
(2005) 08 GAU CK 0018

In the Gauhati High Court

Case No : Writ Petition (C) No. 183 (AP) of 2005

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APPELLANT

Vs

State of Arunachal Pradesh and Others

RESPONDENT

Date of Decision : 19-08-2005

Acts Referred:

Arunachal Pradesh Health Service Rules, 1990 — Rule 11, 7, 8, 9
Arunachal Pradesh Health Services Rules, 2000 — Rule 6, 9

Citation : (2005) GLT 89 Supp

Hon'ble Judges : B.K. Sharma, J

Bench : Single Bench

Advocate : N. Tagia, for the Appellant; C.K. Sarma Baruah, B.L. Singh and T. Son, for the Respondent

Final Decision : Allowed

Judgement

B.K. Sharma, J.—The Petitioner in this writ petition has challenged the assignment of seniority to the Respondent No. 3 over him.

2. The facts are not in dispute. The Petitioner was first appointed as Junior Medical Officer with effect from 4.3.1985. The formal order of his appointment was issued on 12.4.1988. While the Petitioner was in service as such, the Annexure-B, advertisement, was issued inviting applications for filling up of certain posts of Specialists under the Health and Family Welfare Department. The advertisement included five posts of Surgical Specialists and one post of ENT Specialist. The Petitioner offered his candidature for the post of Surgical Specialists and he appeared in a selection held on 21.8.1988 in New Delhi. It is the case of the Petitioner that pursuant to the aforesaid advertisement and considering the candidatures offered by various candidates call letters were issued and altogether 15 candidates appeared in the interview. The Respondent No. 3 did not apply for the post. It is the further case of the Petitioner that the Respondents selected seven persons in various disciplines and in the surgical category two persons including the Petitioner were selected for appointment.

Accordingly, the Petitioner was appointed by the Annexure-D, order dated 22.4.1988. However, such appointment was stated to be on ad hoc basis.

3. There is no dispute that the Respondent No. 3 was appointed on 23.3.1988 without any selection. A copy of his order of appointment is available in the counter-affidavit filed by the Respondent No. 3 and the same has been annexed as Annexure-9 to the counter-affidavit. He was also appointed on ad hoc basis stipulating that he would require to serve in Arunachal Pradesh for a period of five years as per the terms and conditions of the Bond executed by him. Thus, while it is the case of the Petitioner that although he was appointed by Annexure-D, order dated 22.4.1988 on ad hoc basis but such appointment being pursuant to the regular selection, he is entitled to count his seniority with effect from 22.4.1988. His further case is that although the Respondent No. 3 was appointed one month prior to the Petitioner, but such appointment being admittedly not pursuant to any regular selection, he is not entitled to count his seniority from the initial date of appointment, i.e., 29.3.1988.

4. In the order of appointment issued in favour of the Petitioner and others, it was stated that their services would be regularized as soon as the Health cadre is formulated. By Annexure-E, order dated 16.1.1991, the service of different incumbents including that of the Respondent No. 3 and the Petitioner were regularized from their respective dates of initial appointment. While the Petitioner's service was regularized with effect from 24.4.1988, the service of the Respondent No. 3 was regularized with effect from 23.3.1988. However, the date of regularization of ad hoc appointment was indicated as 15.2.1990.

5. After the aforesaid order dated 16.1.1991 another order was issued on the same date by which the officers named in the order including the Respondent No. 3 and the Petitioner were declared as members of the Arunachal Pradesh Health Services (APHS), as per the provisions of Rule 7 of the Arunachal Pradesh Health Service Rules, 1990, with effect from 16.2.1990. In this order also the respective dates of initial appointment of the Petitioner and the Respondent No. 3 were indicated.

6. The Petitioner made a representation on 9.6.1999 praying for publishing the combined gradation list of Specialists. However, it was only on 18.7.2002, a provisional gradation list of APHS was published asking for objections etc from the officer. In the list, the Respondent No. 3 was placed at SI. No. 5 while the Petitioner was placed at SI. No. 6. Being aggrieved by such assignment of seniority to the Petitioner below the Respondent No. 3, the Petitioner made representation on 15.1.2004, urging that since he was appointed pursuant to a regular selection he would rank senior to the Respondent No. 3, who was appointed without any such selection. In the representation he also made a grievance against the placement of one Dr. M. Jini above him.

7. The representation of the Petitioner was disposed of by the Annexure-J, communication dated 16.11.2004 rejecting the prayer of the Petitioner.

Indicating the respective dates of appointment of the Petitioner and the Respondent No. 3, it was held that the Respondent No. 3 would rank senior to the Petitioner. After such rejection of the prayer of the Petitioner, the provisional seniority list has been made final vide Annexure-K, Memorandum dated 28.10.2004. While the grievance of the Petitioner as regards his placement below the said Dr. M. Jini is concerned, has been redressed by placing the Petitioner above him, but his grievance against the Respondent No. 3 remained the same, inasmuch as, as against the placement of the Petitioner at SI. No. 5, the Respondent No. 3 has been placed at SI. No. 4.

