

(2013) 09 GAU CK 0017
In the Gauhati High Court
Case No : Writ Petition (C) No. 52 of 2011

P.L. Liandinga and Others

APPELLANT

Vs

The State of Mizoram and Others

RESPONDENT

Date of Decision : 20-09-2013

Acts Referred:

Citation : (2014) LabIC 602

Hon'ble Judges : C.R. Sarma, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

C.R Sarma, J.—By preferring this writ petition, under Article 226 of the Constitution of India, the petitioners, who are working as Programme Officer, Integrated Child Development Scheme (hereinafter referred to as, "P.O., ICDS") under Social Welfare Department, Government of Mizoram, have challenged the Inter-Se-Seniority List, issued by the Government of Mizoram, Social Welfare Department vide Notification No. A.23021/1/87-SWP, dated 21.12.2010, whereby the private respondent No. 6 has been placed at Serial No. 1 and the petitioners have been placed at Serial Nos. 2, 3 and 4 respectively. The petitioners have also prayed for a direction for drawing up a Final Common Inter-Se-Seniority List, counting the services of the petitioners from the date of their joining in the post of P.O. i.e. with effect from 10.08.1986, 21-08-1986 and 06-08-1993 in respect of Writ Petitioner Nos. 1, 2 and 3 respectively and placing them above the private respondent No. 6. I have heard Mr. P.C. Prusty, learned counsel, appearing for the writ petitioners. I have also heard Mr. Aldrin Lallawmzuala, learned Additional Advocate General, Mizoram, appearing for the State respondent Nos. 1, 2, 3, 4 and 5 and Mr. A.R. Malhotra, learned counsel, appearing for the private respondent.

2. The writ petitioners' case, in brief, as may be required for disposal of this writ petition, may be stated as follows:

(i) By Notification No. SWD. 18/79/81, dated 16.12.1982 (Annexure-6 to the writ petition), the Government of Mizoram appointed the writ petitioners as Child Development Project Officers (hereinafter referred to as, "CDPO") under ICDS Projects, on Ad hoc basis for a short period, subject to regularization in accordance with the Recruitment Rule to be approved by the Government in due course.

(ii) By another Notification No. SWD. 28/80/106, dated 13.09.1983 (Annexure-7 to the writ petition), the private respondent was appointed, on Ad hoc basis, as District Social Welfare Officer (for short DSWO), on the same terms and conditions, as has been made in respect of the writ petitioners. The writ petitioners' services were confirmed as CDPO with effect from 16.12.1984 and the services of Private respondent, as DSWO was confirmed with effect from 14.09.1985.

(iii) By letter dated 20.03.1986 (Annexure-11 to the writ petition), the Government of India, Ministry of Human Resource (Department of Women's Welfare) confirmed the following suggestions that "(i) only the posts of CDPOs Should be the feeder posts for promotion as Programme Officer under ICDS, (ii) so long as pay-scales of Programme Officer and CDPO are the same, the senior most CDPO should be kept as Programme Officer and (iii) if the pay-scale of Programme Officer becomes higher than that of CDPO, the post of Programme Officer should be filled up on a promotion basis".

(iv) In view of the said clarification and pay-scale being identical, the Government by Notification No. SWD. 28/80/158, dated 17.06.1986 (Annexure 12 to the writ petition), transferred and posted the petitioner Nos. 1 and 2 as P.O. of State ICDS Cell and District ICDS Cell respectively. Similarly, by Notification No. A11012/20/93 SWD, dated 27.07.1993 (Annexure-13 to the writ petition), the petitioner No. 3 was transferred to the post of P.O. Div. ICDS Lunglei.

(v) By Notification, dated 30.12.2003, the private respondent was posted as Centre Director with effect from 26.06.2003 and subsequently, the date of giving effect to the said promotion was modified as the date of joining i.e. 02.01.2004.

(vi) By Notification No. A. 13011/2/93-SWD, date 10.02.2004 (Annexure-18 to the writ petition), services of the petitioner Nos. 1, 2 and 3 as P.O. ICDS, were regularized with effect from 10.08.1986, 21.08.1986 and 06.08.1993 respectively.

