

(1988) 04 GAU CK 0012

In the Gauhati High Court

Case No : Civil Rule Nos. 8, 119 and 120 of 1982

M.C.Roy; J.C.Deb Nath; S.Mukherjee

APPELLANT

Vs

State of Tripura

RESPONDENT

Date of Decision : 20-04-1988

Acts Referred:

Constitution of India, 1950 — Article 309, 309

Tripura Judicial Service Rules, 1974 — Rule 21(2)(x), 21(2)(x)

Citation : (1988) 2 GLJ 201 : (1988) 2 GLR 384

Hon'ble Judges : J.Sangma, J and S.N.Phukan, J

Bench : Division Bench

Advocate : S.B.Roy, M.Nath, H.Lodh, D.P.Kundu, A.M.Lodh, Advocates appearing for Parties

Judgement

Phukan, J.—By this common judgment and order we propose to dispose of three writ petitions filed by three Judicial Officers, namely, Shri M.C. Koy, Shri J.C. Deb Nath and Shri S. Mukherjee against the State of Tripura, the Gauhati High Court and others regarding validity of fixation of their seniority under Tripura Judicial Service Rules, 1974, for short the Rules, read with the Tripura Judicial Service (Determination of Seniority) Rules, 1981, for short, Rules of 1981. All the above three writ petitions were heard together and the points involved are common.

2 In exercise of the powers conferred by the proviso to Article 309 read with Articles 233 and 234 of the Constitution, Governor in consultation with the High Court and the State Public Service Commission made the aforesaid Rules in the year 1974 constituting the Judicial Service for the State and Rules were published on 18th May, 1974, prior to the Rules all recruitments to the posts were made from the members of the Bar and in the year 1975 for the first time recruitment was made under the Rules. Under Rule 3, the Judicial Service consists of three grades, namely, Grade I, II and III. Grade HI consists of posts of Munsiff, Judicial Magistrate, SubDivisional Judicial Magistrates, Registrar (Munsiff) for the Court of District Judge, an Assistant Legislative Counsel and

Under Secretary to the Government. According to clause (d) of subrule (3) to Rule 6 of the Rules appointment to the posts in Gr. III in any one year shall be made by the Governor by filling up 50% of the posts through Public Service Commission and the remaining 50% by selection made amongst the members of the Bar in consultation with the High Court. In the year 1975 all the three petitioners were selected from amongst the members of the Bar in consultation with the High Court and appointed in Grade III of the service on 16th May, 1975. On 7th July, 1975 a tentative seniority list of the members of the Tripura Judicial Service Grade III as on 30th June, 1975 was published by the State Government and the said list was finalised on 31st July, 1975. It is not disputed that the officers whose names appeared from serial No. 1 to serial No. 11 of the said list were already holding judicial posts and accordingly they were absorbed at the initial constitution of the Tripura Judicial Service with effect from 18.5.1974. In the said list, the names of Mr. S. Mukherjee, Mr. J.C. Deb Nath and Mr. M.C. Roy appeared at serial Nos. 13, 14 and 16 respectively. On 19.11.81 in exercise of powers conferred by proviso to Article 309 of the Constitution read with Rule 21 of the Rules the Governor in consultation with the High Court framed the Tripura Judicial Service (Determination of Seniority) Rules, 1981 and the said Rules were given retrospective effect from 1.1.75. In view of the provisions contained in Rule 4 of the said Rules of 1981 inter se seniority of the members of Grade III appointed on the result of the competitive examination held by Tripura Public Service Commission and members recruited by selection from amongst the members of the Bar was fixed on rotational basis and accordingly respondent Nos. 4, 5 and 6 were shown senior to Shri M.C. Roy, petitioner in Civil Rule No. 8 of 1982 and respondent Nos. 4 and 5 were shown senior to the petitioners Shri J.C. Deb Nath in Civil Rule No. 119 of 1982 and Mr. S. Mukherjee in Civil Rule No. 120 of 1982. Being aggrieved, the petitioners have approached this Court for appropriate relief.

3. Before we proceed further to consider the contentions of the parties we quote below the relevant rules governing seniority of members of Grade III. Subrule (2) of Rule 21 runs as follows :

""Seniority. 21. (1) The seniority inter se of the members of Grade I or Grade II of the service shall be determined by the Governor in consultation with the High Court according to the general principles of seniority framed by the State Government:

Provided that inter se seniority between the members appointed by promotion and by direct recruitment in Grade I shall be determined on the basis of the rules framed by the Government in consultation with the High Court for the purpose.

(2) The relative seniority of the members in Grade III of the service shall be determined in the manner indicated below :

(a) The seniority of the members who are appointed on the result of the competitive examination held by the Commission shall be determined

according to the order of merit in the list of candidates prepared under clause 3 of the Second Schedule.

