

(2014) 01 AP CK 0060

In the Andhra Pradesh High Court

Case No : Writ Petition No's. 13052, 9122, 9136, 9156, 12175, 12176 of 2010, 11439, 11954, 14747 of 2011 and W.P. Sr. 168326 of 2012

S.S.L. Narayana and Others

APPELLANT

Vs

Ch. Madhu Mohan Rao and Others

RESPONDENT

Date of Decision : 24-01-2014

Acts Referred:

Constitution of India, 1950 — Article 16 16(4)

Citation : (2014) 3 ALD 430 : (2014) 3 ALT 185 : (2014) LabIC 1730

Hon'ble Judges : L. Narasimha Reddy, J;Challa Kodanda Ram, J

Bench : Division Bench

Advocate : M. Pandu Ranga Rao, Sri P.V. Krishnaiah and Sri P.V.S.S.S. Rama Rao, for the Appellant; M. Surender Rao, Sri J.R. Manohar Rao and Sri P.R. Prasad, for the Respondent

Final Decision : Dismissed

Judgement

L. Narasimha Reddy, J.—In this batch of writ petitions, the common order dated 17-03-2010 in O.A. Nos. 11590 of 2009 and batch, and similar orders passed in other OAs, by the A.P. Administrative Tribunal (for short "the Tribunal") are challenged. The petitioners figured as respondents in all or some of the original applications. The subject-matter of the OAs was the fixation of seniority of Prohibition and Excise Inspectors (for short the "Inspectors") in the Department of Prohibition and Excise, Government of Andhra Pradesh. The Andhra Pradesh Excise Subordinate Service Rules (for short "the Rules") was issued through G.O.Ms. No. 202, dated 16-02-1961. The post of Inspector figured in category 1 therein. The method of appointment to the post used to be through direct recruitment, to the extent of 40%, and the remaining, through promotions. However, from the year 1997 onwards, appointment to all the posts is only through promotion.

2. In the year 1993, steps were initiated to fill up the posts of Inspectors through direct recruitment in various zones of the State. The task of selection of the

candidates was entrusted to the A.P. Public Service Commission (for short "the A.P.P.S.C."). Notification was issued, examinations were conducted and selection process was undertaken. The APPSC submitted a list of selected candidates to the appointing authority, i.e. the Commissioner of Prohibition and Excise (for short "the Commissioner"). Individual orders of appointment were issued to the selected candidates.

3. The issue pertaining to fixation of seniority of the candidates selected and appointed as Inspectors in the year 1993 was the subject-matter of several proceedings and orders passed therein. In the meanwhile, promotions to the posts of Assistant Excise Superintendents were also made. Ultimately, the Commissioner took the view that the seniority of the candidates shall be decided as per the roster, referable to Rule 22-A of the A.P. State and Subordinate Service Rules, 1996 (for short "the Rules"). The Appellate Authority confirmed the same. Hence, the aggrieved persons, most of the respondents herein, have approached the Tribunal with a prayer to declare the action of the Commissioner in fixing the seniority in the post of Inspector, on the basis of roster as illegal, arbitrary and contrary to Rules and to direct him to fix the seniority as per the ranks assigned by the APPSC.

4. The OAs were opposed by the petitioners herein as well as the Government. Through orders, which are challenged in these writ petitions, the Tribunal held that the seniority of Inspectors appointed through direct recruitment must be determined as per the ranking assigned by the APPSC.

5. Arguments on behalf of the petitioners are advanced by Sri M. Pandu Ranga Rao, Sri P.V. Krishnaiah and Sri P.V.S.S.S. Rama Rao. They submit that the roster under Rule 22 of the Rules is nothing but a concrete step for the implementation of reservations provided for under the Rules, in exercise of power under Article 16(4) of the Constitution of India. They contend that the appointments are made strictly in accordance with the roster, and the fitment of an individual against a roster point is not only for the purpose of appointment but also for the seniority. According to the learned counsel, the exercise so undertaken fits into Rule 33(a) of the Rules and that the seniority lists have been published accordingly. It is also submitted that the principle laid down by the Supreme Court in *Bimlesh Tanwar Vs. State of Haryana and Others*, extensively relied upon by the Tribunal, would be applicable only when the service rules are silent on the aspect, but not where the Rules specifically provide for it. Learned counsel submit that the orders passed by the Tribunal cannot be sustained in law, and that they are liable to be set aside.

