
(2000) 04 RAJ CK 0010

In the Rajasthan High Court

Case No : Civil Special Appeal No. 787 of 1997

State of Rajasthan and Others

APPELLANT

Vs

Bachhraj Soni and Another

RESPONDENT

Date of Decision : 25-04-2000

Acts Referred:

Rajasthan Subordinate Offices Ministerial Staff Service Rules, 1957 — Rule 27(12)

Citation : (2000) 2 WLN 277

Hon'ble Judges : Rajesh Balia, J; Mohd. Yamin, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

Rajesh Balia, J.—This appeal u/s 18 of the Rajasthan High Court Ordinance, 1949 is directed against the order dated 27.1.1997 passed by the learned single Judge of this Court in S.B. Civil Writ Petition No. 2298 of 1987 whereby the writ petition filed by the petitioner-respondent was allowed and the order dated 9.6.1987 passed by the Rajasthan Civil Services Appellate Tribunal, Jaipur was set aside and the respondents were directed to correct the seniority list published on 28.10.1985 by placing the petitioner at proper place reckoning his services from 11.9.1964.

2. The brief facts leading to this appeal are: that petitioner-respondent Bachhraj Soni was appointed as Lower Division Clerk against a vacant post vide order Annexure/1 dated 10.9.1964 and was posted in Tehsil Taragarh. He came to be confirmed on the post of Lower Division Clerk with effect from 14.9.1972 vide order Annexure/2 dated 28.10.1972. Thereafter, the services of the petitioner were transferred to the Transport Department, Govt. of Rajasthan, on his desire, against a vacant post and he was posted in the office of the District Transport Officer, Banner vide order dated 29.4.1978. The above transfer was effected with concurrence of the Heads of both the Departments.

3. After the petitioner was transferred to the Transport Department, a tentative

seniority list of Lower Division Clerks was published on 23.8.1978 and in that list, the name of the petitioner was not included. Having come to know about this fact, the petitioner made a representation on 15.9.1978 mentioning therein that his services were regularised since 16.9.1964 and he has been confirmed on the post of Lower Division Clerk with effect from 14.9.1972 but his name does not find place in the seniority list published by the Transport Department where he has been transferred and posted with the concurrence of the Heads of both the Departments. Thereafter, a provisional seniority list was again published by the Transport Department on 30.1.1985, in which the name of the petitioner was shown at item No. 192. His date of appointment was shown as 5.5.1978 and the date of confirmation as Lower Division Clerk was shown as 4.6.1983.

4. Against this provisional seniority list dated 30.1.1985, the petitioner made a representation mentioning therein that he has already been confirmed on the post of Lower Division Clerk with effect from 14.9.1972, that is prior to his transfer in the Transport Department and, therefore, he could not have been shown as confirmed Lower Division Clerk with effect from a later date i.e. 4.6.1983. However, considering the petitioner to be a fresh appointee in the Transport Department, a final seniority list was published on 28.10.1985 showing his date of confirmation as 4.6.1983. In these circumstances, the petitioner filed an appeal before the Rajasthan Civil Services Appellate Tribunal, Jaipur challenging the date of his initial appointment and confirmation shown in the final seniority list. In the final seniority list, he was shown to be an appointee of 5.5.1978 instead of 16.9.1964. His date of confirmation was also shown as 4.6.1983 instead of 14.9.1972. The petitioner-respondent has prayed for assigning correct dates of his appointment and confirmation and consequential benefit of assigning seniority on the post of Lower Division Clerk.

5. The appeal filed by the petitioner-respondent came to be rejected by the Rajasthan Civil Services Appellate Tribunal vide its Judgment dated 9.6.1987, by holding that the appointment of the petitioner made in the Transport Department by way of transfer from other Department was on his own request and thus, it was a fresh appointment and therefore he was correctly assigned seniority in the Transport Department.

6. Against this Judgment of the Tribunal, the petitioner-respondent filed the present writ petition before this Court. The writ petition filed by the petitioner came to be allowed by the learned single Judge vide his order dated 27.1.1997. It was held that Rule 27(12) of the Rajasthan Subordinate Offices Ministerial Staff Rules, 1957 (for short "the Rules") which has been relied upon by the Tribunal and the Transport Department was not in existence at the time when the services of the petitioner were transferred to the Transport Department and this rule was not retrospective in operation. Therefore, it cannot be invoked for the purpose of denying the benefit of past services rendered by the petitioner-respondent in other Department. The learned single Judge directed the respondents to correct the seniority list published on 28.10.1985 by placing the

petitioner at proper place reckoning his service from 11.9.1964.

7. Against this order dated 27.1.1997 passed by the learned single Judge, the non-petitioner-appellant has preferred this appeal, which was in the first instance rejected by this Court vide its Judgment dated 16.10.1997 by holding that the State was not a interested party in the matter of seniority and therefore, the appeal is not maintainable. Thereafter, the State filed Special Appeal No. 3367 of 1998 before the Hon''ble Supreme Court. The Hon''ble Supreme Court vide its order dated 20.7.1998 set aside the order dated 16.10.1997 passed by the Division Bench of this Court and remanded the case back to the Division Bench for a fresh disposal of the appeal on merits. Thus, the present appeal has come up for disposal before us.