(b) The seniority of the members recruited by selection from amongst the members of the Bar shall be determined according to the order their appointment is recommended by the High Court.

(c) The interse seniority of the members mentioned in clauses (a) and (b) shall be determined on the basis of the rules framed by the Government in consultation with the High Court for this purpose."

The Rules of 1981 have been annexed as Annexure IV to the petition and relevant Rule 4 is reproduced below :

"Interse seniority in Grade III.

4. The interse seniority in Grade III of the Tripura Judicial Service between the members who are appointed on the result of the competitive examination held by the Tripura Public Service Commission and members recruited by selection from amongst the members of the Bar shall be determined in rotation in the proportion of 1:1 based on quota of recruitment made in any one year according to the provisions of Tripura Judicial Service Rules, 1974, the rotation stating with a member recruited by selection from amongst the members of the Bar.

Provided that the seniority of the members securing the same position in the merit lists shall be treated at par, but amongst the same position on holders in the merit list of the two sources, the members senior in age, shall have the seniority over the other."

4. There is no dispute that the first batch of appointment to Grade III of the Judicial Service was made in the year 1975 following the norms of the State Judicial Service Rules and that the petitioner! were appointed by selection from amongst the members of the Bar and that the respondent Nos. 4, 5 and 6 of Civil Rule No. 8 of 1982 were appointed on the result of the competitive examination conducted by the Public Service Commission and all the above persons were appointed in the year 1975. The final seniority list dated 31st, July, 1975 was in respect of seniority of members of Tripura Judicial Service in Grade III as on 30. 6. 75 and as the respondents were not selected on the aforesaid list their names did not find place in the seniority list. In the counter by the State it has been specifically stated that at the letter of approval of the High Court regarding appointment from the members of the Bar did not specify "the order under which the members in serial No. 1261 of the alleged seniority list were recommended," therefore, the seniority between the members of the Bar had to be determined in consultation with the High Court under Rule 21 (2) (b) of the Rules and accordingly the aforesaid seniority list was published only to determine the order of recommendation of the High Court, and as such, it did not contain the names of respondents No. 4, 5 and 6 who were appointed subsequently but in the same year on the recommendation of the Public Service Commission.

5. In the affidavit of the State the reason for publishing the seniority list in the month of July, 1975 has been explained and it has been stated that the said list had to be published as while approving the names selected by the Committee from the members of the Bar for appointment in Grade III, the High Court did not indicate the order in which the said members were recommended for appointment. We find from the letter of the Registrar, High Court, at Annexure "B" to the affidavit in reply of the State that seniority of the members was not indicated and accordingly seniority list of 1975 had to be prepared in consultation with the High Court. We accept the explanation for publishing the said seniority list.

5A. The first contention of Mr. Lodh, learned counsel for the petitioners was that the Rules of 1981 were arbitrary as by giving retrospective effect the said Rules took away the rights of the petitioners regarding their seniority. On the other hand, Mr. Barman Roy, learned Advocate General submitted that under Article 309 of the Constitution the Governor has got power to give retrospective effect of any Rules framed under Article 309 and that no vested right of the petitioners was taken away as the seniority list in question which was published on 31.7.75 only to fix the interse seniority of the members of the Judicial Service in Grade III recruited from the Bar. Mr. Kundu, learned counsel appearing for respondents has submitted that when the petitioners joined the service they did so knowing fully well that their interse seniority would be determined in future on the basis of Rules to be framed by the Governor under clause (c) of subrule (2) of Rule 21 of the Rules. Mr. Kundu has further submitted that there is no arbitrariness in the Rules of 1981 in fixing the seniority on rotational basis in view of the law laid down by the Apex Court.

6. In *B. S. Vadera vs. Union of India*, AIR 1969 S. C. 118 their Lordships held that Rules framed under Article 309 of the Constitution

may have both prospective and retrospective effect and the Rules can be impeached only on the grounds such as breach of Part III of the Constitution or any other Constitutional provisions. This view was also accepted in *T. R. Kapoor vs. State of Haryana and others*, AIR 1987 S. C. 415. However in *Ex Major N. S. Singhal vs. Director General, Armed Force, Medical Service, New Delhi and another*, AIR 1972 S. C. 628, it was held that the Government has no power to alter or modify the conditions of service of a government servant with retrospective effect to the prejudice of the government servant.

7. Situated thus, we hold that Rules framed under Article 309 of the Constitution can be given retrospective effect but in doing so the authority cannot alter or modify the conditions of service of a government servant to his prejudice. Accordingly, we find no illegality in retrospective effect of the Rules of 1981.

