

(2002) 09 DEL CK 0006

In the Delhi High Court

Case No : CWP No"s. 4604, 7356 of 2000, 5549 of 2001 and 670 of 2002 25 September 2002

Sanjiv Mahajan

APPELLANT

Vs

Union of India

RESPONDENT

Date of Decision : 25-09-2002

Acts Referred:

Citation : (2002) 125 TAXMAN 606

Hon'ble Judges : S.B. Sinha, C.J.;A.K. Sikri, J

Bench : Full Bench

Advocate : R.K. Gupta and A.K. Behera, for the assessed Dr. L.P. Verghese, G. Tushar Rao, G.D. Gupta and Pankaj Kumar, for the Revenue, for the Appellant;

Judgement

S.B. Sinha, C.J.

All these four writ petitions involving common questions of fact and law were taken up for hearing together and are being disposed of by this common judgment.

However, the fact of the matter is being noticed from Civil Writ Petition No. 4604 of 2000.

2. On or about 7-2-1986, the Department of Personnel and Training (hereinafter referred to as the "DOPT) issued an Office Memorandum in terms whereof the general principles of determining the seniority of various categories of persons employed in Central Service were laid down whereby and whereunder the relative seniority of direct recruits and promotees were to be determined according to rotation of vacancies between the direct recruits and the promotees, which was to be based on the quota of vacancies reserved for direct recruitment and promotion respectively in the Recruitment Rules. By way of an Explanatory Memorandum to these principles, it has been stated that a roster is required to be maintained based on the reservation of vacancies for direct recruitment and promotion in the Recruitment Rules and as such where appointment to a grade is

to be made 50 per cent by direct recruitment and 50 per cent by promotion from a lower grade, the inter se seniority of direct recruits and promotees is said to be determined on 1 : 1 basis.

3. On or about 3-7-1986, the DOPT issued another Office Memorandum regarding fixation of seniority of direct recruits and promotees. By reason of the said Office Memorandum, the relative seniority of direct recruits and of promotees shall be determined according to the rotation of vacancies between direct recruits and promotees, which shall be based on the quota of vacancies reserved for direct recruitment and promotion respectively in the Recruitment Rules and in the event adequate number of direct recruits do not become available in any particular year, rotation of quotas for the purpose of determining seniority would take place only to the extent of the available direct recruits and the promotees. In other words, the promotees will be bunched together at the bottom of the seniority list below the last position to the extent direct recruits are not available. However, the unfilled direct recruitment quota vacancies would be carried forward and added to the corresponding direct recruitment vacancies of the next year for taking action for direct recruitment for the total number of vacancies according to the usual practice.

4. It is not in dispute that as per the Recruitment Rules, there is two modes of recruitment to the post of Income Tax Inspector in the Department of Income Tax namely, $33\frac{1}{3}$ per cent by direct recruitment and $66\frac{2}{3}$ per cent by promotion.

5. On or about 12-3-1988, Staff Selection Commission (hereinafter referred to as the "SSC") advertised for direct recruitment for the post of inspector of Central Excise, Income Tax, etc. Pursuant to or in furtherance of the said advertisement, the petitioners applied for the said posts. Written test was conducted by SSC on 17-7-1988 wherein the petitioners also participated and during the period December, 1988-January, 1989 being successful in written test, they appeared at the interview.

6. In the meantime, on or about 22-9-1988, a seniority list of Income Tax Inspectors based on quota 1 : 2 as provided in the Office Memorandums dated 7-2-1986 and 3-7-1986 respectively was made and published by the respondent No. 3 herein.

7. The result of the said Examination was published by SSC in July, 1989 in terms whereof the petitioners were selected as Income Tax Inspectors. After medical and police verification, they joined the Department of Income Tax as Income Tax Inspectors in October, 1989.

8. On or about 20-7-1995, based on the principle of quota and rota for fixation of seniority as prescribed in the said Office Memorandums, respondent No. 3 issued an eligibility list of Income Tax Inspectors, who were likely to be considered for promotion to the cadre of Income Tax Officer in terms whereof on 7-9-1995, the petitioners were promoted as Income Tax Officer.

9. It is not in dispute that challenging the orders dated 20-7-1995 and 7-9-1995, an Original Application was filed before the Tribunal by J.S. Tanwar & Ors., which was registered as O.A. No. 1899/95. Therein an affidavit was filed by the then Chief Commissioner of Income Tax stating that promotee cannot be assigned seniority against year of recruitment for 1988-89 and cannot be given seniority above direct recruits for the year 1989-90 and the year of appointment has no relevance as per the said Office Memorandum dated 7-2-1986.

