

CASE NO.:
Appeal (civil) 4907 of 1999

PETITIONER:
M.Subba Reddy and Anr.

RESPONDENT:
A.P.State Road Transport Corporation and Ors.

DATE OF JUDGMENT: 12/04/2004

BENCH:
S.B.SINHA.

JUDGMENT:
J U D G M E N T

With C.A. No. 4908 of 1999

S.B.SINHA, J :

INTRODUCTION:

The usual vexed question as regard determination of inter se seniority between the direct recruit and the promotees once again falls for consideration in this appeal which arises out of a judgment and order dated 3.2.1999 passed by a Division Bench of the Andhra Pradesh High Court in Writ Appeal No.70/1990.

FACTUAL MATRIX:

The appellants herein were granted temporary promotion in terms of Regulation 30 & 34 on or about 18.1.1993 on purely temporary basis and against the vacancies reserved for direct recruitment subject to appointment. The petitioner was promoted as Assistant Traffic Manager. On 31.1.1983 when vacancy arose in the promotee quota, his services were regularised after placing him on probation with effect from 27.12.1986. Thereafter he was confirmed on 1.4.1987. The respondents-direct recruits were borne into the services of the Corporation on 9.11.1990 on being recruited as officer under Training (General). The next batch of direct recruits came into the service of the Corporation on 4.3.1991.

The Office Order dated 9.9.1988 reads as follows:-

"The VC & MD has now accorded sanction for regularisation of the officers in the cadres of ATM/AME as the case may be with probation rights with retrospective effect from the dates indicated against them, against the posts earmarked for promotion. The VC & MD has also accorded sanction for declaration of the period of probation of these officers from the dates shown against their names."

A perusal of this order clearly shows that the promotion of the appellant was regularised with probation rights with retrospective effect from the dates specified therein. It categorically states that such regularisation was against the post earmarked for promotion. It does not say that the seniority of the promotees would be fixed after the direct recruitment is made. The direct recruits were appointed on or about 9.11.1990. It is also not in dispute and as would appear from the counter affidavit filed by the first respondent herein before the High Court that there had been a ban on direct recruitment from 1977 upto 1988. In the meanwhile on 13.5.1994, the appellants were promoted to the Class I Senior Scales as Divisional Managers. A provisional seniority which was prepared on 22.8.1994 was finalised on 10.11.1994 whereagainst some representations were made. A writ petition filed thereagainst was dismissed. A writ appeal preferred by the appellant was also dismissed.

Statutory Provision:

The first respondent is a statutory corporation constituted under the Road Transport Corporation Act, 1950. It framed rules in exercise of its power conferred under Section 45 thereof. Rule 3 of the Recruitment Rules provides for appointment to the post of Assistant Traffic Manager by three modes; (i) by direct recruitment (ii) by promotion and (iii) by transfer or deputation. The method of recruitment to each post specified in column 2 of Annexure 'A' is to be as shown in the corresponding entry in column 3. Sub-rule 4 of Rule 3 of Recruitment Regulation reads thus:-

"3. Appointment and qualification:
(4) Where suitable departmental candidates are not available for promotion to any of the posts specified in Annexure-A where the posts are to be filled by promotion only, such posts may be filled by direct recruitment by selection provided that recruitment to all the higher posts from the lower posts shall be made by way of promotion and resort had to direct recruitment only when suitable and qualified persons are not available for promotion."

Regulation 17 provides for temporary appointment. A temporary appointment de'hors the rules is permissible only in administrative interest owing to emergency, provided, however, the post is not one which is reserved for promotion. Such an appointee may be replaced by an approved candidate who is qualified to hold the post under the regulations. Regulation 18 reads as under:-

"18. Date of Commencement of probation of persons appointed temporarily:

If a person, having been appointed temporarily under clauses (1), (3), or (6) of

regulation 17 to a post borne on the cadre of any service, or having been appointed to any services otherwise than in accordance with the regulations governing appointment thereto is subsequently appointed to the service in accordance with these regulations, he shall commence his probation from the date of such subsequent appointment or from such earlier date (not being earlier than the date of his first appointment on a temporary basis) as the appointing authority may determine. He shall also be eligible to draw increments in the time scale of pay applicable to him from the date of commencement of his probation but shall not be entitled to arrears of pay unless otherwise ordered by the corporation."

