
(2017) 02 BOM CK 0073
In the Bombay High Court
Case No : Writ Petition No. 847 of 2015

Maya M. Pednekar

APPELLANT

Vs

State of Goa

RESPONDENT

Date of Decision : 02-02-2017

Acts Referred:

Constitution of India, 1950 — Article 16
Goa Government (Seniority) Rules, 1967 — Rule 5

Citation : (2017) 3 ALLMR 788 : (2017) 2 BCR 599

Hon'ble Judges : F.M. Reis and Nutan D. Sardesai, JJ.

Bench : Division Bench

Advocate : Mr. N.N. Sardesai, Sr. Advocate with Mr. L. Raghunandan, Advocate, for the Petitioner; Mr. D. Lawande, Addl. Advocate General with Mr. P. Dangui, Additional Government Advocate, for the Respondent No. 1; Mr. D. Lawande, Addl. Advocate General, for the Respondent No. 2; Mr. A.F. Diniz, with Mr. Ryan Menezes, Advocates, for the Respondent No. 3; Mr. V.A. Lawande, Advocate, for the Respondent No. 4

Final Decision : Dismissed

Judgement

F.M. Reis, J.—Heard Shri N.N. Sardesai, learned Senior Advocate appearing for the Petitioners, Shri P. Dangui, learned Additional Government Advocate appearing for the Respondent no. 1, Shri D. Lawande, learned Additional Advocate General appearing for Respondent no. 2, Shri A. F. Diniz, learned Counsel appearing for Respondent no. 3 and Shri V. A. Lawande, learned Counsel appearing for Respondent no. 4.

2. The above petition inter alia prays for a Writ or direction to quash and set aside the report dated 16.02.2015 prepared by the learned Ombudsman and the impugned order dated 09.09.2015 and restore the final seniority list dated 16.07.2008.

3. Briefly, it is the case of the Petitioner that the Respondent no. 2 published an advertisement in the local newspaper dated 31.08.2001 for inviting applications

for 11 posts and 11 vacancies likely to occur in future. The Respondent no. 1 informed the Respondent no. 2 on 30.11.2011 to prepare a waiting list of 19 candidates and as such, the total vacancies were 30 out of which 11 existing and 19 were to be in the waiting list. It is further contended that the Respondent no. 2 on 21.11.2001 made recommendations of 11 candidates to the existing 11 posts and the remaining 21 posts were reserved under waiting list for the said posts. Among the 11 posts, 7 were in General category and 3 were in OBC and one was CFF. The Petitioner no.1 was appointed on 15.02.2002 as a Mamlatdar by the Respondent no. 1. As per the requisition by the Respondent no. 1 on 26.02.2002 the Respondent no. 2 further recommended 8 candidates from the above waiting list to the said post which included five posts from General category and 3 were in OBC. Thereafter, by letter dated 24.05.2002, the Respondent no. 2 recommended two candidates one belonging to the general category and one from OBC category. The Petitioner no. 4 was recommended in this batch and was appointed to the post of Mamlatdar. On 27.11.2002 as per the requirements the Respondent no. 2 made recommendations for two more candidates for the said post out of which one belonging to General category and one from OBC category. The Petitioner no. 5 and 6 were recommended and appointed for the post of Mamlatdar on 14.01.2003. On 03.06.2003, the final batch of recommendations consisted of 7 candidates for the said post from the waiting list from which 6 were from General category and one from OBC category were recommended. On 22.01.2007 the Respondent no. 2 submitted a common merit list to the Respondent no. 1 which was prepared based on the marks secured by each candidate in the viva voce. Thereafter, the Respondent no. 1 announced that there was some anomaly in the common merit list given by the Respondent no. 2 and, therefore, sought clarification on the said anomaly as the same was required to finalise the common seniority list. Thereafter, on 24.10.2007 the Respondent no. 2 observed that while recommending the name of the candidate to the Respondent no. 1 from time to time, apparently wherever the candidates had secured equal marks, their date of birth was not taken into consideration for determining their inter se seniority. Hence, the discrepancy occurred as observed by the Respondent no. 1 in his letter dated 20.08.2007. The tentative seniority list was thereafter prepared on 06.11.2007 by the Respondent no. 1 based on the letter dated 22.11.2007 and ultimately a final seniority list was prepared on 16.07.2008 as per the appointment orders. The Respondent no. 3 and 4 being aggrieved by the final seniority list made representations to the Respondent no. 1 in 2008 and 2009 and, thereafter, a Writ Petition was filed by the Respondent no. 3 before this Court challenging the final seniority list. This Court by order dated 08.10.2009 disposed of the writ petition on the statement made by the learned Advocate General upon instructions that the representation would be considered and decided in accordance with law. The Respondent no. 1, thereafter, by an order dated 19.11.2009 decided to withdraw both the tentative seniority list dated 06.11.2007 and the final seniority list dated 16.07.2008 and to go for a fresh process for determining seniority. The Petitioners being aggrieved by the said order dated 19.11.2009 filed writ petition