8. The official as well as the private Respondents have filed their counter-affidavits. The stand in the affidavits is that the services of both the officers having been regularized by a common order dated 16.1.1991 (Annexure-E) from their respective dates of appointment and the date of appointment of the Respondent No. 3 being prior in point of time, he has been rightly assigned seniority above the Petitioner. According to them, with the framing of the Arunachal Pradesh Health Services Rules, 1990, the existing officers came to be born in the service with effect from 16.2.1990 in terms of the provisions of Rule 7 of the Rules and thus, taking into account the initial dates of appointment, the seniority was determined.

9. Mr. N. Tagia, learned Counsel for the Petitioner, argued that since the Petitioner was appointed pursuant to a regular selection and the Respondent No. 3 was appointed on pick and choose basis, as per normal rules of seniority so well known in service jurisprudence, the Petitioner cannot rank junior to the Respondent No. 3. He placed reliance on the decisions of the Apex Court in *Dr M.A. Haque and Others Vs. Union of India (UOI) and Others*, and *State of U.P. and Others Vs. Dr. R.K. Tandon and Others*,

10. Mr. C.K. Sarma Baruah, learned Advocate General, Arunachal Pradesh, appearing for the State assisted by Mr. B.L. Singh, learned Sr. GA., Arunachal Pradesh, submitted that the service of both the incumbents having been regularized by a common order dated 16.1.1991, from their initial dates of appointment, the seniority of the Respondent No. 3 over the Petitioner was rightly fixed, his date of appointment being prior to the date of appointment of the Petitioner. Referring to the orders of appointment in respect of both the incumbents, he submitted that since both of them were appointed on ad hoc basis, there is no question of granting any weightage to the Petitioner on the ground of he having been appointed pursuant to a selection.

11. Mr. T. Son, learned Counsel for the Respondent No. 3, in his forceful argument while adopting the arguments of the learned Advocate General, Arunachal Pradesh, submitted that the Petitioner being content with the order of regularization dated 16.1.1991, all these years cannot now unsettle the settled position by questioning the seniority position assigned to the Respondent No. 3.

12. I have given my anxious consideration to the submissions made by the

learned Counsel for the parties. I have also considered the materials on record including the Recruitment Rules of 1990 and 2000. Be it stated here that after the aforesaid Rules 1990, the Government of Arunachal Pradesh framed a new set of Rules in supersession of the earlier Rules, 1990. The new set of Rules is called the Arunachal Pradesh Health Services Rules, 2000.

13. The moot question for determination is as to whether the Petitioner can claim seniority over the Respondent No. 3 on the ground that he was a regularly selected candidate. There is no dispute that the selection was conducted pursuant to the advertisement issued vide Annexure-B, dated 19.6.1987. There is also no dispute that the Petitioner and others excluding the Respondent No. 3 appeared in the selection. In paragraph-7 of the writ petition, the Petitioner has stated that he was appointed by Annexure-D, order dated 22.4.1988, pursuant to his selection. To such an averment of the Petitioner, there is no denial on the part of the official and private Respondents. It is true that his appointment was described as ad hoc appointment.

14. There is also no dispute that the Respondent No. 3 was appointed without any selection. However, the whole basis of the argument of the Respondents is that since the services of both the incumbents have been regularized by a common order dated 16.1.1991 from their initial date of appointments, the Respondent No. 3 has been rightly assigned seniority over the Petitioner his date of appointment being prior in point of time. By another order issued on the same date, i.e., 16.1.1991, the incumbents named in the order including the Petitioner and the Respondent No. 3 were appointed to the APHS invoking the provisions of Rule 7 of the Arunachal Pradesh Health Services Rules, 1990, since superseded by the Rules of 2000.

15. Rule 7 of the Rules 1990 provided for initial constitution of the services. As per the said provisions, the officer holding in Arunachal Pradesh Health Services Grade A or Grade B posts immediately before the commencement of the Rules would be the members of the Service in respect of the posts or Grades as the case may be. Thus, this Rule did not provide for fixation of seniority. It only deal with the initial constitution of the service with the members of the service in their respective posts or the Grades, Rule 11 of the Rules provided for fixation of seniority. Rule 11 is quoted herein below:

11. Seniority.- (1) The relative seniority of members of the service shall be determined on the basis of appointment made to grade at the time of initial constitution under Rules 8 and 9 of these rules, provided that if the seniority of any such member had not been specifically determined on the said date, the same shall be determined by the Government in accordance with the rules applicable to members of similar services under Central Government/Arunachal Pradesh as the case may be, in consultation with State Public Service Commission.