10. A seniority list of Income Tax Officers on all India basis was published by Central Board of Direct Taxes (hereinafter referred to as the "CBDT") on 1-1-1996 in the names of the petitioners were included. On or about 12-9-1996, the respondent No. 3 issued order that eligibility list dated 20-7-1995 shall be deemed to be the seniority list of Income Tax Inspectors except Serial No. 38 and on or about 27-1-1997, the respondent No. 3 issued seniority list of Income Tax Inspectors without mentioning the name of the petitioners as they were already promoted. However, on or about 29-5-1998, the Department of Income Tax took a totally opposite stand and circulated seniority list of Income Tax Officers as on 31-3-1998 seriously affecting the seniority of the petitioners, who were already promoted as Income Tax Officers. The petitioners made a representation against the said seniority list on 19-6-1998.

11. On or about 8-9-1999, the learned Tribunal in the said Original Application filed by J.S. Tanwar directed the respondent to hold review DPD on the basis of seniority list dated 8-2-1999. However, on or about 10-9-1999 after knowing the said order dated 8-9-1999, the direct recruit Inspectors filed a Miscellaneous Application before the Tribunal wherein it was ordered that the department will not take action till seniority list is upheld by the Tribunal.

12. Yet again one of the promotees, namely, J.L. Mamtani filed an Original Application before the Tribunal being O.A. No. 388 of 1999 for holding Review D.P.C. as per seniority list dated 8-2-1999 without impleading direct recruit Inspectors as parties and vide order dated 7-5-1999, the Tribunal disposed of the said Original Application on the basis of an undertaking of department to hold review DPC.

13. Questioning the aforesaid order dated 7-5-1999 passed by the Tribunal, the petitioners filed a writ petition being C.W.P. No. 3468 of 1999 before this court, however, on 12-10-1999, the same was subsequently withdrawn with the liberty to approach the Tribunal.

14. Thereafter, the petitioners herein filed an Original Application before the Tribunal inter alia, challenging the seniority list dated 8-2-1999 and praying for restoration of seniority list dated 20-7-1995. The said Original Application was heard together with other cases by the Tribunal and by reason of the judgment dated 23-2-2000, the seniority list dated 8-2-1999 was set aside and the respondent No. 3 was directed to recast the seniority list.

Challenging the said order dated 23-2-2000 passed by the Tribunal, the present

writ petitions are being filed.

15. The learned Tribunal, however, by reason of the impugned order failed to consider the respective contentions of the parties in their proper perspective. It further failed to assign sufficient or cogent reason in support of its decision.

16. The questions, which arise for consideration, in these writ petition revolve round interpretation of two Office Memorandums dated 7-2-1986 and 3-7-1986 issued by the DOPT, the relevant portion whereof are thus :

"OFFICE MEMORANDUM

The 7th February 1986

Subject : General principles of determining the seniority of various categories of persons employed in Central Service.

As the Ministry of Finance, etc., are aware, the General Principles for determination of seniority in the Central Services are contained in the Annexure to Ministry of Home Affairs O.M. No. 9/11/55-RPS dated 22-12-1959. According to paragraph 6 of the Annexure above (Item I) the relative seniority of direct recruits and promotees shall be determined according to rotation of vacancies between the direct recruits and the promotees, which will be based on the quota of vacancies reserved for direct recruitment and promotion respectively in the Recruitment Rules. In the Explanatory memorandum to these Principles, it has been stated that a roster is required to be maintained based on the reservation of vacancies for direct recruitment and promotion in the Recruitment Rules. Thus where appointment to a grade, the inter se seniority of direct recruits and promotees is determined on 1: 1 basis.

2. While the above mentioned principle was working satisfactorily in cases where direct recruitment and promotion kept pace with each other and recruitment could also be made to the full extent of the quotas as prescribed in cases where there was delay in direct recruitment, or promotion, or where enough number of direct recruits or promotees did not become available, there was difficulty in determining seniority. In such cases, the practice followed at present is that the slots meant for direct recruits or promotees, which could not be filled up, were left vacant, and when direct recruits or promotees became available through later examinations or selections, such persons occupied the vacant slots, thereby became senior to persons who were already working in the grade on regular basis, in some cases, where there was short fall in direct recruitment in two or more consecutive years. This resulted in direct recruits of later year taking seniority over some of the promotees with fairly long years of regular service already to their credit. This matter had also come up for consideration in various court cases both before the High Courts and the Supreme Court and in several cases the relevant judgment had brought out the inappropriateness of direct recruits of later years becoming senior to promotees with long years of service.