6. Sri M. Surender Rao, learned Senior Counsel, and Sri J.R. Manohar Rao, learned counsel for the contesting respondents, on the other hand, submit that reservation referable to Article 16(4) of the Constitution of India would enable a person belonging to reserved category, to secure employment, even if he is unable to compete with the others, and beyond that, the provision does not confer any benefit of seniority. They submit that the roster was prepared only

with a view to ensure that the reservation is properly enforced, particularly when the number of vacancies to be filled each time, are relatively small. They contend that the provision, which gets attracted in the context of fixation of seniority, particularly for the candidates appointed through direct recruitment is, Rule 36, and the said Rule was violated by the Commissioner, when he prepared the seniority list or made promotions, and by the appellate authority. They further submit that Rule 33(a) of the Rules does not at all enable the Government to ignore the merit, which is evident from the proviso appended thereto. It is also urged that the occasion to rely upon Rule 33(b) does not arise, since the appointing authority did not undertake the exercise of fixation of seniority, while issuing orders of appointment.

7. Learned Government Pleader for Services-II submits that the seniority lists have been prepared in accordance with the relevant provisions of law and the directions issued by the Tribunal, from time to time, and that promotions were also effected accordingly.

8. The post of Inspector is a zonal one, under the Presidential Order issued through A.P. Public Employment (Organisation of Local Cadres and Regulation of Direct Recruitment) Order, 1975. The vacancies that were available under direct recruitment category were notified in the year 1993, and the APPSC has selected the candidates. The seniority list was published at a later point of time, reflecting the points in the roster, under Rule 22 of the Rules. The contesting respondents insisted that it must be according to the ranking assigned by the APPSC. They have also cited the examples of the fixation of seniority, for the posts of Regional Transport Officers.

9. By and large, the appointments to the posts in the public service are required to be made on the basis of selection, which, in turn, shall be only on the basis of merit. To this general principle, exception is carved out, whenever reservations are provided for in favour of SC, ST and other socially Backward Class candidates, under the relevant provisions of the Constitution, such as Article 16(4). For the posts reserved in favour of the respective categories, the competition is limited to be among the candidates belong to that category. No comparison is undertaken with the merit secured by the candidates of unreserved categories.

10. The orders providing for reservations in the respective categories of candidates stipulate the percentage. For instance, in the State of Andhra Pradesh, reservation in favour of Scheduled Caste candidates is provided to the extent of 15%, 7.5% for Scheduled Tribe and 27.5% for Other Backward Classes. Accurate representation of the candidates of the respective categories can be ensured at the time of selection, only when quite large number of posts are filled. Many a time, when small number of posts are filled particularly at higher levels in Government Departments working out the reservations would pose its own problems. With a view to ensure adequate representation and correct implementation of the rules of reservation, a 100 point roster is prepared, indicating the places for the respective categories. This would avoid the cluster of

candidates of any particular category and ensure equitable distribution of the reserved candidates.

11. The petitioners insist that the seniority must be determined as per the places in the 100 point roster. They seek to draw support from Rule 36(b) of the Rules. Therefore, it becomes necessary to have a glance of Rules 33 and 36 of the Rules. They read,

Rule 33: Seniority:--(a) The seniority of a person in a service, class, category or grade shall, unless he has been reduced to a lower rank as a punishment, be determined by the date of his first appointment to such service, class, category or grade:

Provided that the seniority of a probationer or approved probationer in a service, class or category from which he stood reverted on the 1st November, 1956 or prior to that date, shall be determined in the statewide gazetted posts and non-gazetted posts in the Departments of the Secretariat and the offices of the Heads of Departments with reference to the notional date of continuous Officiation with or without breaks in that service, class or category prior to the 1st November, 1956 to the date of re-appointment made thereafter, but in shall not disturb the inter-seniority which obtained in the Andhra State. (This proviso shall be in force till 31st October, 1996).