(2) All permanent officers included in the service under Rules 8 and 9 in any

grade shall rank senior to all officers appointed to the grade subsequently. All permanent officers included in the initial constitution of the service in any grade shall rank senior to all temporary officers appointed to that grade subsequently.

(3) The seniority of persons recruited to the service after the initial constitution shall be determined in accordance with the general instructions issued by the Government from time to time, in conformity with the rules governing seniority of employee serving the Central Government at the initial constitution of the Arunachal Pradesh Health Service cadre.

(4) In case not covered by above provisions, seniority shall be determined by this Government.

16. As per the said provisions of Rule 11, the relative seniority of the members of the service shall be determined on the basis of appointment made to the Grade at the time of initial constitution of service under Rules 8 and 9 of the Rules. Rules 8 and 9 of the Rules laid down the procedure of filling up the vacancies in any category which remained unfilled after the initial constitution of the service. However, it was emphasized that if the seniority of any member has not been specifically determined, the same should be determined by the Government in accordance with the Rules applicable to the members of the similar service under the Central Government/Arunachal Pradesh in consultation with the State Public Service Commission. In the event of failure to determine the seniority being not covered by any of the provisions mentioned in Sub-rules (1), (2) and (3), then as per. Sub-rule (4) the same was to be determined by the Government.

17. Rule 6 of the Rules of 2000, speaks of initial constitution of the service as per which all the officers appointed prior to commencement of the earlier Rules, 1990 and all the officers appointed under the Rules of 1990 before commencement of the Rules of 2000 shall be deemed to have been appointed under the Rules of 2000 and they shall be the members of the Service in their respective grades. Rule 9 of the Rules, 2000 deals with the determination of seniority. The provisions of Rule 9 also speak of determination of the seniority on the basis of the Rules governing the fixation of seniority in accordance with the general instructions issued by the State Government from time to time. It also emphasizes that the seniority of different incumbents shall be as was obtaining on the date of commencement of the rules.

18. The whole emphasize of the Respondents is that since the dates of commencement of the Rules be it 1990 or 2000, since the Petitioner and the Respondent No. 3 had already entered the service prior to that and the date of appointment of the Respondent No. 3 was prior to the date of appointment of the Petitioner, as a natural corollary of the Rules, the Respondent No. 3 would rank senior to the Petitioner.

19. The provisions relating to seniority in both the Rules, i.e., 1990 and 2000 are somewhat ambiguous without any clarity. However, at the same time the said provisions provide for fixation of seniority in reference to the rules of seniority

being followed in other services under the Central Government/Arunachal Pradesh.

20. As noticed above, it has not been disputed by any of the Respondents that the Petitioner was appointed pursuant to a selection. On the other hand, the Respondent No. 3 was appointed without any selection. Although the Petitioner was appointed on ad hoc basis and shown regularized by order dated 16.1.1991 from his initial date of appointment, he will be entitled to his seniority from his initial date of appointment and the expression "ad hoc" used in his appointment order will be of no consequence. In this connection, I may gainfully refer to the decision of the Division Bench of this Court in *A.T. Gatakwad v. Union of India and Ors.* 2003 (3) GLT 10. Referring to the decision of the Apex Court, the Division Bench of this Court held that since the Petitioner in that case was promoted pursuant to recommendation of DPC, although his such promotion was stated to be on ad hoc basis and regularized subsequently, he would get his seniority from the initial date of promotion. In the instant case also, although the expression "ad hoc" was used while appointing the Petitioner but the same being pursuant to his regular selection with the issuance of the order dated 16.1.1991 regularising his service and appointing him as a member of the APHS, the same would relate back to his initial date of appointment, i.e., 24.4.1988.

21. The question that arises for consideration is as to whether the Respondent No. 3 should also get the similar treatment. In both the orders 16.1.1991, there is no indication regarding fixation of seniority from the initial dates of appointment. Regularization and appointment of an incumbent in a particular service with retrospective effect may not necessarily inclusive of fixation of seniority retrospectively. The Respondent No. 3 has not been appointed pursuant to any regular selection. His initially "ad hoc" appointment must be treated to be stop gap and fortuitous.

22. In the case of *Dr. M.A. Haque (supra)*, the Apex Court emphasized the need for fixation of seniority on principles laid down in various earlier decisions, more particularly, in *The Direct Recruit Class-II Engineering Officers' Association and others Vs. State of Maharashtra and others*, It was observed that the persons who are neither appointed nor regularized in accordance with the Rules cannot get their seniority from their initial appointment.

23. Similar view has been expressed in the case of *Dr. R.K. Tandon (supra)*. This case was in respect of fixation of seniority between those selected through Public Service Commission and those appointed on ad hoc basis.

