982 without assigning any reasons. The said representation has been forwarded to the Government by the MCH on 26.7.2003 and the Government by the Memo.No.14355/F1/2003-2 dated 19.9.2003 rejected the request of the 1st respondent for revision of his seniority. Thereafter, the 1st respondent gave another detailed representation dated 5.11.2005, which was forwarded to the Government by proceedings of the Commissioner dated 22.11.2005 for review of the orders dated 19.9.2003, which was again rejected by the Government in Memo. No. 5820/F1/2005-4 dated 22.11.2005 stating that according to Rule 33 of the Rules, the order of merit or the order of preference assigned by the recruitment agency cannot be altered under any circumstances and the seniority shall be determined in accordance with it. Since the 1st respondent was appointed against O.C. vacancy though he belongs to BC-A, he cannot be fitted against BC-A point even though M. Nageshwar who was appointed against the roster point for BC-A did not join duty.

7. Aggrieved by the same, the 1st respondent filed O.A. No. 1014 of 2005. The Tribunal following its earlier decision in O.A. No. 7490 of 1999 dated 05.08.2005, by the order impugned, set aside the orders dated 19.9.2003 and 22.11.2005 of the Government and remanded the matter to the Government directing it to pass fresh orders keeping in view the law and the directions issued therein within a period of four weeks from the date of receipt of a copy of the order and, pending the decision of the Government, directed not to make any promotions to higher categories. Paragraphs 8 and 9 of the order of the Tribunal read as follows:

In view of the above law as laid down by the Apex Court, Hon'ble High Court and this Tribunal, it is very clear that the meritorious candidate of a reserved category cannot be denied his seniority over and above the persons under the same category and he should be asked to exercise his option for placing him over and above the selected candidates in the reserved category. As far as the present case on hand, the person Mr. M. Nageswar, who was selected under B.C "A" category did not join at all in the post and therefore, the applicant should be placed at the same place as he belongs to B.C "A" category, as was held by the Tribunal in the aforesaid O.A., while settling the law.

These aspects have not been taken into consideration by the respondents while passing the impugned orders with respect to the place of the applicant over and above the selected candidates in the B.C "A" category. As far as the 2nd aspect is concerned, the respondents have never considered the grievance of the applicant with respect to the alteration of date of appointment, which has to be considered for the purpose of seniority. It has been changed from 24.12.1981 in the provisional seniority list to that of 3.1.1982 in the final seniority list, without assigning any reasons whatsoever. This aspect was specifically raised by the applicant in the representation made by him. Therefore, it is a fit case to set aside the impugned proceedings and remand the matter to the first respondent to consider the case of the applicant in view of the law as extracted above with respect to the placement of the applicant over and above the B.C "A" candidates

i.e., at Sl. No. 1 in place of Mr. M. Nageswar in the appointment orders dated 21.12.1981 and with respect to the alteration of date of joining in the final seniority list without assigning any reasons whatsoever at all. In view of Rule 33 of the A.P. State and Sub-ordinate Service Rules, the applicant's date of regularization should be taken from the date of his first joining in the cadre. Therefore, it should be 24.12.1981 and this date should be restored in the final seniority list by placing the applicant at appropriate place. Accordingly, the impugned orders issued in Memo No. 14355/F1/2003-2, M.A dated 19.9.2003 and Memo No. 5820/F1/2005-4, dated 22.11.2005 are set aside and the matter is remanded to the first respondent for passing orders, keeping in view the aforesaid law and directions given. These orders should be passed within a period of four weeks from the date of receipt of a copy of this order. Pending passing of the orders, there shall not be any promotions to the higher posts from the category of TPA/Supervisor.

With the above directions, this O.A is disposed of. No costs.

8. It appears that while setting aside the memos issued by the Government, the Tribunal has considered the decisions of the Apex Court in Ritesh R. Sah Vs. Dr. Y.L. Yamul and others, , State of Bihar and Others Vs. M. Neethi Chandra and Others, and in Anurag Patel v. U.P. Public Service Commission and Ors. The Tribunal was of the view that meritorious candidates of a reserved category cannot be pushed down below the less meritorious persons even though the less meritorious person is appointed against the roster point. Further, the 1st respondent's date of regularization should be taken from the date of his first joining in the cadre and the order of preference indicated in the appointment order cannot be disturbed.