(b) The appointing authority may, at the time of passing an order appointing two or more persons simultaneously to a service, fix either for the purpose of satisfying the rule of reservation of appointments or for any other reason the order of preference among them; and where such order has been fixed, seniority shall be determined in accordance with it:

Provided further that the order of merit or order of preference indicated in a list of selected candidates prepared by the Public Service Commission or other selecting authority, shall not be disturbed inter-se with reference to the candidates position in such list or panel while determining the seniority in accordance with this rule and notional dates of commencement of probation to the extent necessary, shall be assigned to the persons concerned, with reference to the order of merit or order of preference assigned to them in the said list.

(c) Whenever notional date of promotion is assigned, such date of notional promotion shall be taken into consideration for computing the qualifying length of service in the feeder category for promotion to the next higher category and that the notional service shall be counted for the purpose of declaration of probation also in the feeder category.

(d) The transfer of a person from one class or category of a service to another class or category of the same service, carrying the same pay or scale of pay shall not be treated as first appointment to the latter class or category for purpose of seniority and the seniority of a person so transferred shall be determined with reference to the date of his regular appointment in the class or category from

which he was transferred. Where any difficulty arises in applying this sub-rule, seniority shall be determined by the Government, if they are the appointment authority and in other cases, the authority next higher to the appointing authority shall determine the seniority.

(e) Where a member of a service, class or category is reduced for a specific period, to a lower service, class or category or grade:

(i) in cases where the reduction does not operate to postpone future increment, the seniority of such member on re-promotion shall, unless the terms of the order of punishment provides otherwise, be fixed in the higher service, class or category at which it would have been fixed but for his reduction;

(ii) in cases where the reduction operates to postpone future increment, the seniority of such member on repromotion shall, unless the terms of the order of punishment provide otherwise, be fixed by giving credit for the period of service earlier rendered by him in the higher service, class or category.

(f) Seniority of a retrenched and reappointed person:--The seniority of a member of a service, who is re-appointed after having been retrenched, owing to reduction of staff as a measure of economy, shall be determined in accordance with the date of such re-appointment:

Provided that the inter-se seniority of such members absorbed in the same service, class or category shall be determined-

(i) in any case in which re-appointment of such members was made in consultation with Public Service Commission or the other selecting authority, in accordance with the order of merit or the order of preference indicated by the said Public Service Commission or other selecting authority; and

(ii) in any other case, in accordance with the total length of service, in the same equivalent or higher service, class or category put in by such member prior to retrenchment.

(g) The seniority of an approved candidate, who takes up military service before joining his appointment to any service, class or category shall, on his appointment to such service, class or category, on his return from the said military service, be determined in accordance with the order of preference shown in the authoritative list of candidates approved for appointment to the service, class or category.

12. Rule 36: Inter-se seniority where the dates of commencement of probation are same:--The seniority of the persons in the service shall be determined as follows:

(i) in respect of the candidate selected by the Andhra Pradesh Public Service Commission or other selecting authorities by direct recruitment, shall be with reference to their ranking assigned irrespective of the date of commencement of their probation in that category;

- (ii) in respect of the persons promoted or appointed by transfer (involving promotion), the dates from which they were placed on their probation;
- (iii) in respect of persons covered under item (ii) above, in case the date of commencement of probation is the same, whoever is aged shall be the senior;
- (iv) in respect of persons appointed on transfer on administrative grounds, shall be from the date on which the individual was placed on probation in the original department; and
- (v) in respect of the persons appointed on request transfer, the date of joining of such person in the new department/unit.

13. Rule 33(b) directs that if the appointing authority has fixed any order of preference among the various candidates, appointed simultaneously, at the time of issuing orders of appointment, the seniority shall be determined in accordance with that.