8. Mr. R.P. Dave, the learned Counsel appearing for the appellant has contended that though Rule 27(12) of the Rules was not in existence at the time when the petitioner-respondent was transferred to the Transport Department yet that period shall be governed by executive instructions issued vide Circulars dated 31.7.1972 and 2.8.1972 laying down that a person who seeks voluntary transfer from one Department to another Department, he shall be placed at the bottom and his service in the previous Department shall not be counted for the purpose of seniority.

9. We have carefully considered this submission and are of the opinion that this submission is not sustainable. First of the Circulars dated 31.7.1972 relates to determination of seniority of Upper Division Clerks and Lower Division Clerks transferred from one Collectorate to another Collectorate. The petitioner-respondent was not transferred from one Collectorate to another Collectorate but was transferred from one Department to another Department i.e. Tehsil Officer (Collectorate) to Transport Department. Therefore, the first Circular could not by itself operate in the case of the petitioner-respondents. The petitioner has been transferred from Tehsil Office (Collectorate) to Transport Department by order dated 29.4.1978 whereas the second circular was issued on 2.8.1972 and there is no dispute that these executive instructions could not operate retrospectively. Therefore, the second circular also does not govern the case of the petitioner. There was no other rule or circular at the time when the petitioner was transferred to Transport Department providing exclusion of services rendered by him in previous Department i.e. Tehsil Office (Collectorate) for the purpose of determination of seniority. Therefore, the petitioner's seniority in the Transport Department will have to be governed on the basis of the Rules as they existed at he relevant time.

10. Admittedly the petitioner was appointed on the post of Lower Division Clerk vide order dated 10.9.1964 and was confirmed on the post of Lower Division Clerk vide order dated 28.10.1972 with effect from 14.9.1972. The petitioner was transferred from Tehsil Office (Collectorate) to Transport Department vide order dated 29.4.1978. Thus, it is clear that at the time when the petitioner was transferred from Tehsil Office (Collectorate) to Transport Department, he was

enjoying the status of substantively appointed and confirmed Lower Division Clerk. As stated above, at the time when the petitioner was transferred from Tehsil Office (Collectorate) to Transport Department, neither the provision of Rule 27(111) of the Rules nor the Circular dated 2.8.1978 was in existence nor the above-mentioned circular dated 31.7.1972 could govern his case. In these circumstances, upon transfer from Tehsil Office (Collectorate) to Transport Department, there had been no alteration in the status of service of the petitioner-respondent. He cannot but be deemed to be in Transport Department also as a substantively appointed Lower Division Clerk from the beginning. No Rule has been pointed out under which a substantive employee on transfer could be treated as nonsubstantive. Therefore, his confirmation as Lower Division Clerk in the Transport Department with effect from 4.6.1983 was superfluous.

In this view of the matter the provisional seniority list dated 30.1.1985 and the Final Seniority list dated 28.10.1985 showing the petitioner's date of appointment and confirmation as 5.5.1978 and 4.6.1983 respectively are obviously erroneous.

11. In coming to this conclusion, we may also notice that Rule 7 of the Rules deals with methods of recruitment and clauses (a) and (b) of Rule 7(1) of the Rules provides method of recruitment to the lowest cadres of Stenographers and Lower Division Clerks by way of direct recruitment. Clauses (c) and (d) of Rule 7(1) of the Rules deals with methods of recruitment on the posts of Upper Division Clerks, Private Secretary and Personal Assistants by way of promotions. Proviso (1) appended to Rule 7(1) provides that a post in any cadre may also be filled by transfer of a person holding a post in another Department corresponding to a post in the cadre concerned with concurrence of the Head of that Department. This proviso clearly postulates that any post whether of initial recruitment to the cadre or the posts which are to be filled in by way of promotion can also be filled by transfer of persons holding a post in another Department corresponding to a post in the cadre concerned with concurrence of the Head of that Department. The Rules nowhere provides that on transfer of a person, he would lose his status as a permanent employee in the transferee department. Moreover, under these rules, appointment by way of transfer cannot be considered as a fresh appointment. Had it been a case of fresh appointment on his transfer to another Department, it would have become necessary to obtain consent of the person to be transferred. No body can be compelled to change his employer. However, it is purely as a matter of condition of service at the initial appointment that an incumbent can be made to such transfer. Further such transfer is also not in the hands of the employee but is in the discretion of the Heads of the Departments to concur or not to concur for the transfer from one to another Department and where the transfer absolutely depends upon the discretion of the Heads of the Departments, the person seeking voluntary transfer cannot claim it as a matter of right and it makes it implicit in such consideration that such concurrence would take into account the administrative exigencies and convenience. We are, therefore, of the opinion that appointment

by way of transfer does not take away the status of the persons which he is enjoying in the service. Therefore, it must be held that petitioner-respondent was regularly appointed as Lower Division Clerk vide order dated 10.9.1964 and was confirmed as such vide order dated 28.10.1972. The confirmation made on the post of Lower Division Clerk by the Transport Department was wholly superfluous and is not of any avail to the appellants in affecting the status of the petitioner-respondent which he was already enjoying.