(vii) By Notification dated 28.01.2004, while upgrading the pay-scale of P.O. to the scale of Rs. 10,000-325-15,000/- p.m. i.e. the scale of the Centre Director with effect from 02.01.2004, it was clarified that the post of P.O. would cease to be the feeder post for the post of Centre Director with immediate effect i.e. 28.01.2004.

(viii) Thereafter, by Notification dated 21-12.2000, the Government issued the

final seniority list showing the private respondent senior to the petitioners.

3. In the above facts and circumstances, the petitioners aggrieved by the seniority list, dated 12.12.2010, have come up with this writ petition.

4. Mr. P.C. Prusty, learned counsel for the petitioners, referring to the respective dates of appointment and confirmation orders, has submitted that though the petitioners joined the service as CDPO in 1982 and transferred and posted as P.O. in June 1986 and July, 1993, after their confirmation in December, 1984 and the private respondent was appointed as DSWO in September 1983 and thereafter confirmed on 14.09.1985 and promoted as Centre Director with effect from the date of joining i.e. 02.01.2004, the State respondents committed error and illegality by placing the private respondent at Serial No. 1 and the petitioners at Serial Nos. 2, 3 and 4 respectively in the said seniority list. According to the petitioners, they being appointed as CDPO prior to the appointment of the private respondent as DSWO and the petitioners confirmation as CDPO being prior to the confirmation of the private respondent, the petitioners should have been shown as seniors to the private respondent in the seniority list.

5. The learned counsel for the petitioners has also submitted that there being no rule for fixation of the Inter-Se-Seniority, at the relevant time, the length of service, rendered by the petitioners, should have been taken as the criteria for fixing the seniority and on that basis the petitioners should have been placed above the private respondents. Learned counsel for the petitioners, referring to the additional rejoinder and the Notification dated 20.02.1997, has submitted that for appointment as DSWO minimum 5 years experience, in the field of social welfare is a pre-requisite and that the private respondent having no such experience, his appointment as DSWO was unlawful, for which he should not have been placed above the writ petitioners in the seniority list, inasmuch as his service could not have been counted.

5A. In support of his contention, the learned counsel for the petitioners has relied on the decisions held in the following cases:--

(1) A.K. Subraman and Others Vs. Union of India (UOI) and Others, ;

(2) Rudra Kumar Sain and Others Vs. Union of India and Others, .

3. G.S. Lamba and Others Vs. Union of India (UOI) and Others, .

(4) Narender Chadha and Others Vs. Union of India and Others, .

(5) Vasant Kumar Jaiswal Vs. State of Madhya Pradesh, .

(6) Desoola Rama Rao and Another Vs. State of Andhra Pradesh and Others, .

(7) S.N. Dhingra and Others Vs. Union of India and Others, and

(8) D.P. Das Vs. Union of India (UOI) and Others, .

6. Refuting the said argument, advanced by Mr. P.C. Prusty, learned counsel for

the petitioners, Mr. Aldrin Lallawmzuala, learned Additional Advocate General Mizoram, appearing for the State respondent Nos. 1, 2, 3, 4 and 5 has submitted that the petitioners' pay-scale as P.O. was upgraded from the initial pay of Rs. 8,000-275-13,500/- to Rs. 10,000-325-15,200/- plus other allowances with effect from 02.01.2004 (Annexure 16 to the writ petition) and that in view of the judgment and order dated 07.02.2008, passed in Writ Petition (c) No. 05/2007, the private respondent's promotion was made effective with effect from 02.01.2004. It is also submitted that by Notification dated 28.01.2004 (Annexure-16 to the writ petition) it was made clear that the post of P.O. would cease to be feeder post of Deputy Director/Centre Director of Social Welfare Department with immediate effect i.e. 28.01.2004.

7. In view of the above, it is submitted that till 28.01.2004 i.e. even after promotion of the private respondent the posts held by the petitioners remained as feeder post of the post held by the private respondent. Therefore, it is submitted that, as on 02.01.2004 i.e. the date on which the private respondent had joined in a higher post, the petitioners were in the feeder post i.e. in lower post and as such the private respondent became senior to the petitioners by virtue of his joining in the higher post i.e. Centre Director prior to the petitioners. In view of the above, it is submitted that the Government committed no wrong by placing the private respondent above the writ petitioners in the seniority list.