14. The proviso takes care of the situation, where the appointment is made by the appointing authority on the basis of any selection undertaken by a different agency. That agency can be a selection committee within the department, a committee of the officials of the same department, or an independent agency, like the APPSC.

15. It is fairly well settled that whenever an appointment or for that matter, promotion, is effected on the basis of selection, the ranking assigned by the selection committee shall govern the order of priority among the selected candidates. In a given case, the appointing authority may not accept the recommendation of the selection committee, in its entirety, or in part. However, the appointing authority is precluded from meddling with the ranking assigned by the selecting agency. For example, if the selection committee has prepared a list of 10 candidates, in the order of merit, and has forwarded it to the appointing authority, the latter has every right to refuse to accept the list in its entirety or to disapprove the selection of some of the candidates. If the appointing authority is of the view that it is not desirable, for reasons which are recognized in law; to appoint candidates at Sl. No. 4 and 7, it can refuse to appoint them, even while appointing the remaining 8 candidates. However, it cannot place candidate at Sl. No. 5 at Sl. No. 1, or undertake such exercise vis-?-vis the other candidates. The principle underlying this is that when the very basis for selection is merit, which, in turn, is manifested in the ranking and thereby the seniority must also depend on the relative merit among the selected candidates.

16. Here itself it is relevant to take note of Rule 3 of the Public Service Commission (Rules of Procedure) Rules (for short "the Procedure Rules") framed by the APPSC. Clauses (vi) and (viii) thereof are relevant. They read:

Rule 3:-

Where any competitive examination is to be conducted by the commission for the

purpose of direct recruitment to a State or Subordinate Service, the Commission shall-

3(vi): arrange the candidates selected by it in the order of merit;

3(viii): forward the list of candidates selected to the appointing authority, simultaneously communicating the result to the successful candidates and releasing the notification to the published in the A.P. Gazette.

17. Proviso to Rule 33(b) of the Rules is intended to give effect to the Rule (3) of the Procedure Rules, framed by the APPSC.

18. In the instant case, it is not even pleaded that the petitioners were shown above the contesting respondents, in the list forwarded by the APPSC. Added to that, this is not a case where the appointing authority issued a common order of appointment for number of candidates, and that the order or ranking mentioned therein is followed, while preparing the seniority list. The very sine qua non for invoking Rule 33(b) is that there must exist an "order of preference" indicated by the appointing authority "at the time of passing an order appointing two or more persons simultaneously". The record, in the instant case, discloses that selected candidates were issued individual orders of appointment. No common appointment was made, much less any order of preference was indicated. Once the appointing authority has issued individual orders of appointment and did not prepare a list as such, at the time of appointment, the question of invoking Rule 33(b) of the Rules does not arise. Added to that, the proviso thereof restricts the power of an appointing authority, referable to Rule 36(b). It cannot tinker with the list forwarded by the selection authority, (in the instant case, the APPSC), wherein ranking is assigned on the basis of merit. Across the Bar, it is stated that the APPSC has forwarded the list of selected candidates arranged in the order of merit.

19. Much emphasis is sought to be laid upon the words "for the purpose of satisfying the rule of reservation of appointments" occurring in Rule 33(b)". Firstly it is to be noted that "satisfying the rule of reservation of appointments" is not the exclusive purpose and it is followed by the words "or for any other reason". Even if one is to apply the principle of ejusdem generis, it is difficult to construe the rule, as requiring the appointing authority to invariably fix the seniority, as per the points in the roster. As observed in the preceding paragraphs, the power of the appointing authority in this behalf virtually stands taken away, or would totally guided by the proviso. In other words, the appointing authority has virtually no role to play, in the matter of fixation of seniority, once the appointments are made on the basis of the recommendation of a selection committee or selecting agency.

20. Rule 36 of the Rules, on the other hand, straightaway gets attracted. Firstly the appointment is through the process of direct recruitment, and secondly, the ranking is assigned by the selection committee. Both the ingredients of the Rule are satisfied.

