
(2011) 09 DEL CK 0453

In the Delhi High Court

Case No : Writ Petition (Civil) No. 5202 of 2011

Santosh Gobru Jadhao and Another

APPELLANT

Vs

Union Public Service commission and Others

RESPONDENT

Date of Decision : 01-09-2011

Acts Referred:

Citation : (2011) 09 DEL CK 0453

Hon'ble Judges : Dipak Misra, C.J; Sanjiv Khanna, J

Bench : Division Bench

Advocate : Vikas B. Pakhiddey, for the Appellant; Naresh Kaushik, for UPSC and Ankur Chibber, for the Respondent

Final Decision : Dismissed

Judgement

Sanjiv Khanna, J.—The dispute pertains to inter se seniority between the Petitioners herein, direct recruits, Santosh Gobru Jadhao and Vijay Kumar Bhaskar, and the promotee-Respondents Nos. 3 to 5, A.K. Dahiya, Vijay Kumar and Ganga Devi Gupta. The Petitioners and the Respondents are working as Programmers in the Union Public Service Commission (UPSC, for short).

2. The seniority list prepared by the UPSC was successfully challenged by the Respondent Nos. 3 to 5 herein before the Central Administrative Tribunal, Principal Bench (Tribunal, for short) in O.A. No. 911/2007, which has been decided by the impugned decision dated 10th May, 2011. The tribunal examined the question whether the criteria for the purpose of fixing the inter se seniority amongst the direct recruits and promotees should be the date of vacancy or the date of appointment and has held that in absence of any rule fixing seniority, date of appointment in the present case is the relevant criteria and not the date of vacancy.

3. The relevant year wise vacancies and appointments of Programmers in UPSC are as under:

Applicant /Respondent

DirectRecruit(D) or Promotees (P)

Date of Vacancy

Date of appointment

Seniority as per

senioritylist

order of the Tribunal

ShriA.K.DahiyaR-3

P

1.7.2003

1.1.2004

5

1

Shri VijayKumarR-4

P

18.3.200

3.6.2004

6

2

Smt. Ganga Devi GuptaR-5

P

1.7.2004

1.7.2004

8

3

ShriSantoshGobruJadhaoP-1

D

3.6.2003

28.9.2005

4

4

D

12.12.2003

17.1.2006

7

5

4. The appointment of the Petitioners was made in the year 2005 and 2006. Since the Respondents Nos. 3 to 5 were promoted as Programmers in the year 2004, they were accordingly declared to be senior to the Petitioners. It may be recorded that the UPSC has not filed any appeal against the decision dated 10th May, 2011 passed by the tribunal allowing O.A. No. 911/2007 and has accepted the same.

5. It is important and relevant to state here that the direct appointees and the promotees were not appointed in the same year. The decision and the ratio, to be applied relates to factual matrix when direct appointees and promotees are appointed in two separate years and whether in such circumstances, date of appointment, not the date of vacancy is relevant for the purpose of inter se seniority.

6. The relevant recruitment rule reads as under:

11. (i) 50% by promotion failing which by transfer on deputation (including short-term contract) and failing both by direct recruitment; and

(ii) 50% by direct recruitment

7. The aforesaid recruitment rule merely stipulates that a post of Programmer will be filled up to 50% by way of promotion, failing which by transfer on deputation and failing both, by direct recruitment and the remaining 50% of the posts will be filled by direct recruitment. There is No. specific provision to rotate the seniority between the promotee and the direct recruits. There is also No. dispute that the Respondent-UPSC has not breached the aforesaid quota rule and at all relevant times they have been maintaining the ratio of 50:50 between the promotees and the direct recruits. The said position has not been disputed.

8. The promotee vacancies were filled in the year 2004 and direct vacancies occurred in the year 2003 (2 vacancies) and 2004 (1 vacancy) could be partly filled up in 2005 (1 post) and 2006 (1 post). It may be noticed that the process of direct recruitment was started in the year 2003. However, there is No. allegation and it is accepted that there was No. deliberate attempt to delay appointment by way of direct recruitments. Malafides is not pleaded or alleged. It may be stated here that in case malafides are proved, the result may be different as has been held by the Delhi High Court in Mr. Vijay Kr. Dua Vs. Union of India (UOI) and Others, This decision was upheld by a Division Bench in LPA No.

478/2003 decided on 1st May, 2008. The said decision relates to a case where a deliberate attempt was made to ensure that direct recruits are able to get the appointments and join as Planning Assistants only after existing employees in DDA were promoted."