24. In the case of *V. Sreenivasa Reddy and others Vs. Govt. of Andhara Pradesh and others*, the Apex Court made the following observations:

14. It is now well settled law that appointment/promotion must be in accordance with the Rules, direct recruit takes his seniority from the date on which he starts discharging the duty of the post borne on the cadre while a temporary appointee appointed de hors the rules or on ad hoc basis or to a fortuitous vacancy gets

seniority from the date of regular appointment.

15. It is settled law by the judgment of the Constitution Bench in Direct Recruits Class II Officers Association v. State of Maharashtra (1990) 2 SCR : AIR 1991 SCW 2226, that appointment in accordance with Rules is a condition precedent to count seniority. Temporary or ad hoc or fortuitous appointments etc. is not an appointment in accordance with the Rules and the temporary service cannot be counted towards the seniority.

25. I may also refer to some of the decisions of the Apex Court concerning the issue raised in this proceeding. In the case of M.A. Haque and Ors. v. Union of India and Ors. reported in 1993 (3) SLJ (SC) , the Apex Court held that the ad hoc doctors in the Railways regularized as per the orders passed by the Apex Court would not get seniority over the regularly appointed doctors.

26. In the case of Food Corporation of India Vs. Thaneswar Kalita and others, the Apex Court observed that the ad hoc promotion de hors the rules, even though continued for a long time would not count towards seniority. It held that the High Court was clearly in error in directing to treat the entire services as on regular basis. Similar views has been expressed in the case of Chief of Naval Staff and another Vs. G. Gopalakrishna Pillai and others, holding that ad hoc appointment without selection by a regularly constituted selection body, although continued uninterruptedly followed by regularization would not count towards seniority.

27. In the case of M.K. Shanmugam and Another Vs. Union of India and Others, reiterating the above views in respect of counting of seniority, the Apex Court once again held that ad hoc service does not count for seniority unless the same was pursuant to the same process as is applicable to regular appointment. In the case, the Apex Court noticed the findings of the CAT that the ad hoc promotions were not recommended by a competent DPC and the selection method which was prescribed for regular promotions, was also not followed. Same view has been expressed in the case of T. Vijayan and Others Vs. Div. Railway Manager and Others, in the case of State of Haryana v. Haryana Veterinary and AHTS Association reported in (2000) 8 SCC (sic) and in the case of State of Bihar and Others Vs. Kameshwar Prasad Singh and Another,

28. The Apex Court in the case of Suraj Parkash Gupta and Others Vs. State of Jammu & Kashmir Others, noticing the recent trend of cases held that the recruitment rules cannot be relaxed. It emphasized on the need of requiring strict conformity with the Recruitment Rules for both direct recruits and promotees. The whole sale regularization order by way of implied relaxation of the Recruitment Rules was held to be invalid. It was held that the power to relax the Rules cannot be treated as wide enough to include a power to relax rules of recruitment. Even for relaxation, the reasons are required to be recorded and even if such reasons are recorded, it was emphasized that the recruitment rules themselves cannot be treated to be producing hardship and bypassed on that ground.

29. In the case of Excise Commissioner, Karnataka and another Vs. V. Sreekanta, the Apex Court reversing the judgment of the High Court held that the Respondent in that case was not entitled to claim seniority from the date of his initial appointment on ad hoc basis, but he was only entitled to claim seniority from the date of his subsequent appointment or regularization under the special rules of recruitment.

30. In both the Rules of 1990 and 2000, the provisions relating to seniority although somewhat ambiguous, it has been provided that recourse may be had to the Rules of seniority being followed in the other departments. It being cardinal principle of fixation of seniority that an ad hoc appointee appointed de hors the Rules cannot score a march, in the instant case also, in my considered opinion, the Respondent No. 3 who was admittedly appointed without any selection cannot score a march over the Petitioner. Regularization of his service by order 16.3.1990 with retrospective effect cannot be said to be for the purpose of fixation of seniority as well. One may get other service benefits like increments, pensionary benefits for the period of his ad hoc service, etc. but certainly the said period cannot be counted for seniority.

31. Since no one else has approached this Court assailing the seniority of the Respondent No. 3 over him, in spite of the finding regarding entitlement of his seniority, it is hereby provided that although he will rank junior to the Petitioner but shall not rank junior to any other officers who are juniors to him in gradation list.

32. In view of the above, the writ petition stands allowed interfering with the Annexure-K, Seniority List dated 28.10.2004, so far as the same relates to assigning of seniority to the Petitioner at SI. 5 below the seniority position of the Respondent No. 3 at SI. 4. Now the Petitioner shall be placed at SI. No. 4 while the Respondent No. 3 shall stand relegated to SI. No. 5. However, it is made clear that other things in the gradation list will remain the same, including the seniority of the Respondent No. 3 above others.

The writ petition stands allowed leaving the parties to bear their own costs.