8. In tune with the arguments, placed by the learned Additional Addl. Advocate General, Mizoram, Mr. A.R. Malhotra, learned counsel, appearing for the private respondent, has submitted that, on the recommendation of the Selection Board, the service of the private respondent as DSWO was regularized with effect from 14.09.1983 and his promotion as Centre Director was also made on the recommendation of the MPSC and the said promotion became effective with effect from 02.01.2004. Referring to the Notification dated 28.01.2004 (Annexure-16 to the writ petition), the learned counsel for the private respondent, has submitted that on 02.01.2004 i.e. the date on which the private respondent joined as Centre Director, the posts of P.O., held by the petitioners, continued to be the feeder posts for promotion to the post of Centre Director till 28.01.2004. Therefore, it is submitted that the private respondent being promoted to the higher post, prior to the petitioners, following the service rules, the seniority list has been rightly prepared showing the private respondent above the petitioner. It is also submitted that as the petitioners appointment, confirmation and regularization have not been done as per the service rules i.e. on the recommendation of the MPSC and they not being regularized as per the service rules, can't, in any manner, claim seniority over the private respondent. It is also submitted that the private respondent being promoted and posted in higher post i.e. the post of Centre Director, on the recommendation of the MPSC, the question of lack of experience at the time of his posting in the lower rank i.e. in the post of DSWO, cannot be raised at this belated stage.

9. Referring to the judgment and order dated 07.02.2008 (supra), the learned

counsel for the private respondent has submitted that the petitioners gave up their challenge to the promotion of the private respondent as Centre Director and as such, the benefits acquired by the private respondent, on such promotion cannot be denied.

9A. In support of his contention, the learned counsel for the private respondent relied on the following decision, rendered by the Apex Court:--

- (1) State of Haryana and Others Vs. Vijay Singh and Others, .
- (2) K. Madalaimuthu and Another Vs. State of Tamil Nadu and Others, .
- (3) Sanjay K. Sinha-II and Others Vs. State of Bihar and Others, , and
- (4) The Direct Recruit Class-II Engineering Officers" Association and others Vs. State of Maharashtra and others, .

10. In his reply to the arguments advanced on behalf of the respondents, Mr. Prusty, learned counsel for the petitioners, has submitted that at the time of appointment, confirmation and also subsequent posting of the writ petitioners as P.O., no service rule was in existence and as such, no fault can be found with regard to the service of the petitioners and that they cannot be deprived from their legitimate right.

11. Having heard the learned counsel, appearing for both the parties, I have carefully perused the materials on record. The dispute raised by the writ petitioners is that they being appointed and confirmed as CDPO prior to the posting and confirmation of private respondent as DSWO and in view of the Central Government's Notification dated 02.03.1986 (Annexure-11 to the writ petition) and upgradation of petitioners" scale to that of the scale of the private respondent with effect from 02.01.2004, the petitioners, considering their length of service, should have been treated as seniors to the private respondent No. 6.

12. In order to appreciate the point raised by the parties, I feel it appropriate to refer to the various decisions and principles laid down by the Supreme Court with regard to fixation of seniority.

13. In the cases of A.K. Subraman and others (supra), it has been held by the Supreme Court that in the absence of statutory seniority rules, seniority is to be determined on the basis of length of service in the grade as well as in an equivalent grade.

In the case of Rudra Kumar Sain and others (supra), the Supreme Court observed "20. In the service Jurisprudence, a person who possesses the requisite qualification for being appointed to a particular post and then he is appointed with approval and consultation of the appropriate authority and continues in the post for a fairly long period, then such appointment cannot be held to be "stop gap or fortuitous or purely ad hoc". In this view of the matter, the reasoning and basis on which, the appointment of the promotes in the Delhi Higher Judicial Service in the case at hand was held by the High Court to be "fortuitous/ad hoc/

stop gap" are wholly erroneous and, therefore, exclusion of those appointees to have their continuous length of service for seniority is erroneous.

In the case of G.S. Lamba and others (supra) the Supreme Court observed that in the absence of any valid principle of seniority, continuous officiating in the cadre, grade service will provide valid principle for seniority.

