

(2003) 04 AHC CK 0016

In the Allahabad High Court

Case No : Civil Miscellaneous Writ Petition No. 25471 of 2000

Sharda Prasad Srivastava

APPELLANT

Vs

State of U.P. and Others

RESPONDENT

Date of Decision : 18-04-2003

Acts Referred:

Constitution of India, 1950 — Article 14, 16

Citation : (2003) 5 AWC 3524 : (2003) 3 UPLBEC 2106(1) : (2003) 3 UPLBEC 2106

Hon'ble Judges : Prakash Krishna, J; M. Katju, J

Bench : Division Bench

Advocate : T.P. Singh, Anupam Kumar and Saran Kumar, for the Appellant; V.K. Singh and S.C., for the Respondent

Final Decision : Allowed

Judgement

M. Katju J.

1. This writ petition has been filed against the impugned judgment of the U.P. Public Services Tribunal dated 19.5.97, Annexure-I3 to the writ petition and the order dated 21.2.2002 rejecting the review application.

2. Heard learned Counsel for the petition.

3. The petitioner was initially appointed as Junior Clerk on 16.10.1962 in the service of the U.P. Government and thereafter on the selection post of Stenographer on 8.11.1971 and he was confirmed on these posts on 15.5.1971 and 1.8.1975 respectively.

4. The Vidyut Nirikshkyalay Lipik Vargiva Sewa Niyamawali, 1973 was issued under Article 309 of the Constitution which superseded the earlier executive orders relating to the service condition of the clerical staff of the department. It is alleged that this Rule applies only to employee appointed on Or after 28.12.73 and not those appointed earlier since the Service Rules were not in existence

prior to 28.12.73. It is alleged that the petitioner was appointed before the Service Rules and there were only executive orders at that time when Junior Clerks, Senior Clerks and Stenographers were in a common cadre and the post of Stenographer was one of the three category of Clerks in the ministerial cadre carrying higher post and grade to the Senior Clerk vide orders dated 24.9.51 and 3.9.55, true copies of which are Annexures 1 and 2. It is alleged in Para 7 of the petition that the petitioner having been appointed much before enforcement of the Service Rules his seniority and promotion is governed by those executive orders. A seniority list exclusively of the Stenographers working in the department was issued vide order dated 21.5.1985. This seniority list was challenged by the petitioner on 12.6.85 i.e., within the date fixed for filing of objection. In that seniority list the petitioner was not treated as par with Jagdish Prasad Kaushik and other Stenographers who were appointed much before enforcement of the Service Rules issued in 1973 and instead he was treated to be a member of the separate water tight cadre of Stenographers not having any opportunity/right of promotion. The petitioner in his objection stated that the said gradation list, as far as the case of the petitioner was concerned was neither in accordance with the higher scale of pay as applicable prior to the enforcement of the Service Rules, 1973 nor was in accordance with the initial date of appointment of the petitioner as Junior Clerk. It is alleged in Para 9 that prior to enforcement of the Service Rules, 1973 the channel of promotion provided for the clerical staff of the department was Junior Clerk and Senior Clerk/Stenographer and Head Clerk (now known as Office Superintendent) in the ascending order on the basis of seniority-cum-merit. In Para 10 of the petition it is stated that the petitioner claimed that his seniority should be determined in the same way as it was determined in the case of one Jagdish Prasad Stenographer. In Para 12 it is stated that in accordance with Fundamental Rules 12-A the petitioner's lien on the post of Junior Clerk could have been terminated only in case the post of Stenographer was considered to be a cadre post. In Para 13 of the petition it is stated that inspite of repeated requests and representations the petitioner's inter-se seniority which ought to have been determined prior to enforcement of Service Rules was not determined by the respondent and due to inaction of the department many Senior Clerks who were appointed prior to the enforcement of Service Rules and were junior in grade and rank to the petitioner were promoted to the higher post of Office Superintendent and Senior Administrative Officer, ignoring the right of promotion of the petitioner. It is alleged that the petitioner's initial objection dated 12.6.85 filed on the issue of seniority was kept unattended and not decided at all while one of his last representations/ reminder filed on 10.11.1994 was decided against the petitioner by the Director vide order dated 17.5.1995 after a gap of 10 years which amounts to arbitrariness and mala fide on the part of the respondent authorities as against the petitioner. True copies of the representation dated 10.11.94 is Annexure-5 and order dated 17.5.1995 is Annexure 6. The petitioner challenged the order dated 17.5.95 in the High Court which directed the petitioner to approach the U.P. Public Service Tribunal vide Annexure 7.