before this Court being Writ Petition no. 359/2010, which came to be disposed of on 01.07.2010. On the basis of the statement of learned Advocate General that the Respondent no. 1 by its order dated 17.08.2010 took a decision to withdraw the order dated 19.11.2009. The Respondent thereafter considered both the representations of the Respondent no. 3 and 4 and upon consideration, the Respondent no. 1 by its order dated 24.08.2011 decided to maintain the final seniority list drawn on 16.07.2008. Subsequently, Respondent no. 3 and 4 made representation to the Respondent no. 1 to refer their dispute with regard to inter se seniority list to the learned Ombudsman and by communication of the Respondent no. 1 the matter was referred to the learned Ombudsman for consideration which came to be registered as Case No. OM2-97/2012-13 and case No. OMB/2- 99/2012-13. In the meanwhile, the Respondent no. 1 sought clarification from Respondent no. 2 on the manner of merit list prepared by the Respondent no. 2 who vide letter dated 28.05.2013 observed that the relevant files wherein recommendations of 30 candidates for the said category were processed have been weeded out as per the Commission's policy. Upon hearing the parties on 16.02.2015, the learned Ombudsman vide its report found favour with the contention of the Respondents no. 3 and 4. The learned Ombudsman came to the conclusion that the 30 officers appointed as Mamlatdar, Joint Mamlatdar, Assistant Directors of Civil Supplies Department in five different batches to be given high seniority in the order of common merit list prepared by Respondent no. 2. Thereafter, the Respondent no. 1 by the impugned order dated 17.02.2015 accepted the report of the Ombudsman and withdrew the final seniority list prepared in the year 2008 and has revised and circulated eligibility list in terms of Rule 10 of the Goa Civil Service Rules. The Petitioners have accordingly being aggrieved by the said action of the Respondent no. 1 filed the above petition for the aforesaid reliefs.

4. The Respondent no. 1 has filed an affidavit-in-reply. It is the contention of the Respondent no. 1 that the challenge to the Order dated 09.09.2015 passed by the Respondent no. 1 finalising the inter se seniority of the officers in the category of Mamlatdar/Joint Mamlatdar/Assistant Director of Civil Supplies and the report submitted by the Ombudsman were prepared after giving due hearing to the concerned officers and that due process of law was followed. It is further contended that the posts advertised were for filling up 11 vacancies in the category of Mamlatdar/Joint Mamlatdar/Assistant Director of Civil Supplies.

5. Thereafter, Respondent no. 2 was informed that another 8 vacancies are likely to occur and subsequently informed that instead of 8 vacancies as intimated earlier, 10 vacancies were likely to occur. While the process was in progress by Respondent no. 2 for recruitment of the candidates for 21 vacancies, the Respondent no. 1 decided to request the Respondent no. 2 to keep 19 officers on the waiting list, besides the 11 likely to occur vacancies. It is also admitted that the 11 candidates were appointed based on the recommendations to the said post vide order dated 15.02.2002. Thereafter, on 17.04.2002, another 8 more candidates were appointed and in the third phase two more candidates came to

