
(2009) 08 AHC CK 0103
In the Allahabad High Court

Jawala Prasad Dubey and Others

APPELLANT

Vs

State of U.P. and Another

RESPONDENT

Date of Decision : 03-08-2009

Acts Referred:

Constitution of India, 1950 — Article 14, 16, 226

Citation : (2009) 08 AHC CK 0103

Hon'ble Judges : Rakesh Tiwari, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

Rakesh Tiwari, J.—Heard counsel for the parties and perused the record.

2. The petitioners have challenged the validity and correctness of the impugned reversion order dated 6.5.1989 by which they were reverted from Group-I service to Group-II service.

3. It has also been prayed that the respondents may be directed to ignore the seniority lists dated 1.8.1988 and 30.9.1988 and treat the seniority list dated 4.3.1987 and 19.3.1988 as correct and legal having long officiation of petitioners in Group I service.

4. It has also been prayed that the respondents may be directed not to interfere in the functioning of petitioners in class II of service of the department from the respective date of promotion dated 8.1.88 and 5.5.88.

5. Before advertng to the arguments of the learned Counsel for the parties it is necessary to bring on record the essential facts as culled out from the writ petition.

6. The petitioners claim to have been appointed in clear vacancy as adhoc employee in Group II of U.P. Subordinate Cane (Group-I and II-General) Services in Cane Development of U.P. Government in 1961, 1962 and 1963 except the petitioner No. 2, who was a direct recruitee and had joined the post

after selection from the Commission. Petitioner Nos. 1 to 5 joined the Grade-I Service after promotion from Grade-II on 23.6.65, 25.12.64, 29.8.66, 3.1.73 and 3.11.71 respectively by order of respondent No. 2. The aforesaid promotion was made by the department against vacancies available for promotion from amongst the existing vacancies in Group-I services.

7. It is stated that from time to time a number of vacancies were available in class II services of department for promotion for the employees working in Group-I services of the department and many junior persons than the petitioners were promoted from Group-I to class II services. The petitioners could not be promoted on the available vacancies for promotion in class II service for the reasons best known to the department.

8. It appears that as nothing was heard from the department or any favourable order was available to the petitioners therefore, the petitioner Nos. 1 to 5 and other similarly situated persons decided to file Claim Petition before the U.P. Public Services Tribunal, Lucknow, which was numbered as Claim Petition No. 334/(T)/III/78. The aforesaid claim petition was decided vide order dated 8.11.85 by the Tribunal, which was not challenged either by the respondents nor any aggrieved party.

9. The Tribunal vide its order dated 8.11.85 held that the seniority list of Group-I prepared by the department is not in accordance with law and held that:

The order of confirmation both in Group-II and Group-I should be made on the basis of date of original appointment taking into consideration the period of continuous officiation and thereafter promotion of the petitioner to class II of U.P. Cane Service should be considered on the basis of seniority as determined.

10. Subsequently, respondent No. 2 issued final seniority list dated 4.3.1987 in compliance of the directions of the Tribunal dated 8.11.85 for the Group-I Services of the department, which was published after inviting objections from the persons concerned in which the name of the petitioner No. 1 was at sl. No. 32, petitioner No. 2 at sl. No. 31, petitioner No. 3 at sl. No. 38, petitioner No. 4 at sl. No. 80 and petitioner No. 5 at sl. No. 84. It is averred in the writ petition that there is virtually no difference between the seniority list dated 4.3.1987 and 19.3.87 as the seniority list dated 4.3.87 contains the name of 242 employees and the seniority list dated 19.3.1988 has got 239 employees of the Group-I service.

11. It is also averred in paragraph 21 of the writ petition that State Government in consultation with the department promoted petitioner No. 1 on 8.1.1988 and petitioner Nos. 2 to 5 were promoted by order dated 5.5.88 from Group I service to class II service (Gazetted) service of the department and had joined the post. However, surprisingly by order dated 6.5.1989 the petitioners were reverted back to the post of Group-I services without affording an opportunity of hearing.