9. In absence of recruitment rules for fixation of inter se seniority, we have to examine, whether or not there are any administrative guidelines on the said subject. These guidelines would apply as long as there is no conflicting rule(s). Ministry of Home Affairs in O.M. No. 9/11/55-RPS dated 22nd December, 1959 had dealt with the said aspect and in paragraph 6, it was elucidated:

6. Relative seniority of Direct Recruits and Promotees. The relative seniority of Direct Recruits and Promotees shall be determined according to the rotation of vacancies between direct recruit and promotees which shall be based on the quotas of vacancies reserved for the direct recruitment and Promotion Respevtively in the Recruitment Rules

10. Later on, Department of Personnel and Training, the Respondent No. 2 herein issued OM No. 22011/7/86-Estt.(D) dated 3rd July, 1986. The relevant portion of the said guidelines reads as under:

2.4.1. The relative seniority of direct recruits and of promotees shall be determined according to the rotation of vacancies between direct recruit 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 does 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 or 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. Thereafter in that year while seniority will be determined between direct recruits and promotees, to the extent of the number of vacancies for direct recruit and promotees as determined according to the quota for that year, the additional, direct recruits selected against the carried forward vacancies of the previous year would be placed on block below the last promotees (or direct recruit as the case may be), in the seniority list based on the rotation of vacancies for that 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% of the vacancies of a

grade to be filled by promotion and the remaining 50 % by Direct Recruitment as assuming there are ten vacancies in the grade arising in each of the year. 1986 and 1987 and that two vacancies intended for direct recruitment remaining 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

2. D1

3. P2

4. D2

5. P3

6. D3

7. P4

8. D4

9. P1

10. D1

11. P2

12. D2

13. P3

14. D3

15. P4

16. D4

17. P5

18. D5

19. P6

20. D7

11. The Word available used in the aforesaid guidelines was explained in O.M. No. 22011/1/2006-Estt.(D) dated 3rd March, 2008. The relevant portion of which reads as under:

2. Para 2.4.1 and 2.4.2 of the O.M. dated 3.7.1986 contains the following provisions: 2.4.1. The relative seniority of direct recruits and of promotees shall

be determined according to the rotation of vacancies between direct recruit 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 does 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.

3. Some references have been received seeking clarification regarding the term "available" used in the preceding para of the O.M. dated 3.7.1986. It is hereby clarified that while the inter-se seniority of direct recruits and promotees is to be fixed on the basis of the rotation of quota of vacancies, the year of availability, both in the case of direct recruits as well as the promotees, for the purpose of rotation and fixation of seniority, shall be the actual year of appointment after declaration of results/selection and completion of pre-appointment formalities as prescribed. It is further clarified that when appointments against unfilled vacancies are made in subsequent year or years either by direct recruitment or promotion, the persons so appointed shall not get seniority of any earlier year (viz. year of vacancy/panel or year in which recruitment process is initiated) but should get the seniority of the year in which they are appointed on substantive basis. The year of availability will be the vacancy year in which a candidate of the particular batch of selected direct recruits or an officer of the particular batch or promotes joins the post/service.

4. Cases of seniority already decided with reference to any other interpretation of term "available" as contained on O.M. dated 3.7.1986 need not be reopened

12. The contention of the Petitioners, who are direct recruits, is that the O.M. dated 3rd March, 2008 is not applicable and has not been given retrospective effect as stipulated in paragraph 4 thereof. It is highlighted that the seniority list was framed in the year 2006, which is before O.M. dated 3rd March, 2008. It is not possible to accept the contention of the Petitioners, in view of the factual background of the present case. What paragraph 4 of the O.M. dated 3rd March, 2008 seeks to protect is the seniority list, that was prepared and has attained finality. The object and purpose of paragraph 4 in O.M. dated 3rd March, 2008 is not to disturb and undo the settled position. This is why They have used the word decided with reference to any other interpretation of term "available" as contained in O.M. dated 03. 07.1986 and further they have used the expression need not be reopened. However, when the matter is sub-judice and is pending consideration, O.M. dated 3rd March, 2008 and the interpretation given to word available can be relied upon and referred to the word available is capable of two interpretations and O.M. dated 3rd March, 2008 seeks to clarify the said dispute and ensure that there is uniform interpretation of the said term. Thus, the O.M. dated 3rd March, 2008 is clarificatory in nature as is apparent from paragraph 3 of the said O.M. Moreover, OM dated 3rd July, 1986 was/is applicable. The table mentioned in paragraph 2.4.2 of the said OM settles the controversy beyond doubt. Interpretation given by the tribunal and by us is as per the said table.

Thus, the inter se seniority between the direct recruits and promotees, when appointed in the same year, is to be rotated and the remaining promotees/direct recruits as the case may be placed at the bottom of the seniority list. In case promotee or direct recruit is not appointed in the year of vacancy, the vacancy is to be carried forward to the next year and in the said year inter se seniority between direct recruits and promotees is fixed by rotation and not on the basis of year/date of vacancy. The statutory Rules only provide for quota and not for rota. Thus rota principle cannot be applied to claim seniority. The quota rule as noticed above has not been breached.