be appointed on 31.07.2002. Two more names were thereafter recommended and appointed on 14.01.2003. The validity of the waiting list was sought to be extended by another 6 months and after extending the validity period the Respondent no. 1 appointed 7 more candidates on 03.06.2003. It is also pointed out that the tentative seniority list was drawn on the basis of the common merit list prepared by the Respondent no. 2 which was circulated vide memorandum dated 06.11.2007. It is also pointed out in the affidavit that the objections filed were examined and the Respondent no. 1 upheld the decision and the seniority was finalised by memorandum dated 16.07.2008 by considering the date of appointment of the officers to such posts. Respondents have stated that they have taken a view on the representation made by the aggrieved officers, and have also reproduced the observations of the Ombudsman and ultimately taken a stand. It is further pointed out that the report of the Ombudsman has been rightly accepted by the State Government. Respondent no. 3 has also filed affidavit where its emphasized by the said Respondent that in terms of Rule 5 of the Goa Civil Service Rules, 1967 the order of seniority in terms of the relative seniority is in terms of the relative seniority of the merit list prepared by the Commission. It is further pointed out that in such circumstances, the final seniority prepared in the year 2008 is not in terms of the rule.

6. Respondent no. 4 has also filed his affidavit in reply and pointed out that the seniority is based on the merit in accordance of the rules and submitted that there is no justification in preparing the seniority list based on the date of appointment.

7. Shri Nitin Sardessai, learned Senior Counsel appearing for the Petitioner has reiterated the facts as stated herein above and pointed out that the disputed impugned report prepared by the Ombudsman dated 16.02.2015 and the impugned order dated 09.09.2015 are erroneous, inequitable and contrary to the relevant service rules and as such the seniority list dated 16.07.2008 deserves to be restored. Learned Senior Counsel submits that the order passed by the learned Ombudsman is arbitrary and contrary to the well settled principles of law governing the principles of inter se seniority amongst the cadre officers when the appointments are made and the vacancies are filled up. Learned Senior Counsel further points out that whilst passing the impugned order, the authorities have lost sight of the settled principles that whilst determining the inter se seniority amongst the officers recruited from different sources and officers appointed by the same process at different times, the date of entry into service is relevant and, as such, the persons who entered into service first at the relevant time to available posts shall rank senior, unless there is a rule providing otherwise. Learned Senior Counsel has thereafter taken us through Rule 5 of the Goa Government (Seniority) Rules, 1967 and pointed out that such Rule would be inapplicable to the facts of the present case. Learned Senior Counsel, as such, pointed out that the learned Ombudsman erred in applying Rule 5 of the said Rules to the present case as it failed to appreciate that Rule 5 is applicable only inter se to the general candidates or reserved candidates in the order of merit

but yet changed when vacancies are filled up as per the roster and appointments are made thereunder. Learned Senior Counsel further submits that the Respondent nos. 3 and 5 cannot claim seniority over Petitioner no. 1 to 4 and 6 as said Petitioners belong to the reserved category and appointed earlier due to roster points maintained by the Respondent no. 1 whereas, Respondent no. 3 and 4 belong to the general category. Learned Senior Counsel further submits that when the vacancies are filled up according to the roster, the said Petitioners belonging to the reserved category, though less meritorious in the order of merit maintained by Respondent no. 2, would occupy respective places assigned in the roster and, as such, the Petitioner nos. 1 to 4 and 6 steal a march over and get seniority over Respondent nos. 3 and 4 belonging to general category. It is further pointed out that the zone of consideration of Respondent no. 3 and 4 are different and distinct than those of the Petitioners no. 1 to 4 and 6. Learned Senior Counsel further pointed out that discrepancy in the merit list prepared by Respondent no. 2 is evident from the letter dated 24.10.2007 wherein the date of birth was not considered while submitting names of the candidates for the concerned posts. Learned Senior Counsel further submits that based on the seniority list dated 16.07.2008, Petitioners have been promoted to the Junior Scale Grade which cannot be disturbed by the Respondent no. 1. Learned Senior Counsel further points out that grave injustice would occasion to the Petitioners in case the seniority list is unsettled based on the impugned order passed by the learned Ombudsman. Learned Senior Counsel as such submits that the impugned order be quashed and set aside.