21. In *Bimlesh Tanwar v. State of Haryana and others* (1 supra) similar issue has arisen for consideration, before the Supreme Court. As in the present case, there also an attempt was made by the appointing authority to fix the seniority on the basis of the points in the roster. It was incidental that no direct provision of law was existing, governing the situation in that case. The Supreme Court observed that, "An affirmative action in terms of Art. 16(4) of the Constitution is meant for providing a representation of a class of citizenry who are socially or economically backward, Art. 16 of Constitution of India is applicable in the case of appointment. It does not speak of fixation of seniority. Seniority is, thus, not to be fixed in terms of roster points. If that is done, the rule of affirmative action would be extended, which would strictly not be in consonance of the Constitution schemes. We are of the opinion that the decision in *PS Ghalaut* (1995) 5 SCC 625 does not lay down a good law".

22. In the case before us also, there is no rule, which mandates that the seniority must be determined on the basis of the points in the roster of reservation.

23. The purpose of reservation stands served, once it is ensured that adequate representation is provided for. Beyond that, the rule of reservation has no purpose to serve. An attempt is made on behalf of the petitioners to draw the analogy pertaining to reservation in promotions and the various rulings in connection thereto. Both the phenomenon stands on a totally different footing. It is only when there exists reservation in promotions, that such a plea can be raised. Admittedly, there is no such provision.

24. There is another way of looking at the matter. It has already been pointed out that roster is prepared only to ensure that there is proper and equitable mixing of the reserved and unreserved candidates in a service. It is not necessary that there must exist a roster, for every service. The rule of reservation can be implemented even without preparing a roster. For example, if 50 vacancies are to be filled by way of direct recruitment, the vacancies that are to be earmarked for each category can easily be worked out. If 20 vacancies are reserved for various categories, and 30 are unreserved, the selection process can be undertaken, and orders of appointment can be issued. If the contention of the petitioners is to be accepted, all the candidates appointed against reserved vacancies must be placed higher in the list, even if the marks secured by them or the ranks assigned by the selecting agency are far less. This was never the intention of the Parliament, which provided for reservation, under the relevant provisions of the Constitution, or the respective rule making authorities.

25. The absurd situations which may emerge, on account of the acceptance of the contention of the petitioners, can be demonstrated by an example. Take for instance, 8 vacancies are required to be filled up, in a service, through direct recruitment, and their respective places in the roster are from 60 to 67 as under:

S. No.

Roster

point

1.

60

SC

2.

61

BC "A"

3.

62

OC

4.

63

OC (W)

5.

64

BC "B"

6.

65

OC

7.

66

ST

8.

67

OC

26. Candidates belonging to reserved candidates are also entitled to be selected against unreserved vacancies, if they secure the merit. In the above selection, let it be assumed that one SC candidate who secured 75% marks came to be selected against an OC vacancy, at roster point 65, and another SC candidate, who secured 45% marks was selected against the reserved vacancy at roster

point No. 60.

Roster point

60

SC

45

61

BC

"A"

52

62

OC

78

63

OC

(W)

68

64

BC

"B"

51

65

OC

75(SC)

66

ST

42

67

OC

72

27. It would result in a situation where an SC candidate with 75% marks would

take his seniority far below the one, who belongs to the same category, but came to be appointed against a reserved vacancy. The absurdities of this nature of various degrees would ensue, if the roster is to be treated as the basis for fixation of seniority.

28. In *Ajit Singh Januja and others Vs. State of Punjab and others*, the Supreme Court has explained the principle pertaining to reservations under Rule 14 and 16(4) of the Constitution of India. Though it was in relation to promotions, the discussion undertaken therein, in a way, constituted the basis for the judgment in *Bimlesh Tanwar v. State of Haryana and others* (1 supra). Recently, a Division Bench of this Court, in *Mubidi Ereshu v. Ch. Subbaiah and others* took the view that the roster point cannot constitute the basis for fixation of seniority.

29. We do not find any merits in the writ petitions. They are accordingly dismissed. The miscellaneous petitions filed in the writ petitions shall also stand disposed of. There shall be no order as to costs.

1W.P. No. 13483/2013,dt.25-11-2013