12. It is further averred that the petitioners immediately filed their objections

against the provisional seniority list dated 1.8.1988, which was later on finalized on 30.9.88 without considering and taking the objection of the petitioners.

13. Learned Counsel for the petitioners has relied upon the judgment of the Tribunal wherein it has been observed that:

the law is therefore, well settled that confirmation is not the touch stone of seniority.

14. It is stated that due to inaction of the department in not obtaining formal approval from the Commission in respect of their promotions in Group I service, the petitioners are being treated as junior to the persons who were selected directly through Commission or promoted in Group I much later than the petitioners; that they are continuously working since their promotion in 1964, 65, 66, 71 and 73 in Group I service on the basis of the continuous officiation on the said post, hence they can not be made to suffer for the fault of the department in not obtaining formal approval from the Commission.

15. The impugned order dated 6.5.1989 has been challenged on the ground that the matter of inter se seniority between promotees of Grade I and direct recruits was finally decided by the Tribunal vide its judgment and order dated 8.11.85 and thereafter the seniority list was prepared accordingly and that the respondents have acted in disregard to the directions of the Tribunal and seniority list prepared subsequently thereto.

16. It is submitted that the petitioners were continuously working in Grade I after their promotion since 20-24 years back, the respondents have illegally and arbitrarily placed the direct recruits and some other promotees as senior to the petitioners and in any case, the respondents ought to have ignored Rules 21(1)(1) (2) of 1979 Rules in cancelling the earlier seniority list dated 4.3.87 and 19.3.88 as the petitioners were promoted in Grade I service much before the persons shown in seniority list dated 30.9.88.

17. According to the petitioners, the impugned order dated 6.5.89 is in violation of the principle of natural justice as the same has been passed without affording any opportunity of hearing to them and further the respondents have no power to go behind the judgment and order dated 8.11.85 and review the seniority list dated 4.3.87 and 19.3.88. Therefore, the petitioners can not be made to suffer for the fault of the department in not obtaining the formal approval of the Commission for last 24 years. The seniority list dated 30.9.88 has been prepared with mala fide intention to provide benefit to certain direct recruits and promotees of Grade I who joined the Grade II service much after the petitioners. It is urged that the impugned order dated 6.5.89 and seniority list dated 30.9.88 are violative of Articles 14 and 16 of the Constitution of India and Rules of 1979 are not applicable in case of the petitioners as they have been officiating in Grade I service for the last 20-24 years after their promotion from Grade II service are entitled to be held senior than the persons shown in the seniority list dated 30.9.88.

18. The impugned order is also challenged on the ground that the respondents have no power to go behind the Tribunal's judgement and order dated 8.11.85 in publishing the fresh seniority list dated 30.8.88 and to apply it retrospectively causing reversion of the petitioners, whose promotion in class II service has already been made on 8.1.88 and 5.5.88. It is stated that seniority list dated 30.9.88 has been prepared after obtaining approval of promotees (Grade II to Grade I) some time after March, 1988 whereas the seniority list dated 4.3.87 with gradation of Grade I service was available at the time of taking alleged approval of the respondents after gap of about 24 years and even otherwise the seniority list dated 30.9.88 can not be held valid seniority list for the reason that approval of the petitioners ought to have been taken before the approval of other promotees of Grade II to Grade I who joined much later than the petitioners.

19. It is lastly urged that the respondents have acted in a malafide manner in reverting the petitioners from class II to Group I service whereas the aforesaid persons who are either junior to the petitioners or they are no where in the seniority list of Group I are being allowed to continue in class II service. The seniority list dated 30.9.88 is not in accordance with Rule 17 of the Rules and is therefore, liable to be quashed and as a consequence the reversion order dated 6.5.89 by which the petitioners were reverted from Group I to class II service can not be sustained.