8. On the other hand, Shri D. Lawande, learned Additional Advocate General, has disputed the said contention. Learned Counsel has taken us through Rule 5 of the said Service Rules to point out that the seniority list is based on the merit list prepared by the Respondent no. 2. Learned Counsel further submits that the fact that the Respondents no. 3 and 4 are found more meritorious to Petitioners no. 1 to 4 and 6 cannot be disputed based on the merit list prepared by the Respondent no. 2. Learned Additional Advocate General has taken us through the relevant provisions of the Rule to point out that the learned Ombudsman has rightly come to the conclusion that the seniority list dated 16.07.2008 has to be corrected. The learned Counsel in support of his submission has relied upon the Judgment of the Apex Court reported in (2011) 8 Supreme Court Cases 115 in the case of D. P. Das v. Union of India And Others.

9. Shri. V. Lawande, learned Counsel appearing for the Respondent no. 4 has pointed out that there was a mistake committed by Respondent no. 2 whilst submitting the names to the Respondent no. 1 which has been corrected, and as such there is no reason to interfere in the seniority of the Respondent no. 4.

10. Shri A. F. Diniz, learned Counsel appearing for the Respondent no. 3, however, submits that the learned Ombudsman has rightly appreciated the material on record to come to the conclusion that the seniority list has to be based on the report of the Ombudsman. Learned Counsel has thereafter taken us

through the relevant provisions of the Service Rules to point out that the seniority is not based on date of joining but on the merit list prepared by the Respondent no. 2 based on the "catchup" principle. In support of his submissions has relied upon the Judgment of Apex Court reported in (1994) 6 Supreme Court Cases 301 in the case of Chairman, Puri Gramya Bank And Another v. Ananda Chandra Das And Others.

11. We have given our thoughtful consideration to the rival contentions and we have also gone through the records.

12. On perusal of the advertisement for the post of Mamlatdar/Joint Mamlatdar/ Assistant Director of Civil Supplies on 31.08.2001, applications were invited for 11 posts and 10 vacancies likely to be occurred in future. Thereafter, by letter dated 30.11.2001, the Respondent no. 1 informed the Respondent no. 2 to make a waiting list of 19 candidates. Thereby, 30 posts were advertised out of which 11 were existing and 19 were to be in the waiting list. The names of the candidates recommended were submitted on 21.12.2001 by Respondent no. 2.

13. It is well settled in the Judgment reported in 2015 SCC Online Punjab & Haryana 7065 in the case of Kulwant Kumar Kalsan v. State of Haryana that the waiting list cannot be a reservoir for filling up future vacancies which has a reason. In the present case, the application invited was for 11 existing posts and 11 vacancies likely to occur in future. As per the request by the Respondent no. 1, the Respondent no. 2 was called upon to prepare a merit list for 11 existing vacancies and 19 to be placed in the waiting list for future vacancies. The facts clearly disclose that the 11 vacancies were accordingly filled up and it cannot be disputed that the seniority of such 11 posts would be in the Order of the merit list prepared by the Respondent no. 2. The point for consideration as such is whether the posts which were filled up subsequently based on the vacancies which occurred on different dates, retained their seniority in accordance with the merit list.

14. First of all, it has to be noted that seniority is not a fundamental right, it is at the most a statutory right. Seniority is relevant mostly in cases of promotion. The key issue which arises for determination is whether the "catch-up" rule and the concept of "consequential seniority" are constitutional requirements of Article 16 and of equality. The concept of "catch-up" rule and "consequential seniority" are judicially evolved concepts to control the extent of reservation. The source of these concepts is in service jurisprudence. These concepts cannot be elevated to the status of an axiom like secularism, constitutional sovereignty etc. It cannot be said that by insertion of the concept of "consequential seniority" the structure of Article 16(1) stands destroyed or abrogated. It cannot be said that "equality code" under Article 14, 15 and 16 is violated by deletion of the "catch-up" rule. These concepts are based on practices. However, such practices cannot be elevated to the status of constitutional principle. The concept of "catch-up" rule and "consequential seniority" are not constitutional requirements. They are not implicit in clauses (1) and (4) of Article 16. They are not constitutional

limitations. They are concepts derived from service jurisprudence and normally applied at the time of promotion of the candidates.