9. Learned Government Pleader contended that when once roster point is fixed as per Rule 33 of the Rules, the appointing authority may at the time of passing an order appointing one or more persons simultaneously to a service, fix either for the purpose of satisfying the rule of reservation of appointments, or for any other reason, the order of preference among them and where such order has been fixed, seniority shall be determined in accordance with it. Further the order of merit or order of preference indicated in a list of selected candidates, prepared by the selecting authority shall not be disturbed inter se with reference to the candidates position in such list or panel while determining the seniority in accordance with this rule and notional dates of commencement of probation to the extent necessary, shall be assigned to the persons concerned, with reference to the order of merit or order of preference assigned to them in the said list.

10. Learned Government Pleader further contended that the Tribunal has failed to note that the 2nd respondent S.A. Sami was shown at S. No. 8 in the select list, whereas the 1st respondent was shown at Sl. No. 9. The placements given in the select list as per the roster points fixed as per Rule 33(2)(b) of the Rules cannot be disturbed. The representation made by the 1st respondent after long lapse of 19 years on the ground that since Nageswar did not join service, his

case should be considered against the roster point given to Nageshwar and he should be placed at S. No. 1 was rightly rejected by the Government in view of Rule 33(2)(b) of the Rules and the review petition was also rightly rejected as the seniority fixed by the recruiting agency cannot be altered. The Tribunal ought not to have given a positive direction that the date of first joining of the 1st respondent should be 24.12.1981 and the same should be restored in the final seniority list by placing the applicant at appropriate place and that the same has been changed from 24.11.1981 to 3.1.2982 without assigning any reasons. Since the Tribunal passed orders ignoring Rule 33 of the Rules, the order is liable to be set aside.

11. Learned Counsel for the 2nd respondent, on the other hand, contended that the 2nd respondent is not a party before the Tribunal. In the order of appointment, he was shown at S. No. 8, whereas 1st respondent was shown at S. No. 9 and in the final seniority list, he is shown above the first respondent. Therefore, he is a necessary and proper party to the proceedings before the Tribunal, and, therefore, the Tribunal ought to have dismissed the O.A. on the ground of non joinder of proper and necessary parties. The order of the Tribunal has affected the rights of the 2nd respondent, as a positive direction was issued to consider the case of the 1st respondent. Learned Counsel has drawn our attention to Rule 33(b) of the Rules showing that in the select list, roster points are required to be maintained. Learned Counsel, therefore, prayed that the order of the Tribunal be set aside.

12. Learned Counsel appearing for the 1st respondent contended that in the first provisional list prepared on 9-10-1999, the 1st respondent was shown above the 2nd respondent i.e., at S. No. 10 and the 2nd respondent was shown at S. No. 13, but, in the final seniority list dated 12.4.2000, his position was altered without giving any notice to him. He has drawn our attention to the decision of the Supreme Court in P.S. Ghalaut Vs. State of Haryana and Others, in support of his contention that he is entitled to be put in place of Nageshwar.

13. It is an admitted fact that in the order of appointment issued by the Special Officer, Municipal Corporation of Hyderabad, in No. 817/G1/GB/79-81/476 dated 21.12.1981; the 1st respondent was shown at S. No. 9, whereas the 2nd respondent was shown at S. No. 8. In the first provisional seniority list issued by the Chief City Planner (town Planning Section), Hyderabad, the name of the 1st respondent was shown at S. No. 31 whereas the name of the 2nd respondent was shown at S. No. 28. Again another provisional seniority list was issued on 8.10.1999 wherein the name of the 1st respondent was shown at S. No. 10, showing the date of joining of the 1st respondent as 24.12.1981 and the name of the 2nd respondent was shown at S. No. 13. Objections were filed to the said list. But, in the final seniority list dated 12.4.2000, the 1st respondent was pushed down to S. No. 14 and the name of the 2nd respondent was shown at S. No. 11 wherein the date of joining of the 1st respondent was shown as 03.01.1982. There is no dispute that no notice was issued to the 1st respondent

before changing his position in the seniority reflected in the provisional seniority list dated 09.10.1999. He was only asked to make objections with regard to his position in the provisional seniority list wherein he was shown at S. No. 10. But, when his position is being changed from S. No. 10 to S. No. 14, he must have been given an opportunity of making representation to the same. The record does not show that such an opportunity was given to the 1st respondent to make his representation as to why he should not be placed at S. No. 14. Therefore, before finalizing the seniority list, the 1st respondent is entitled to a notice to make his representation about the change of his seniority.

14. The main contention of the 1st respondent is that since M. Nageshwar who is placed at S. No. 1 of the select list, selected under BC.A category, did not join duty, he is entitled to be placed at the said place since he belongs to the same category and meritorious than Nageshwar. The Government rejected the claim of the 1st respondent on the ground that the order of preference assigned by the recruitment agency as per Rule 33 of the Rules cannot be altered and, therefore, he cannot be fitted against the roster to which Nageshwar was appointed even though Nageshwar did not join service.