20. Per contra, learned Standing counsel has placed reliance upon paragraphs 7 to 14 and 19 of the counter affidavit in which it has been averred that there are two types of candidates, i.e. one who are directly appointed after approval from the Public Service Commission their seniority will be determined in accordance with the order of the Public Service Commission and the other who are promotees. It is stated that the petitioners are claiming seniority on the basis of their alleged promotion in respect of the posts available for direct recruitment and at the relevant point of time there were 59 posts which were earmarked for direct recruits and another 59 posts which were meant for promotees from the departmental candidates.

21. It is further stated that against 59 posts available for promotion 178 incumbents were promoted on adhoc basis in view of various claims as well as sugar mill incumbents to be sent on deputation but these promotions were purely on adhoc basis and terminative subject to regular promotion after approval from the Public Service Commission; that no candidate who was junior to the petitioners have been promoted in class II and the averments made in the writ petition are factually incorrect. It is submitted that the candidate whose name was at sl. No. 23 in the seniority list was a direct recruitee through Public Service Commission and that the representation of the petitioners were considered and only thereafter seniority list was published, hence it does not call for any interference under Article 226 of the Constitution.

22. It is also stated that from perusal of the writ petition it appears that the petitioners have tried to challenge the promotion of certain persons but those

persons have not been impleaded as parties to the writ petition and as such the petition is not maintainable and is liable to be dismissed on this score alone.

23. It is urged by the learned Standing counsel that the petitioner Nos. 1 to 3 were initially appointed in SCS Group II Technical and petitioner Nos. 4 and 5 were appointed in Group II (General). Thereafter,petitioner Nos. 1 and 5 were appointed on adhoc basis in U.P. Subordinate Cane Service Rules (Group II Technical) and petitioner No. 2 was appointed after selection by Public Service Commission in the years 1961,62 and 63.

24. It is stated that petitioner Nos. 1 to 3 were selected on the post of Assistant Cane Protection Inspector and petitioner Nos. 4 and 5 were selected on the post of Cane Development Inspector/Manure Inspector in Subordinate Cane Service Rule (General section). Petitioner Nos. 1 to 3 were promoted from SCS Group II to Group I and petitioner Nos. 4 and 5 were promoted from Group II (General). Prior to 8th March, 1973 there was separate seniority list for the members of technical and general Section. Petitioner Nos. 4 and 5 were promoted against the vacancies which was only meant for direct recruits and since duly selected candidates against these vacancies were not available, hence in the absence of such selected hand the petitioners were as in a stop gap arrangement promoted but that will not vest them with any right or interest of regularization or seniority. None of the petitioners had become member of the service of SCS Groups general in between 1975 to 1988, hence they were not eligible for consideration for promotion to class II services.

25. It is also submitted that there is nothing on record to show that Dina Nath made any representation to the department for his promotion in group II. However, he filed Claim Petition before the U.P. Public Services Tribunal and the Tribunal vide order dated 8.11.1988 quashed the seniority list dated 12.1.1977 with the direction to prepare fresh list of Subordinate Cane Service Group I and II in accordance with the directions and approval and selection by the Public Service Commission.

26. After hearing arguments of the learned Counsel for the parties I am of the opinion that the petitioners were given adhoc promotion on direct recruitment posts subject to finalization of appointments by direct recruitment. Admittedly, prior to 8th March, 1973 there was separate seniority for the members of technical and general section. The members of general section those who were appointed in 1948 in Group II general could find a birth in Group I general much after petitioner Nos. 1 to 3 though initially appointed in 1961, 1962 and 1963 who got promotion in Group I technical in 1964, 1965 and 1966. The post of Assistant Cane Protection Inspector on which the petitioners were initially appointed was brought in the cadre of SCS group general vide Government Order dated 8.3.1973 and as such the petitioners appear to be trying to take double advantage of their early promotion in group I technical on the ground that incumbent of general section appointed in 1948 could only be promoted after the petitioners. The petitioners have no right to claim appointment on post to be

filled up by promotion meant for direct recruit.