3. This matter, which was also discussed in the National Council has been

engaging the attention of the government for quite some time and it has been decided that in future, while the principle of rotation of quotas will still be followed for determining the inter se seniority of direct recruits and promotees, the present practice of keeping vacant slots for being filled up by direct recruits ... thereby giving them unintended seniority.

4. Thus, if adequate number of direct recruits do not become available in any particular year, rotation of quotas for the purpose of determining seniority would take place only to the extent of the available direct, recruits and the promotees. In other words, to the extent direct recruits are not available, the promotees will be bunched together at the bottom of the seniority list below the last position up to which it is possible to determine seniority, on the basis of rotation of quotas with reference to the actual number of direct recruits who become available. The unfilled direct recruitment quota vacancies would, however, be carried forward and added to the corresponding direct recruitment vacancies of the next year (and to subsequent years where necessary) for taking action for direct recruitment for the total number according to the usual practice. Therefore, in the year while seniority will be determined between direct recruits selected against the carried forward vacancies of the previous year would be placed on an bloc below the list promotee for direct recruit (as the case may be), in the seniority list based on the rotation of vacancies for the year. The same principle holds goods for determining seniority in the event of carry forward, if any, of direct recruitment or promotion quota vacancies (as the case may be) in the subsequent year.

Illustration :

Where the Recruitment Rules provide 50 per cent of the vacancies of grade to be filled by promotion and the remaining 50 per cent by direct recruitment, and assuming there are ten vacancies in the grade arising in each of the years 1986 and 1987 and that two vacancies intended for direct recruitment remain unfilled during 1986 and they, could be filled during 1987, the seniority position of the promotees and direct recruits of these two years will be as under :

1986

1987

1.P1

9.P1

2.D1

10.D1

3.P2

11.P2

4.D2

12.D2

5.P3

13.P3

6.D3

14.D3

7.P4

15.P4

8.P5

16.D4

17.P5

18.D5

19.D6

20.D7

"Office Memorandum dated 3-7-1986

2.4.1 The relative seniority of direct recruits and of promotees shall be determined according to the rotation of vacancies between direct recruits and promotees which shall be based on the quota of vacancies reserved for direct recruitment and promotion respectively in the Recruitment Rules.

2.4.2 If adequate number of direct recruits do not become available in any particular year, rotation of quotas for the purpose of determining seniority would, take place only to the extent of the available direct recruits are not available the promotees will be bunched together at the bottom of the seniority list below the last position up to which it is possible to determine seniority, on the basis of rotation of quotas with reference to the actual number of direct recruits who become available. The unfilled direct recruitment quotas vacancies would, however, be carried forward and added to the corresponding direct recruits and promotees, to the extent of the number of vacancies for direct recruits and promotees as determined according to the quota for the year, the additional direct recruits selected against the carried forward vacancies of the previous year would be placed on an bloc below the list promotee for direct recruits (as the case may be), in the seniority list based on the rotation of vacancies for the year. The same principle holds good for determining seniority in the event of carry forward, if any, of direct recruitment or promotion quota vacancies (as the case may be) in the subsequent year.

Illustration :

Where the Recruitment Rules provide 50 per cent of the vacancies of grade to be

filled by promotion and the remaining 50 per cent by direct recruitment, and assuming there are ten vacancies in the grade arising in each of the years 1986 and 1987 and that two vacancies intended for direct recruitment remain unfilled during 1986 and they could be filled during 1987, the seniority position of the promotees and direct recruits of these two years will be as under:

1986

1987

1.P1

9.P1

2.D1

10.D1

3.P2

11.P2

4.D2

12.D2

5.P3

13.P3

6.D3

14.D3

7.P4

15.P4

8.P5

16.D4

17.P5

18.D5

19.D6

20.D7

2.4.3 In order to help the appointing authority in determining the number of vacancies to be filled during a vacancy Register giving a running account of the vacancies arising and being filled from year may be maintained in the proforma enclosed.

2.4.4 With a view to curbing any tendency of under reporting/suppressing the

vacancies to be notified to the concerned authorities for direct recruitment, it is clarified that promotees will be treated as regular only to the extent, which direct recruitment vacancies, are reported to the recruiting authorities on the basis of the quotas prescribed in the relevant recruitment rules. Excess promotees, if any, exceeding the share falling to the promotion quota based on the corresponding figure, notified for direct recruitment would be treated only as ad hoc promotees."