8. Now the next question is whether any prejudice was caused to the petitioners in view of the fact that the Rules of 1981 were given retrospective effect. Tentative seniority list and the final seniority list of the members of Judicial

Service in Grade III are available at Annexures II and III to the petition, In the said list it was made absolutely clear that seniority of the members of the Judicial Service in Grade III was published as on 30th June, 1975. Petitioners when entered service were well aware of Rule 21 of the Rules of 1974. Clause (c) of subrule (2) of Rule 21 clearly provides that interse seniority of members to the Grade III service recruited by selection from amongst the members of the Bar and on the basis of the result of the examination to be held by the Public Service Commission shall be determined on the basis of Rules to be framed by the Government in consultation with the High Court and accordingly Rules of 1981 were framed. Petitioners were recruited from Bar and respondents Nos. 4, 5 and 6 were appointed on the result of the examination held by the Commission in the year 1975, Of course respondent Nos. 3, 4 and 5 were appointed subsequently in October, 1975. The seniority list was published in July 1975 and it was in respect of members of Judicial Service in Grade III as on 30th June, 1975, and as such, the question of fixing the seniority of the respondents Nos. 3, 4 and 5 did not arise. Petitioners being well aware of Rule 21 of the Rules of 1974 and also of the fact that seniority list was published in July, 1975 cannot now claim that any prejudice has been caused to them. In other words, petitioners knew that their seniority would be refixed after appointment being made on the result of the examination held by the Public Service Commission in the same calendar year 1974 on the basis of clause (c) of sub rule (2) of Rule 2 of the Rules of 1974, and as such, there was no question of any prejudice being caused to the petitioners by the Rules of 1981.

9. It has been urged before us that fixation of seniority on rotational basis by the Rules of 1981 is arbitrary. In *Mervyon Continho and others vs. Collector of Customs, Bombay and others*, AIR 1967 S.C. 52 the recruitment to the service was from two sources and it was provided in the Rules that seniority shall be fixed by rotational system, i.e., by alternatively fixing the promotee and direct recruitee in the seniority list. It was held by their Lordships that where recruit to the cadre is from two sources seniority had been fixed as provided in the explanation to the relevant Rules by alternatively fixing promotee and the direct recruitee in the seniority list and that in doing so there was no violation of principle of equality of opportunity enshrined in Article 16 (1) of the Constitution by following the rotational the system for fixing seniority in a cadre. We are, therefore, of the opinion that in fixing seniority rotational system by Rules of 1981 of Grade III Officers of the Judicial Service there was no violation of the constitutional provision and such fixation was not illegal and valid. An attempt was made by Mr. Lodh to show that the seniority in respect of officers in the case in hand ought to have been fixed on the basis of confirmation or length of service. It is a settled law that length of service can be taken into consideration in fixing the seniority of officers only in absence of Rules. But in the present case as the Rules of 1974 and 1981 clearly provide the method of fixing seniority we are unable to accept the contention of Mr. Lodh on this point.

10 In *Durga Das Purkayastha vs. Hon"ble Gauhati High Court and others*, (1988)

1 GLR 6, the present Rules of 1974 came up for consideration before a Division Bench of this Court in respect of fixation of inter se seniority of the members of Grade I Officers. Subrule (1) of Rule 21 of 1974 Rules, inter alia, provides that the inter se seniority of members of Grade I or Grade II shall be determined by the Government in consultation with the High Court according to the general principle of seniority framed by the State Government; provided that the inter se seniority between the members appointed by promotion and by direct recruitment in Grade I shall be determined on the basis of Rules framed by the Government in consultation with the High Court for the purpose and Rules of 1981 provide for such fixation for Grade I Officers also. This Court relying on the decision of the Apex Court held that counting of seniority from the date of confirmation would be highly hazardous, inasmuch as, confirmation is one of the "Inglorious uncertainties of the government servant depending neither on efficiency of the incumbent nor the availability of substantive vacancy". In view of the above law we are constrained to hold that date of confirmation cannot be criteria for fixing the seniority. We, therefore, reject the contention of Mr. Loah.

11. To sum up we hold that the seniority list of the members of the Tripura Judicial Service Grade III as on 30th June, 1975 was published only in respect of fixation of inter se seniority of the officers who were absorbed at the initial constitution of the service and who were recruited from amongst the members of the Bar, that giving of retrospective effect of Rules of 1981 was valid and legal, that re-fixation of seniority after appointment of respondents Nos. 4 5 and 6 in the same year of 1915 on rotational basis was legal and proper and that such re fixation of seniority did not cause any prejudice to the petitioners.

12. For the reasons stated above, we hold that all the 3(three) petitions are without any merit and are liable to be dismissed which we hereby do.

In the result all the three petitions are dismissed. Parties to bear their own costs.