27. It appears that a seniority list was prepared on 30th September, 1988 on the basis of the decision rendered in *G.P. Dobal v. Chief Secretary*, therefore, necessity arose for preparation of fresh list as such they were not covered in the general eligibility in view of the decision rendered in *G.P. Dobal (supra)* having not been approved by the Public Service Commission. The promotion of the petitioners could not have been made against posts of direct recruits and in any case their promotion was purely on adhoc basis and tentative subject to regular promotion after approval from the Public Service Commission.

28. It also appears that no candidate junior to the petitioners were promoted in group II and that the stand taken by the petitioners in the writ petition is factually incorrect. The petitioners have tried to challenge promotion of certain persons but those persons have not been impleaded as party in the writ petition and for this reason also the writ petition is not maintainable as against them.

29. The vacancy of direct recruit was not available to the petitioners and one of the petitioners had become members of the service of SCS groups general in between 1975 to 1988, they were not eligible for consideration for promotion to class II services. It appears that none of the promotees in group I were approved by the Public Service Commission and the list dated 4.3.1987 was found to be defective, hence it was quashed by the Cane Commissioner, U.P. vide his order dated 19th March, 1988. The action was taken by the Cane Commissioner, U.P. In the light of the directions of the U.P. Public Services Tribunal in Claim Petition No. 105/F/III/87 dated 5.8.1987.

30. In paragraphs 21, 22 and 26 it has been averred that:

21. ...the total strength of SCS group I general comprises of Senior CDI 82 posts, CPI 34 posts, AMO 1 post and TA 1 post. The total being 118 posts. It is pertinent to point out that against 118 sanctioned posts 242 incumbents were given seniority in the list dated 4.3.1987 amongst 64 incumbents belonging to direct quota and against 59 sanctioned posts for promotees 178 incumbents were from adhoc promotees. It appears that among direct recruits 25 candidates were promoted from group I to class I and II and in place of those promotees on adhoc promotion against 25 posts were made tentative.

22. ...It is stated that the list of promotion dated 19.3.1988 was tentative one as the Public Service Commission was going to hold selection against promotional quota.

26. ...Petitioner No. 2, Balwan Singh filed his objection against list dated 1.8.1988 but as he was not in the zone of eligibility of approval in the year-wise vacancies, his name did not find place in the list of the graded persons numbering 151 in which 59 were selected from direct quota and 94 from promotion quota of 59 and 35 persons had retired or some of them died in the intermediary period of year-wise vacancies. Representation of the petitioners

was considered and rejected as he did not come in the field of regular section in SCS group I general.

31. The promotion list dated 19.3.1988 of the petitioners being tentative could not therefore, be valid as the Public Service Commission was going to hold selection against the promotional quota.

32. It has been averred in paragraph 28 of the counter affidavit that:

28. With regard to the contents of paragraph 28 of the writ petition, it is stated that as stated earlier petitioner No. 1 alone was in the field of eligibility and petitioner Nos. 2 to 5 do not come in the field of eligibility and as such the petitioner No. 1 alone was placed in the list in which the Public Service Commission accorded approval in the year 1983-84 and then selection of promotion was made from the seniority of the subordinate cane service group II general in the light of judgment of the Tribunal dated 8.11.1985 where list of continuous officiating service was taken into consideration. The petitioners were promoted in group I from the list of seniority which was quashed by the Tribunal and for their own interest they want to place reliance on the list which has already been quashed by the Tribunal. So far as candidate at sl. No. 30 is concerned, he was promoted on 21.2.1968 though he came in group II in 1948 and petitioner No. 1 who came in group II in 1961 got promoted on 23.6.1965 having two separate wings of service prevailing at that time as such the petitioners which got out of turn promotion from the list which has been quashed cannot make claim which is no list in the light of the judgment of the Tribunal.