15. Seniority is to be determined from the date of appointment. It is sequitur that a person becomes a member of the service only on appointment and not before the event happens by the methods prescribed. A right to appointment of a member of the Service can accrue against a vacancy and, as such, it does not create a right to seniority unless a person is declared in terms of the Rules to be a Member of the Service. This is for the reason that a Member of the Service has to run and be reckoned from the date of appointment. As such, a right to seniority can accrue only from the actual appointment. Hence, the question of seniority has to be determined on appointment of a candidate. The question becomes moot and in operation only when recruitment cycle is completed and appointments are made. It has to be noted that the select list prepared by the Respondent no. 2 can be used to fill up the notified vacancies and not future vacancies. The select list gets exhausted after all the notified seats were filled up. In such circumstances, the candidates who were below in the select list at serial no. 11 could not claim appointment to the post unless the vacancies arose in the Service. In such circumstances, the question of applying the "catch-up" rule to alter the seniority would not at all accrue to candidates who have not yet been borne in the Service and vacant posts do not exist. The impugned Order passed by the Ombudsman as such would result in persons who were appointed much later and were entered into service only subsequently would claim Seniority on the basis of the select list prepared by the Respondent no. 2 by applying the "catch-up" rule principle which cannot accrue to them unless they have been duly appointed in Service to a vacant post. The contention of Mr. A. F. Diniz, learned Counsel appearing for the Respondent no. 3, that as all the candidates were in the select list in the same recruitment process, their seniority would be governed based on the merit list, cannot be accepted. In the present case, the Respondent no.2 recommended 11 candidates to the existing 11 posts and the remaining 19 posts were reserved in the waiting list. Among the said 11 posts, 7 were from General category and 3 were from O.B.C. and 1 from CFF. The Petitioner no.1 was appointed on 15.02.2002 as a Mamlatdar by the Respondent no.1. Thereafter, on 26.02.2002 the Respondent no.2 further recommended 8 candidates from the waiting list to the said post which included 5 posts from General category and 3 from O.B.C. Subsequently, on 24.05.2002 the Respondent no.2 recommended 2 candidates, one belonging to the General category and one from O.B.C. and the petitioner no.4 came to be recommended in this batch and was appointed to the post of Mamlatdar. The records also reveal that on 27.11.2002 the Respondent no.2 recommended two more candidates, one belonging to General category and one from O.B.C. The Petitioner no.5 and 6 were recommended and appointed for the post of Mamlatdar on 14.01.2003. The final batch of recommendation consisting of 7 candidates was made on 03.06.2003, out of which 6 were from General category and one from O.B.C. The Respondent nos. 3 and 4 were recommended in this batch. What transpired from

the above is that the Respondent nos. 3 and 4 were recommended by the Respondent no.2 in the final batch vide recommendation dated 03.06.2003. Admittedly, the Petitioners were recommended by the GPSC much earlier than the Respondent nos. 3 and 4. What would also be material to note is that the Petitioners as well as the Respondent nos. 3 and 4 were in the merit list prepared by the Respondent no.2. Another aspect to be taken into consideration is that the recommendation by the Respondent no.2 was in five batches as and when the vacancies were available to the respective posts. As such, what can be gathered from the above is that when all the Petitioners were appointed, there were no vacant posts available for the Respondent nos. 3 and 4. A waiting list prepared in service matters by a competent authority is a list of eligible and qualified candidates who in order of merit are placed below the last selected candidate. The recommendation by the Respondent no.2 become effective after the vacant posts are available and consequently a requisition is made by the State Government. In such circumstances, in terms of Rule 5 of the Goa Government (Seniority) Rules, the inter se seniority of the candidates recommended by the respondent no.2 in each batch as and when the vacancy arise would be in the order of merit in the select list prepared by the respondent no.2. In such circumstances, the seniority of the Respondent nos. 3 and 4 would have to be reckoned from the date of their appointment and they cannot claim it with retrospective date when admittedly they were not entitled to be appointed nor recommendations sought to such posts as there were no vacancies then available.