13. The aforesaid exposition or ratio is also in consonance with the law expounded and explained by the Supreme Court in *N.K. Chauhan v. State of Gujarat* (1997) 1 SCC 308, wherein it has been held that:

32. We therefore reach the following conclusions: 1. The promotions of Mamlatdars made by Government between 1960 and 1962 are saved by the as far as a practicable proviso and therefore valid. Here it falls to be noticed that in 1966 regular rules have been framed for promotees and direct recruits flowing into the pool of Deputy Collectors on the same quota basis but with a basic difference. The saving provision "as far as practicable has been deleted in the 1966 Rules. The consequence bears upon seniority even if the year is treated as the unit for quota adjustment.

2. If any promotions have been made in excess of the quota set apart for the Mamlatdars after rules in 1966 were made, the direct recruits have a legitimate right to claim that the appointees in excess of the allocable ratio from among Mamlatdars will have to be pushed down to later years when their promotions can be regularised by being absorbed in their lawful quota for those years. To simplify, by illustration, if 10 Deputy Collectors' substantive vacancies exist in 1967 but 8 promotees were appointed and two direct recruits alone were secured, there is a clear transgression of the 50:50 rule. The redundancy of 3 hands from among promotees cannot claim to be regularly appointed on a permanent basis. For the time being they occupy the posts and the only official grade that can be extended to them is to absorb them in the subsequent vacancies allocable to promotees. This will have to be worked out down the line wherever there has been excessive representation of promotees in the annual intake. Shri Parekh, counsel for the Appellants has fairly conceded this position.

3. The quota rule does not, inevitably, invoke the application of the rota rule. The impact of this position is that if sufficient number of direct recruits have not been forthcoming in the years since 1960 to fill in the ratio due to them and those deficient vacancies have been filled up by promotees, later direct recruits cannot claim deemed dates of appointment for seniority in service with effect from the time, according to the rota or turn, the direct recruits' vacancy arose. Seniority will depend on the length of continuous officiating service and cannot be upset by later arrivals from the open market save to the extent to which any excess promotees may have to be pushed down as indicated earlier.

(Emphasis supplied)

14. After referring to N.K. Chauhan (supra), the Supreme Court in Radha Mohan Malakar and Others Vs. Usha Ranjan Bhattacharjee and Others, , has held:

23. In our opinion the principle of the decision in AIR 1977 251 (SC) can be illustrated by taking a hypothetical example. Suppose in a particular service 50% of the vacancies are to be filled in by promotion and 50% by direct recruitment, and suppose there is a rule that the inter se seniority of direct recruits and promotees is to be fixed according to the rotation of vacancies between direct recruits and promotees in the manner that the first post will go to a promotee, the second to a direct recruit, the third to a promotee, the fourth to a direct recruit, and so on. Even here the ordinary rule that seniority will depend on the length of the continuous officiating service has to be followed unless the quota of direct recruits or of the promotees has been exceeded. It is only if the said quota is exceeded that the appointees have to be pushed down in the seniority, otherwise seniority has to be taken from the date of continuous officiating service. 24. In the present case it is admitted that the quota of direct recruits has not been exceeded. Hence, in our opinion, the seniority of direct recruits (the Appellant) has to be taken from the date of their initial appointment and they cannot be pushed down in seniority. The promotees (the Respondents herein) were appointed to Grade II of TCS after the appointments of the direct recruits (the Appellants). Hence the former have to be treated as junior to the latter. The earlier Division Bench decision of the High Court dated 29-7-1992 has to be understood in the light of the decision of this Court in N.K. Chauhan case.

26. In B.S. Mathur and Another Vs. Union of India (UOI) and Others, it was observed that ordinarily inter se seniority is to be determined on the basis of continuous length of service. The Court in the aforementioned decision has referred to the earlier decision in O.P. Singla and Another Vs. Union of India (UOI) and Others, and Rudra Kumar Sain and Others Vs. Union of India and Others,

27. Since the quota of direct recruits has not been exceeded hence in our opinion the seniority has to be calculated from the date of the initial appointment and the said seniority cannot be pushed down

15. Earlier, in AFHQ/ISOs SOs (DP) Association and Others Vs. Union of India (UOI) and Others, the Supreme Court had observed:

40. Mr. Paramjit Singh Patwalia, learned Senior Advocate appearing on behalf of the Appellant AFHQ/ISOs SOs (DP) Association, in support of his submissions, placed reliance upon Suraj Parkash Gupta and Others Vs. State of Jammu & Kashmir Others, In the said case, this Court dealt with a situation of giving direct recruitment appointment antedated from the date of occurrence of a vacancy in the direct recruitment quota, even if on that date the said person was not directly recruited. The Court, in answer to Point 4, held as under: (SCC p. 599, paras 80-81) Point 4 Direct recruits cannot claim appointment from date of

vacancy in quota before their selection

80. We have next to refer to one other contention raised by the Respondent direct recruits. They claimed that the direct recruitment appointment can be antedated from the date of occurrence of a vacancy in the direct recruitment quota, even if on that date the said person was not directly recruited. It was submitted that if the promotees occupied the quota belonging to direct recruits they had to be pushed down, whenever direct recruitment was made. Once they were so pushed down, even if the direct recruit came later, he should be put in the direct recruit slot from the date on which such a slot was available under the direct recruitment quota.

81. This contention, in our view, cannot be accepted. The reason as to why this argument is wrong is that in service jurisprudence, a direct recruit can claim seniority only from the date of his regular appointment. He cannot claim seniority from a date when he was not borne in the service. This principle is well settled. In *N.K. Chauhan v. State of Gujarat* (1997) 1 SCC 308 Krishna Iyer, J. stated: Later direct recruits cannot claim deemed dates of appointment for seniority with effect from the time when direct recruitment vacancy arose. Seniority will depend upon length of service.

Again, in *A. Janardhana v. Union of India* (1983) 3 SCC 60 it was held that a later direct recruit cannot claim seniority from a date before his birth in the service or when he was in school or college. Similarly it was pointed out in *A.N. Pathak and Others Vs. Secretary to the Government, Ministry of Defence and Another*, that slots cannot be kept reserved for direct recruits for retrospective appointment 41. In *State of Uttaranchal v. Dinesh Kumar Sharma* (2007) 1 SCC 683 this Court has clearly held that the seniority is to be reckoned not from the date when the vacancy arose, but from the date on which the appointment is made to the post.

42. In *M. Subba Reddy and Another Vs. A.P. State Road Transport Corporation and Others*, relied upon by Mr L.N. Rao, learned Senior Advocate appearing on behalf of AFHQ Civil Services (Direct Recruits-Gazetted) Officers' Association, this Court while dealing with inter se seniority between direct recruits and promotees to the post of assistant traffic manager (for short ATM) and Assistant Mechanical Engineer (for Short AME) in A.P. State Road Transport Corporation, held that rota rule is inbuilt in the quota prescribed in Item 3 Annexure A (Section B) to the A.P. SRTC Employees (Recruitment) Regulations, 1966 and could not be deviated from. In that case, the Appellant promotees were promoted to the posts of ATMs/AMEs temporarily under Regulation 30 as there were No. direct recruits available. They were promoted subject to being reverted to substantive posts on approved candidates becoming available. Regulation 34 (6) states that the revertees shall subsequently be considered for repromotion against the quota of vacancies reserved for promotees. Therefore, one has to read Regulation 3 of the A.P. SRTC Employees (Service) Regulations, 1964 with Regulations 30 and 34 of the Recruitment Regulations. It is only when such

reverttees are repromoted as per Regulation 34, can they be deemed to have been appointed to the posts of ATM or AME. Therefore, when the Appellants were tentatively appointed to the post of ATMs/AMEs originally for want of direct recruits and to the posts reserved for direct recruits, it cannot be said that they were first appointed to that category within the meaning of Regulation 3 of the Service Regulations. Therefore, seniority had to be fixed between the direct recruits and the promotees strictly in accordance with the quota provided for in item 3 of Annexure A (SectionB). The said Regulations prescribe a quota of 1:1, which leads to rota for confirmation.

36. The relevant Rules, as referred to above, clearly envisage that the continuous officiation in a service without break also gives the benefit of seniority, but in a case where the recruitment is from two sources and the quota is prescribed, then the person from one source cannot take the benefit available to the other source within the quota. Thus, promotees who have been promoted within their quota of 75% under the Rules as prescribed under the Third Schedule read with Rule 16(7) of the Rules would get the benefit of continuous officiation from the date of their substantive appointment to the grade of availability of a substantive post and after having worked on temporary basis in the grade. Those who have been appointed temporarily under Note (2) from the cadre of Assistants to the grade of Assistant Civilian Officers temporarily, would not get the benefit of their continuous officiation and shall be liable by operation of law to be reverted or there shall be deemed reversion when the nominees from UPSC would join on the recommendations of UPSC. Such temporary officers may not actually face reversion because by the time the vacancies of the next year may become available in their quota of 75% and they can very well, by virtue of their seniority, earn the benefit of substantive appointment under the Third Shedule

16. In view of the aforesaid, we do not find any merit in the present writ petition and the same is accordingly dismissed. No. costs.