Accordingly the petitioner filed a claim petition before the Tribunal vide Annexure 8. True copy of counter affidavit and rejoinder affidavit before the Tribunal are Annexures 9 and 10. Respondents submitted reply to the petitioner's rejoinder affidavit vide Annexure 11. The petitioner's written argument is Annexure 12, The claim petition has been dismissed by the impugned judgment dated 19.5.97 vide Annexure 13.

5. The petitioner filed a review petition which has also been dismissed and hence this writ petition.

6. We have carefully perused the impugned order of the Tribunal. The Tribunal has taken the view that since the petitioner was confirmed on the post of Stenographer in 1975 after finalisation of the list in December, 1973, there was no illegality in finalisation of the gradation list in which the petitioner was placed at Serial No. 9. The Tribunal has further observed that Shri Kaushik was confirmed prior to the finalisation of the Service Rules, 1973 whereas the petitioner was confirmed after the Service Rules came into force. Hence their cases are distinguishable.

7. A counter affidavit has been filed. It has been stated in Para 4 of the counter affidavit that the petitioner was appointed on the post of Junior Clerk on 16.10.1962 and was confirmed on 31.5.1971. In Para 5 it is stated that the gradation list was issued on 25.4.87. In Para 6 it is stated that prior to enforcement of Vidyut Nirikshnalaya Lipik Vargiya Sewa Niyamawali, 1973 the post of Stenographer was a part of selection over the post of Senior Clerk. The selection of Junior Clerk and Stenographer is to be made by separate qualifying test and as such Stenographer cannot be classified as Clerks. The Stenographers have a totally separate entity as compared to the cadre of Junior Clerk and Senior Clerk by virtue of their nature of job. The case of Kaushik is different as he was confirmed prior to the finalisation of the Service Rules. Hence, there is no discrimination against the petitioner.

8. Rejoinder Affidavit has also been filed. We have perused the same.

In our opinion, there is a clear discrimination against the petitioner vis-a-vis the case of Jagdish Prasad Kaushik and R.K. Nigam. It is well settled that confirmation is not very relevant in determining seniority because it is a matter of chance vide S.B. Patwardhan and Another Vs. State of Maharashtra and Others, In The Direct Recruit Class-II Engineering Officers' Association and others Vs. State of Maharashtra and others, the Supreme Court observed (vide Para 13) that "seniority cannot be determined on the sole test of confirmation, for confirmation is one of the inglorious uncertainties of Government service depending neither on efficiency of the incumbent nor on the availability of substantive vacancies. The principle for deciding inter-se seniority has to conform to the principles of equality spell out by Articles 14 and 16" (see also Para 47 of the judgment). In O.P. Garg and others, Vs. State U.P. and others, the Supreme Court observed that determination of seniority on the basis of the date of

confirmation is arbitrary, The same view was taken in Qamar Jahan Vs. U.P. Public Services Tribunal and Others,

9. It is clear that the petitioner as well as Kaushik and Nigam are on the same footing since they were appointed prior to the 1973 Rules. Merely because the petitioner was confirmed after 1973 whereas Kaushik and Nigam were confirmed earlier this will make no difference because it is not confirmation but the initiate date of appointment which has to be seen. Since the petitioner has been treated differently from Kaushik and Nigam, Article 14 of the Constitution is violated. Hence, writ petition is allowed. The impugned judgment dated 19.5.97 is quashed. The respondents are directed to determine the petitioner's seniority in accordance with the executive order prevailing prior to the Service Rules enforced on 28.12.73 and treat him similar to Jagdish Prasad Kaushik and R.K. Nigam who confirmed prior to the 1973 Rules.

10. The petitioner shall also get all the consequential benefits and arrears which will be paid with 12% interest per annum from the date when it was due till the date of payment. The payment must be paid within two months.