

(1994) 11 SHI CK 0025
In the High Court Of Himachal Pradesh
Case No : C.W.P. No. 1648 of 1993

Sri M.R. Chaudhary

APPELLANT

Vs

Hon"ble High Court and Others

RESPONDENT

Date of Decision : 24-11-1994

Acts Referred:

Constitution of India, 1950 — Article 309
Himachal Pradesh Higher Judicial Service Act — Section 8
Himachal Pradesh Higher Judicial Service Rules, 1973 — Rule 12, 8

Citation : (1994) ShimLC 291 Supp

Hon'ble Judges : Gulab C. Gupta, C.J.;S.N. Phukan, J

Bench : Division Bench

Advocate : D.C. Jishtu and Dharam Chand, for the Appellant; D.D. Sood, for Respondents 1 and 3 and Indar Singh, General, for the Respondent

Final Decision : Allowed

Judgement

Gulab C. Gupta, C.J.—This judgment will also govern the disposal of C.W.P. No. 1198 of 1993. The Petitioner and Respondent Janeshwar Goel in this writ petition and the Petitioner Surjit Singh in the other writ petition are all members of the Himachal Pradesh Higher Judicial Service constituted as per the Himachal Pradesh Higher Judicial Service Rules, 1973, (hereinafter referred to as the Rules) framed under Article 309 of the Constitution of India. Petitioner Shri Chaudhary is a direct recruit whereas the others are promotees from the Subordinate Judicial Service. The seniority between the three officers named above was first determined in the seniority list published by the Registrar of the High Court on 22-12-1990 wherein Petitioner" Shri Chaudhary was shown at serial No. 9, Petitioner Shri Surjit Singh at serial No 10 and Respondent Shri Goel at serial No. 11. It appears that the Petitioner Shri Chaudhary was appointed by order dated 11-1-1988 whereas the other two were appointed substantively by order dated 8-1-1988. All these three were, however, confirmed with effect from 8-1-1990 by order dated 17-3-1990 passed by the High Court. It further appears that Respondent Shri Goel made a representation to the Respondent High Court

claiming re-fixation of his seniority under the proviso to Rule 12 of the Rules, which representation was accepted and by order dated 2-3-1993 Respondent Shri Goel was made senior to Petitioners Shri Chaudhary and Surjit Singh. Both the Petitioners felt aggrieved by the said order and challenge the legal validity thereof by filing these two separate writ petitions in this regard.

2. Submission of the learned Counsel for the Petitioners Shri Chaudhary and Shri Singh is that recruitment to the Higher Judicial Service is made by promotion as also by direct recruitment as provided under Rule 8 of the rules aforesaid, that is, 2/3rd by promotion and 1/3rd by direct recruitment and in order to give effect to the aforesaid rule a rota system is followed wherein after two posts allotted to promotees one post is given to direct recruit Under the second proviso to this rule a member of the Judicial Service may be appointed in the vacancy reserved for direct recruit only on officiating basis till the direct recruit is not appointed. In other words, the post reserved for direct recruit cannot be given to the promotees in any manner. It is, therefore, submitted that the impugned order is violative of this rule inasmuch as it has the effect of giving the post reserved for direct recruit, that is, Petitioner Shri Chaudhary, to Respondent Shri Goel, a promotee. Learned Counsel for Respondent Shri Goel, however, submitted that there is nothing on record to indicate that the rota system has either any legal sanctity or has been followed in practice and hence there is no justification for the submission that the impugned order violates Rule 8 of the aforesaid rules. It is, therefore, submitted that re-fixation of seniority of Respondent Shri Goel under Rule 12, Proviso (iii) is legal and valid.

3. Rule 8, which is relevant to the aforesaid controversy reads as under:

8. Recruitment to service.-(1) Recruitment to the service would mean by promotion and direct recruitment in the following manner:

(a) 2/3 by promotion.

(b) 1/3 by direct recruitment:

Provided that this ratio would apply only to the recruitments to be made after the coming into force of these rules:

Provided further that nothing in this rule shall prevent the officiating appointment of a member of the Himachal Pradesh Judicial Service on any post which is to be filled up by direct recruitment, till a direct recruit is appointed.