12. Now coming to the question of assignment of seniority, we may state that Rule 27 of the deals with seniority. Substantive Rule 27 of the Rules, which was in vogue at the relevant time when the petitioner entered the service in 1964 or confirmed in 1972 reads as under:

Seniority-Seniority in each class of posts shall be determined by the date of the order of substantive appointment to the class of post concerned.

The above Rule 27 of the Rules was in vogue at the time when the petitioner entered into the service on 10.9.1964 and even on 28.10.1972 when he was confirmed on the post of Lower Division Clerk. According to this rule, seniority follows the date of substantive appointment. This rule does not make any exception in the criteria for determining the seniority of different class of persons in different Departments nor it provides any different rule, for determination of the seniority of persons appointed in the Department by regular method of recruitment or by way or transfer. In absence of any rule, when a person already appointed in the service is transferred to another Department, he carries that very status of his appointment and the date of substantive appointment to the transferee department so as to find his place in the seniority amongst the incumbents of the transferee Department. In the present case, the petitioner-respondent was transferred to Transport Department vide order dated 29.4.1978. Vide Govt. Notification No. F. 7(6) DOP (A-II)/73, dated 15.11.1976, the following was substituted in Rule 27 of the Rules:

Seniority in service shall be determined in each category of the service by the year of substantive appointment.

This substantive part was further substituted by following vide Notification No. F. 7(8) DOP/A-II/78 dated 20.7.1979:

Rule 27. Seniority: Seniority of persons appointed to the lowest post of the Service or lowest categories of posts in each of Group/Section of the Service as the case may be, shall be determined from the date of confirmation of such persons to the said post put in respect of persons appointed by promotion to other higher posts in the Service or other higher categories of posts in each of the Group/Section in the Service, as the case may be shall be determined from the date of their regular selection to such posts.

The relevant proviso governing the case of transfer on his own request was added for the first time vide Notification No. F. 3(13) DOP/A-II/80 dated

19.8.1982 as under:

[xi-a] that notwithstanding anything contained to the contrary in substantive part of Rule 27, in case of a person holding a post mentioned in Sub-rule (2) or Rule 6 of these rules in a Department and has been transferred from one Department to another on the corresponding post in the cadre concerned at his own request in accordance with proviso (1) to Sub-rule (1) of Rule 7, the inter-se seniority of such person vis-a-vis persons of the Department in which such person has been taken on transfer at his own request shall be determined from the date he joins the new Department on the post concerned.

(Added vide Notification No. F. 3(13) DOP /A-11/80 dated 19.8.1982)

The aforesaid proviso (xi-a) to Rule 27 of the Rules thus came into force with effect from 19.8.1982 i.e. about four years after the petitioner has been transferred and posted in the Transport Department. This proviso does not give any indication that it is retrospective in operation. This proviso is applicable to only those persons who have been transferred on their own request after it come into force i.e. with effect from 19.8.1982.

13. Since we have reached the conclusion that on the date when the petitioner was transferred from Tehsil Office (Collectorate) to Transport Department i.e. on 29.4.1978, there was no provision in the Rules providing that upon transfer of a Govt. servant from one Department to another Department, his date of substantive appointment and status as he was enjoying on the date of transfer shall be altered, therefore, the respondents are wholly unjustified in treating the date of substantive appointment and the date of confirmation of the petitioner as 5.5.1978 and 4.6.1983 instead of 14.9.1964 and 14.9.1972 respectively. We have also come to the conclusion that proviso (xi-a) to Rule 27 of the Rules as also the Circulars dated 31.7.1972 and 2.8.1978 were not in vogue on the date when the petitioner was transferred and posted in the Transport Department and therefore, they shall be not be applicable to the facts of the present case. Since the petitioner was transferred in the Transport Department vide order dated 29.4.1978 and on that date, he was enjoying the status of a confirmed Lower Division Clerk and, therefore, the necessary consequence of assigning the seniority to the petitioner-respondent on that basis must follow.

14. At this belated stage, the learned Counsel for the appellants wanted to raise a preliminary objection as to the maintainability of the writ petition on the ground that all persons whose seniority is likely to be affected have not been impleaded as party-respondents. In the present case, the dispute is not so much in determining the seniority by applying the wrong principles but the dispute is as to the correct date of substantive appointment and the confirmation on the post of Lower Division Clerk and the consequent fixation of seniority being incidental thereto, in our opinion, every incumbents in the service is not necessary party to be heard in determining what is the substantive date of appointment of the petitioner in service. The incidental consequence that follows

does not make them necessary parties even otherwise.

15. As a result of this, this appeal fails. The appellants are directed to redetermine seniority of the petitioner-respondent in the Transport Department on his entry on 29.4.1978 treating him substantively appointed in service with effect from 14.9.1972 when he was confirmed on the post of Lower Division Clerk without reference to proviso (xi-a) to Rule 27 of the Rules as also the Circulars dated 31.7.1972 and 2.8.1978.

16. There shall be no order as to costs.