In the case of Narender Chadha and others (supra), the Supreme Court referred to the case, of D.R. Nim, I.P.S. Vs. Union of India (UOI), , wherein it has been observed that when an officer has worked for a long period for nearly 15 to 20 years in a post and had never, been rebutted, his continuation in the office, cannot be held to be a temporary or stop gap; arrangement even though the order of appointment may state so and in such circumstances entire period of officiation has to be counted for seniority.

In the case of Vasant Kumar Jaiswal (supra), the Supreme Court observed that in the absence of statutory rules or executive memorandum or order laying down rule for determination of seniority in a grade, the normal rule applicable would be to determine seniority on the basis of length in service.

In the case of Desoola Rama Rao and another (supra), the Supreme Court observed, that in the absence of any seniority rules, length of service is the basis of fixing inter-se-seniority.

In the case of S.N. Dhingra and others (supra), the Supreme Court, referring to the Constitution Bench judgment in Rudra Kumar, Sain and others (supra) observed that continuous length of service should be the basis for inter-se-seniority.

In the case of D.P. Das (supra), the Supreme Court, referred to; the case of M.B. Joshi and Others Vs. Satish Kumar Pandey and Others, , wherein it has been laid down that in the absence of any specific rules, seniority amongst persons holding similar post in the same cadre has to be determined on the basis of length of service and not on any other fortuitous circumstances.

In the case of D.P. Das (supra), the Supreme Court observed that, if no rule is prescribed for determination of seniority, the guide line following from the executive instruction may be accepted in order to evolve a just policy, for determination of seniority.

14. In the case of State of Haryana and others (supra), referring to the proposition laid down by the Constitution Bench of Supreme Court in the case of Direct Recruit Class II Engineering Officers" Association (supra), the Supreme Court observed that if the initial appointment was not made following the procedure laid down by the rules, but the incumbent continued in the said post interruptedly till the regularization of his service in accordance with the rules, the period of officiating the service would be counted.

In the case of K. Madalaimuthu and another (supra), the Supreme Court has

observed that a person who is appointed temporarily to discharge his function in a particular post, without recourse to the recruitment rules cannot be said to be in service till such time as his appointment is regularized and that from the date on which his service is regularized, the appointee can count his seniority in the cadre.

15. In the case of Sanjay K. Sinha-II and others (supra), the Supreme Court observed that the appointment made contrary to service rules are merely fortuitous and do not confer benefit of seniority on the appointees over and above the regular/substantive appointees to the service. In the case of Direct Recruit Class Engineering Officers" Association (supra), the constitution Bench of the Supreme Court observed:--"(A) Once an incumbent is appointed to a post according to rule, his seniority has to be counted from the date of his appointment and not according to the date of his confirmation. The corollary of the above rule is that where the initial appointment is only ad hoc and not according to rules and made as a stop gap arrangement, the officiation in such post cannot be taken into account for considering the seniority. (B) If the initial appointment is not made by following the procedure laid down by the rules but the appointee continues uninterruptedly till the regularization of his service in accordance with the rules, the period of officiating service will be counted. (C) When appointments are made from more than one source, it is permissible to fix the ratio for recruitment from the different sources, and if rules are framed in this regard they must ordinarily be followed strictly."

16. In view of the above principles laid down by the Apex Court, it is clear that in the absence of any service rule, uninterrupted length of service rendered by an appointee in a grade is required to be taken as the criteria for fixing his seniority. The service of the appointees made de hors the service rules cannot be taken into consideration to fix the seniority over the appointees, who are appointed as per the service rules. It is also settled law that the seniority of an incumbent, appointed as per the service rules, is, to be counted from the date of his appointment and not according to the date of his confirmation. However, if the initial appointment is not made following the service procedure, but the incumbent is allowed to continue in the post interruptedly till regularization of his service in accordance with the rules the period of officiating service is required to be counted.

17. Upon careful perusal of the Government Notifications and orders etc. as referred to by both the parties, it is found that there is no dispute that the petitioners were posted as CDPO in 1982 on ad hoc basis, while the private respondent was posted as DSWO with effect from 12.09.1983. The petitioners' services were regularised in the said posts with effect from 16.12.1984 and the private respondent was confirmed against his post with effect from 14.09.1985. Fact remains that the petitioners and private respondent held two different posts. The service of private respondent was regularised as per the service Rule i.e. on the basis of the recommendation made by the Selection Board whereas there

was no such recommendation in respect of the petitioners.