A bare reading of this rule would indicate that the ratio between the promotees and direct recruit has to be maintained as provided therein and that the post reserved for a direct recruit can be given to a promotee only by giving him the officiating appointment till a direct recruit is appointed. In other words, the rule provides that ratio must be maintained and post reserved for direct recruit should not be given on substantive basis to a promotee. This, in our opinion, implies the rota rule and hence the said rule must be deemed to have legal sanctity, In order to ascertain whether this rule has been followed or not in the

past, we went through the original record of the High Court available with the learned Counsel and found that the rule has been taken into consideration while confirming officers in the service. In other words, the rule has been followed while allocating vacancies in substantive capacity. Under the circumstances, the rule not only has legal basis but has also been followed in practice. That was perhaps the reason why in the seniority list published on 22-12-1990 Petitioner Shri Chaudhary was shown senior to Shri Surjit Singh and Shri Goel even though he was appointed subsequent to them. It is the case of Shri Chaudhary that on the date of his appointment as a direct recruit there was no vacancy to be given to promotees and, therefore, neither Petitioner Shri Surjit Singh nor Respondent Shri Goel could be given appointment in a substantive capacity on that date. It is further submitted that one vacancy became available in January 1989 when Shri Surinder Prakash resigned from service and the other vacancy became available on 31-8-1990 when Shri R.L. Sharma, a promotee officer, retired. Neither Shri Chaudhary nor Shri Surjit Singh objected to the seniority in the year 1990, Respondent Shri Goel, no doubt, represented against the same and his representation has been accepted. The question requiring consideration is whether while fixing seniority of officers in service, vacancy reserved for a direct recruit could be given to a promotee If the second proviso to Rule 8 is to be given any meaning, the answer should be in the negative. The further question requiring consideration, therefore, is whether Rule 12 empowers the High Court to ignore the rota system inbuilt in Section 8 of these rules.

4. Rule 12, on which reliance has been placed by the learned Counsel for the Respondent Shri Goel reads as under:

12. Seniority.-The seniority, inter se, of the substantive members of the Service, whether direct recruits or promoted officers, shall be determined with reference to the respective dates of their confirmation:

Provided that the seniority, inter se, of substantive members of the service having the same date of confirmation shall be determined as follows:

- (i) in the case of direct recruits, the older in age shall be senior to the younger ;
- (ii) in the case of promoted officers, in accordance with the seniority in the H.P. Judicial Service as it stood immediately before their confirmation ;
- (iii) in the case of promoted officers and direct recruits the older in age shall be senior to the younger.

Third clause of the proviso to this rule, no doubt, provides that inter se seniority of promotees and direct recruits will be determined on the basis of age ; the older in age being treated as senior to the younger in age. This rule, in our opinion does not justify giving a go-by to the rota rule under Rule 8 in view of the mandatory language thereof. Then a bare reading of this rule would indicate that the seniority, in general, has to be determined with reference to the date of confirmation of officers holding substantive posts in the service. In the instant

case all the three officers have been, no doubt, confirmed on the same date, but that is not the end of the matter. The confirmation has, however, to be in relation to the post available in the service. Availability of post is as a result of application of rota rule under Rule 8. Age rule under Rule 12 which is an exception to the general rule cannot therefore be so applied as to confirm a promotee on a non-available post. Application of this rule can also not allot a post reserved for a direct recruit to a promotee. Under the circumstances, even if the confirmation be on one and the same day, the officer holding the post specified for direct recruit cannot be required to vacate that post only to satisfy the age rule contained in this rule. The substantive part of Rule 12 would remain satisfied by counting the seniority of the officers holding substantive ranks in the service with reference to their respective dates of confirmation. Proviso, as is well known, is an exception to the rule and it applies when a situation of the type arises. In this view of the matter, third sub-clause of the proviso to the rule could lawfully be applied only in those cases where promoted officers and direct recruits start holding the substantive rank on the same date and are also promoted appointed on the same date. It will not cover a case where posts from both the categories were not available on the same date, in such a situation there will be no conflict of interest and hence there will be no necessity of refixing the seniority. Rule 12 of the rules, in our opinion, cannot be read in isolation and must be read alongwith Rule 8 and if so read, Clause (iii) of the proviso would not be applicable in the instant case. Clearly, therefore, Respondent Shri Goel could not be permitted to occupy the post reserved for a direct recruit i.e. Petitioner Shri Chaudhary. In this view of the matter, the impugned order dated 2-3-1993 must be held to be illegal and quashed.

5. It must in all fairness be noticed that the learned Counsel for the Petitioner Shri Surjit Singh also challenged the constitutional validity of the seniority rule contained in Rule 12 of these rules on the ground that determination of seniority based on confirmation is illegal and arbitrary in view of the judgment of the Supreme Court in O.P. Garg and others, Vs. State U.P. and others, . We have not considered it necessary to decide this question in the instant writ petition as the said question, in our opinion, really does not arise for consideration.

6. The writ petitions succeed and are allowed. Order of the High Court dated 2-3-1993 refixing the seniority of Petitioners vis-a-vis Shri Janeshwar Goel is hereby quashed. As a necessary consequence the seniority as contained in the gradation list for the year 1990 circulated by the Registry on 22-12-1990 would remain valid and Shri M. R. Chaudhary will be treated as senior to Shri Surjit Singh and Shri Janeshwar Goel and Shri Surjit Singh to Shri Janeshwar Goel. No costs.