33. The petitioners have made following prayers in the writ petition.

(i) To issue a writ, order or direction in the nature of certiorari quashing the impugned reversion order dated 6.5.1989.

(ii) To issue a writ, order or direction in the nature of mandamus directing the respondents to ignore the seniority list dated 1.8.1988 and 30.9.1988 and treat the seniority list dated 4.3.1987 and 19.3.1988 as correct and legal having regard to long officiation of petitioners in Group I service.

(iii) To issue a writ, order or direction in the nature of mandamus commanding the respondents not to interfere in the functioning of petitioners in class II of service of the department from the respective date of promotion dated 8.1.88 and 5.5.88.

34. As stated above, the petitioners continued on adhoc basis as eligible persons were officiating in group I and II and even though the direct quota selection was delayed. The petitioners were sent to Public Service Commission for regular selection except petitioner No. 1, who was eligible and the seniority list dated 30th September, 1988 was prepared after obtaining approval on 18/19.4.1988.

35. It is relevant to note here that the petitioners were holding the post on adhoc basis from the list dated 4.3.1989 which has admittedly been quashed vide order

dated 19.3.1988. The persons at sl. No. 32 and 42 were much more senior to the petitioners as they were appointed through Public Service Commission on or about 1948 whereas the petitioners appointment is of 1961 only in SCS group II. All the ten persons who were appointed after their selections in group I direct quota were eligible for promotion in view of the selected hands available in group I but the petitioners were not members of service of group I at that time. Since the seniority list having been found defective and not in conformity with the decision of the Apex Court, therefore, it was quashed on 19th March, 1988. Raj Pal Singh, Srichand Verma, Indrajit Arora, Anil Tripathi, R.S. Tyagi, S.N. Rai, Manvendra Singh, Babban Chaubey, Chintamani Beldar, Anil Kumar Singh, Ravi Kumar Srivastava, Bali Ram Chauhan and Riyazuddin Khan originally belonged to be members of SCS group I technical. These persons were originally appointed after their selection by Public Service Tribunal on the post of Junior Agro Assistant which post was later on approved vide order dated 8th March, 1973. Appointment of the petitioners in class II was not on the basis of any selection.

36. From above it is clear that the claim of the petitioners that they should be promoted in class II is absolutely is misconceived and incorrect.

37. It appears from record that petitioner Nos. 1 to 5 were given class II only on adhoc basis and as stop gap arrangement which could not have been done and as such were rightly sent back in Group I vide order dated 6.5.1989.

38. It may also be noted that petitioner No. 1 has been approved though petitioner Nos. 2 to 5 were not approved by the Public Service Commission as not being in the zone of eligibility. As stated earlier that 178 persons were promoted as against 59 posts out of which some were sent on deputation. It also appears that in the light of the directions of the Tribunal interse seniority among the selected and approved incumbents as tentative list was circulated on 1.8.1988 and after considering representation final list was declared on 30th September, 1988.

39. The petitioners having been promoted in class II in a stop gap arrangement and not on the basis of any selection, hence were rightly sent to their substantive posts. Since petitioner No. 1 has been approved by the Public Service Commission in Group II and rest of the petitioner Nos. 2 to 5 have not been approved by the Commission, hence except petitioner No. 1, none of them are not entitled to have any post in Group I and their claim for promotion in class II is wholly misconceived and erroneous in the eye of law.

40. For all the reasons stated above, the impugned order dated 6.5.1989 is liable to be upheld and the petitioners are not entitled to be treated as senior by ignoring the seniority lists dated 1.8.88 and 30.9.88 and treating the seniority lists dated 4.3.1987 and 19.3.1988 as correct and legal having regard to long officiation of the petitioners in Group I service would not give them any legal right to claim post meant for direct recruit.

41. The writ petition is dismissed. No order as to costs.