18. By Notification dated 20.03.1986 (Annexure-1) to the writ petition) the Government of India accepted the suggestions regarding posting and promotion as P.O. As per the said recommendation, if the pay-scales P.O. and CDPO is found to be same then, the senior most CDPO should be kept as P.O. and if basic scale of P.O. is found to be higher than the CDPO, the post of P.O. should be filled up on promotion basis.

After receipt of the said clarification, the Government of Mizoram, in view of identical pay-scale posted the petitioners as P.O. with effect from 17.06.1986 (in respect of petitioner Nos. 1 and 2) and 27.07.1993 (in respect of petitioner No. 3) and thus, they continued as P.O. Admittedly, there was no recruitment rule at the relevant time and the same came into effect in 2002.

19. Vide Notification dated 30.12.2003 (Annexure 15 to the writ petition) on the recommendation of the MPSC, the private respondent, who was holding the post of DSWO was promoted as Centre Director in the pay-scale of Rs. 10,000-325-15,200/- p.m. with effect from 20.06.2003. However, in view of the judgment and order dated 07.02.2008 (supra), the promotion of the private respondent became effective from the date of his joining i.e. with effect from 02.01.2004.

In view of, above, it is clearly found that as on 02.01.2004, the private respondent was holding the higher post of Centre Director bearing higher pay-scale. As indicated in the said judgment and order dated 07.02.2008 (supra), the petitioners gave up the challenge to the promotion of the private respondent and thus the private respondent's promotion attained its finality.

20. By notification dated 28.01.2004 (Annexure-16 to the writ petition), the basic scale of the P.O., ICDS was upgraded from Rs. 8000-275-13,500/- to Rs. 10,000-325-15,200/- p.m. with effect from 02.01.2004. It is found that the pay-scale of the petitioners was made equal to the pay-scale of the private respondent with effect from 02.01.2004 i.e. on which date private respondent joined in the higher post.

21. However, by the said Notification, it was provided that consequent upon the said upgradation of pay-scale, the post of P.O. would cease to be the feeder post of Deputy Director/Centre Director with immediate effect. Therefore, it is found that the post of P.O. ceased to be the feeder post of Centre Director with effect from 28.01.2004. Hence, there is no difficulty in understanding that on 02.01.2004 i.e. the date on which the private respondent joined in a higher post, the petitioners continued to remain in the feeder post i.e. in lower rank. They attained the rank of the private respondent with effect from 28.01.2004 i.e. after about 26 days of the promotion of the private respondent to the higher grade, in as much, as he joined as Centre Director on 02.01.2004 and from this date, his promotion became effective.

22. Therefore, as the private respondent had held the higher post prior to the petitioners, the petitioners claim for seniority over the private respondent cannot be accepted, because by virtue of his promotion to a higher post, prior to the attaining the same rank of the petitioners, the private respondent acquired seniority in the rank. Person promoted to a higher post must get precedence over the persons allowed to hold such higher post subsequent period, in fixation of seniority. Because by virtue of promotion prior to the person enjoying similar pay-scale, the date of promotion should be the determining factor and not the pay-scale.

23. Admittedly, in the present case, the petitioners' appointment as CDPO and P.O. was not made as per any service rules, inasmuch as, no rule was in existence at the relevant time. The rules came into force with effect from 2002. But the promotion of the private respondent, as Centre Director, was made as per rules i.e. on recommendation of the MPSC. Therefore, in view of the principles laid down in the above cited cases, the seniority attained by the private respondent, by virtue of such promotion cannot be denied. That apart, in view of holding higher post by the private respondent, prior to the petitioners, the length of service in feeder post rendered by the petitioners can't be criteria for determining their seniority over the private respondent.

Therefore, in my considered opinion the State authority, committed no error by showing the private respondent as senior to the petitioners, in the seniority list.

24. In view of the above discussions, I find no merit in this writ petition, requiring interference with the impugned Inter-Se-Seniority List, dated 21.12.2010. Accordingly, this Writ petition is dismissed. No order as to costs.