16. Rule 5 of the Goa Government (Seniority) Rules, 1967 reads thus :

"5. Direct recruits.- Notwithstanding the provisions of rule 4, the relative seniority of all direct recruits shall be determined by the order of merit in which they are selected for such appointment on the recommendation of the Union Public Service Commission or other selection authority, persons appointed as a result of earlier selection being senior to those appointed as a result of a subsequent selection.

Provided that where persons recruited initially on a temporary basis are confirmed subsequently in an order different from the order of merit indicated at the time of their appointment, seniority shall follow the order of confirmation and not the original order of merit."

The said Rule clearly provides that seniority would be governed by the order of merit in which they are selected for such appointment on the recommendation of the Commission. As pointed out herein above, the initial advertisement invited applications for 11 posts and 11 vacancies likely to occur in future. The seniority of the 11 posts which were appointed on the basis of the recommendation of the Respondent no.2 no doubt would be governed by the merit in which they have been selected. It is not in dispute that there were no vacant posts after the 11 appointments were filled up. All other 19 candidates at the request of the Respondent no.1 as such were asked to be placed in the waiting list. This would itself suggest that as far as the remaining 19 posts are concerned, there were no

vacant posts which could be appointed at the time when the original 11 posts were filled up. The vacant posts which then available were 7 from General, 3 from OBC and one from CFF category. The appointments were made in five separate batches as and when the posts were vacant or created at the request of the Respondent no.1 to the Respondent no.2. The learned Ombudsman has taken a view that all the candidates who were appointed in five different batches from 15.02.2002 to 03.06.2003 were to be given seniority in the order of common select merit list prepared by the GPSC. In other words, even before the candidates had entered the cadre or borne in the cadre, the learned Ombudsman found that they should be given seniority from the date when they were not even part of the cadre. In this connection, the Apex Court in the judgment reported in (2014)14 SCC 720 in the case of State of Uttar Pradesh and others v. Ashok Kumar Srivastava and another has held at para 24 thus :

"24. Learned Senior Counsel for the appellants has drawn inspiration from the recent authority in Pawan Pratap Singh and others v. Reevan Singh and others, where the Court after referring to earlier authorities in the field has culled out certain principles out of which the following being the relevant are reproduced below:

"45.(ii) Inter se seniority in a particular service has to be determined as per the service rules. The date of entry in a particular service or the date of substantive appointment is the safest criterion for fixing seniority inter se between one officer or the other or between one group of officers and the other recruited from different sources. Any departure therefrom in the statutory rules, executive instructions or otherwise must be consistent with the requirements of Articles 14 and 16 of the Constitution.

xxx xxx xxx

(iv) The seniority cannot be reckoned from the date of occurrence of the vacancy and cannot be given retrospectively unless it is so expressly provided by the relevant service rules. It is so because seniority cannot be given on retrospective basis when an employee has not even been borne in the cadre and by doing so it may adversely affect the employees who have been appointed validly in the meantime."

In the present case, it is not in dispute that when the Petitioners were appointed, there were no substantive posts available to appoint the Respondent nos.3 and 4. In such circumstances, without being borne in the cadre as there were no substantive posts available at the relevant time, it would be grossly unjust to accept that persons who are already in service would be deprived of their seniority on the basis of the subsequent appointment which would have an effect of a retrospective date of availability of the substantive posts.

17. The impugned report dated 16.02.2015 prepared by the learned Ombudsman and the impugned order dated 09.09.2015 are quashed and set aside. Rule is made absolute in the above terms with no orders as to costs.

18. At this stage, Shri Ryan Menezes, learned counsel appearing for the respondent no.3 and Shri V. A. Lawande, learned counsel appearing for the respondent no.4 seek stay of the operation of the aforesaid judgment for a period of eight weeks. The learned counsel appearing for the petitioners submits the orders of this Court.

19. In the peculiar facts and circumstances of the case, the respondents shall maintain status quo of the subject seniority for a period of eight weeks.