15. The Supreme Court in P.S.Ghalaut's case (1 supra) no doubt observed that the vacancies are to be filled up only according to the roster points and the candidates seeking appointment against reserved points, though less meritorious in the order of merit, will occupy their assigned reserved slots. In the same judgment, it was also held that a reserved candidate cannot complain that, he having been selected in the merit as a general candidate, must be placed in the placement reserved for candidates belonging to reserved candidates at a higher position at which place a candidate belonging to the reserved category was placed. In the instant case, though the 1st respondent is more meritorious among the candidates belonging to B.C. "A" category, but he was considered as a general category candidate, and, Nageshwar, who belongs to the same category i.e., B.C. "A", was put in against the slot reserved for B.C. "A" category i.e. at S. No. 1. No doubt, he has not joined service. But the 1st respondent cannot occupy the said place when the recruitment, which had taken place 26 years ago, had become final. It is well settled that date of joining is not the criteria, for fixation of seniority, and it is the placement in the order of appointment that govern the order of seniority of persons, appointed in a post or category, as per Rule 33 of the Rules. In *Chairman, Puri Gramya Bank and Another Vs. Ananda Chandra Das and Others*, , it was held that the date of joining is not the criteria for the purpose of counting seniority.

16. Further, in *Bimlesh Tanwar Vs. State of Haryana and Others*, , a three-Judge Bench of the Supreme Court observed thus:

An affirmative action in terms of Article 16(4) of the Constitution is meant for providing a representation of a class of citizenry who are socially or economically backward. Article 16 of the Constitution of India is applicable in the case of an appointment. It does not speak of fixation of seniority. Seniority is, thus, not to

be fixed in terms of the roster points. If that is done, the rule of affirmative action would be extended which would strictly not be in consonance of the constitutional schemes. We are of the opinion that the decision in P.S Ghalaut does not lay down a good law.

(emphasis supplied)

17. The principle laid down in Anurag Patel Vs. U.P. Public Service Commission and Others, , that a meritorious candidate of a reserved category cannot be denied his seniority over and above the persons under the same category, and he should be asked to exercise his option for placing him over and above the selected candidates in the reserved category has also no application, as the positions determined 26 years ago cannot be upset, at this stage. Further, when Nageshwar did not join service, then that vacancy no more exists. However, since the 1st respondent was shown at S. No. 10 in the provisional seniority list dated 8.10.1999 and the same was altered in the final seniority list dated 12.4.2000 without notice to the 1st respondent, the 1st respondent ought to have been issued with a notice.

18. However, the writ petitions are liable to be allowed on the ground that the Tribunal passed an order without an opportunity to the 2nd respondent as he was not impleaded as a party to the O.A. Since the 2nd respondent, who is assigned placement above the 1st respondent in the final seniority list, will be affected by the impugned order of the Tribunal, he should have been impleaded as a party to the O.A. Even the Tribunal did not take care to see that proper and necessary parties are impleaded as respondents to the proceedings before it. Right which has been conferred on the 2nd respondent and others, as per the final seniority list dated 12.04.2000, should not have been unsettled by the Tribunal, without affording them an opportunity of being heard, who are likely to be affected by the impugned order. The principle of audi alterem partem has been given a go bye by the Tribunal while passing the impugned order. Therefore, the Tribunal is not justified in issuing the directions to consider the case of the 1st respondent for placement over and above the B.C. "A" candidates i.e. at S. No. 1 in place of M. Nageshwar without impleading the 2nd respondent and other candidates in the seniority list who are likely to be affected. The order of the Tribunal is, therefore, liable to be set aside as being violative of the principles of natural justice.

We would have remanded the matter back to the Tribunal for fresh disposal after affording an opportunity to the 2nd respondent and others likely to be affected. But, since the MCH has not issued a notice to the 1st respondent before his placement at S. No. 10 as shown in the provisional seniority list dated 9.10.1999 is changed to S. No. 14 in the final seniority list dated 12.4.2000, we are inclined to remit the matter to the MCH to consider the entire matter afresh after issuing notices to all the persons likely to be affected and decide the final seniority, in the light of Rule 33(b) of the Rules and the law laid down by the Apex Court on the issue, within a period of six weeks from the date of receipt of a copy of this

order, uninfluenced by any of the observations made hereinbefore.

19. For the reasons aforesaid, both the writ petitions are allowed and the order of the Tribunal is set aside. There shall be no order as to costs.