17. Allegedly with a view to explain the said Office Memorandums, certain Office Notes were also issued, the relevant portions whereof are in the following terms :

"With reference to "X" on p. 18 and "Y" on p. 19/ante it will be clear from our note on pp. 9-10/ante that if action for the Recruitment year 1986-87 has been initiated at any time during that Recruitment year even if the exam is held in 1988 and the results are declared in 1989 and the candidates join only in 1990, since the action for recruitment was initiated in 1986-87 itself merely because the process of recruitment took so long for which the candidates cannot be blamed and since the responsibility for the delay completing the process of recruitment squarely lies with the administration, it would not be appropriate to deprive the candidates of their due seniority of 1986-87. Consequently, if action was initiated during the recruitment year 1986-87 even if it culminates in the joining by the selected candidates only in 1990, they will get seniority of 1986-87. This applies equally to DRs as well as promotees. In other words, if such DRs of 1986-87 ultimately join in 1990 yet they will be rotated with promotees of 1986-87."

"4. It may further be stated that even though it is SSC's endeavor to hold the exam every year, there have been instances when certain exams could not be conducted on an yearly basis. For example, the Inspector of Income Tax/CE exam., 1996 could be held by SSC only in 1999 and its result is yet not out. This has happened in the case of Assistants Grade and Stenographers Grade Examination too that the exam could not be held in the year for which it was intended but was delayed for one reason or the other inspite of this delay in conducting the exam, the candidates of that exam will still belong to that particular year. It may further be added here that the crucial date for determining the age and educational qualifications as also the benefit of age relaxation to departmental candidates, wherever applicable, is also reckoned with reference to the year of examination given in S.S.C.'s advertisement and not in the year the exam is actually held and accordingly the department recast vacancies."

18. The purposes for which such Office Memorandums and Office Notes had been issued appear to be laying down uniform formulae so that the conflicting decisions of the Apex Court in the matter of fixation and seniority having regard to the quota rota rule may be removed.

19. The learned Tribunal, however, did not address itself the question from the angle of interpretation of the aforementioned Office Memorandums.

The question, which was required to be taken into consideration, was as to whether the said Office Memorandums should be read literally or with a view to find out as to whether it sought to suppress a mischief which led to an anomalous situation. The learned Tribunal further failed to take into consideration the rival contentions as to whether the Office Notes in the file are merely clarificatory in nature or thereby new directions were sought to be issued.

20. There cannot be any doubt whatsoever that a mere noting in the file does not confer any right, but the same may be referred to for the purpose of construction of an Office Memorandum by way of a clarification. All office memorandum must be construed independently, but the intention of the maker thereof may be found out from such clarification. There cannot, however, be any doubt whatsoever that such Office Notes can only supplant the Office Memorandums and not supplement the same.

21. Although we have heard the learned counsel appearing on behalf of the parties at great length, we may only notice the submission of Dr. Verghese representing the department. Although it appears to be that the department itself has changed its stand from time-to-time, but the final stand taken before us by Dr. Verghese for and on behalf of the department is that by reason of the aforementioned Office Memorandums as also the Office Notes, the Central Government intended to determine the inter se seniority giving due leverage to the time which has been consumed by the Administration in filling up the vacancy. Thus, if for some reason or the other, the vacancies could not be filled up in a Particular year and they are carried over to the next year, such vacancies may be considered to have arisen next year, but in the event the selection process continues but despite best efforts made by the department in this behalf, the same cannot be completed within a short time, the direct recruits should not suffer in the matter of seniority due to the lapse(s) on the part of the Administration.

22. Another question, which also requires serious consideration, is as to whether the entitlement list was to be considered to be a seniority list. No material has been placed before us to show that before declaring the said entitlement list, what sort of objections, if any, had been invited. The said factor may also be found to be a crucial one inasmuch as in the event, the entitlement list is considered to a seniority list, the petitioners herein could not have been reverted back.

23. Having regard to the fact that the judgment of the learned Tribunal is absolutely cryptic and no cogent or valid reason has been assigned in support thereof, and as the contentions raised before the Tribunal as also before us have not been considered at all, we are of the opinion that for determination of the crucial questions wherefor, it may be necessary, for the parties to adduce further evidence, the matter may be remitted back to the learned Tribunal for consideration of the matter afresh and the parties may bring on record such other or further materials as may be directed by the learned Tribunal. The

impugned judgment is, Therefore, set aside. However, having regard to the facts and circumstances of the case, we would request the learned Tribunal to consider the desirability of disposing the matter as expeditiously as possible.

These writ petitions are disposed of with the aforementioned observations and directions without any order as to costs.