Regulation 30 provides for temporary promotion, clause 6 whereof reads thus:-

"(6) If any person referred to in clause (4) is subsequently promoted to the higher category in accordance with these regulations, he shall commence his probation in such category from the date of such subsequent promotion or from such earlier date as the appointing authority may in its discretion determine. He shall also be eligible to draw increments in the time scale of pay applicable to him from the date of commencement of his probation but shall not be entitled to arrears of pay unless otherwise ordered."

Regulation 34 reads as under:

"If in any of the following categories a sufficient number of approved candidates who have successfully completed their training is not available for filling posts reserved to be filled by direct recruitment such posts may be filled temporarily by departmental promotion until approved candidates who have successfully completed their training become available to replace the promotees and the reverted person shall subsequently be considered for repromotion against the quota of vacancies reserved for being filled by promotion.

- (a) Asstt. Mechanical Engineer and Asstt. Works Manager.
- (b) Asstt. Traffic manager
- (c) Chargeman
- (d) Traffic Inspector Grade II and Head Depot Clerk.
- (e) Artisans."

In terms of item No.3 of Annexure 'A' (Section-B)

Class-I, Junior Scale Service, as appended to the said regulation, so far as the post of Assistant Traffic Manager is concerned; in a unit of 4 the first and third vacancy are to be filled in by appointment of an officer under training who has successfully completed his training and the second and the fourth by promotion of a Chief Inspector. If, however, a suitable candidate is not available, the vacancy can be filled up by a suitable candidate from other categories.

Regulation 3 providing for seniority reads as under:-

"Seniority

(a) The "Seniority" of a person in 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. If any portion of the service of such person does not count towards probation his seniority shall be determined by the date of commencement of his service which counts towards probation.

Interpretation of the Regulations is required to be considered having regard to the factual backdrop as noticed hereinbefore.

High Court Judgment:

The learned Single Judge sought to make a distinction between those who had been promoted prior to 1981 and those who were promoted subsequent thereto. The learned Single Judge of the High Court, however, applying the quota-rota rule held that direct recruits were rightly treated as senior to the promotees. The Division Bench of the high Court also proceeded on the basis that vires of the regulations being not in question, the question of placement of the promotee candidates in the event of non-availability of direct recruit candidate did not arise and in that view of the matter the contention that the promotee candidate would rank senior to the direct recruits must be repelled.

Findings:

The High Court unfortunately did not enter into the question as regard application and interpretation of the Regulations. It is neither in doubt nor in dispute that any ad hoc or any temporary appointment or temporary promotion de'hors the rules or against the quota meant to be filled up by direct recruitment shall be of no avail for any purpose whatsoever as consequent upon the appointment of the direct recruits such promotees are liable to be reverted. However Regulation 18 which provides for date of commencement of probation either by way of direct recruitment or by way of promotion, clearly states that the date of probation may in the event of his subsequent appointment (which would include promotion) may commence from the date of subsequent appointment or

from such earlier date, as the case may be. Appellants herein were temporarily promoted to the post of Traffic Managers initially in the year 1983. By an office order dated 9.9.1988, their promotion was regularized with retrospective effect from 27.12.1986. Their services were so regularized having regard to the vacancies which occurred in the posts earmarked for promotion.

It is furthermore not in dispute that total ban for direct recruitment was imposed from the year 1977 to 1988 and, thus, the purported quota and the rota rule contained in clause 3 of Annexure 'A' could not have been given effect to. In a situation of this nature I am of the opinion that the said quota rule become inoperative.

A similar question come up for consideration before a Constitution Bench of this Court in Direct Recruitment Class II Engineering Officers' Association vs. State of Maharashtra and Ors. [1990 (2) SCC 715] wherein this court observed:

"Mr. Tarkunde is right when he says that in such a situation the rule should be appropriately amended, so that the scope for unnecessary controversy is eliminated. But, merely for the reason that this step is not taken promptly, the quota rule, the performance of which has been rendered impossible, cannot be treated to continue as operative and binding. The unavoidable situation brings about its natural demise, and there is no meaning in pretending that it is still vibrant with life. In such a situation if appointments from one source are made in excess of the quota, but in a regular manner and after following the prescribed procedure, there is no reason to push down the appointees below the recruits from the other source who are inducted in the Service subsequently. The later appointees may have been young students still prosecuting their studies when the appointments from the other source take place - and it is claimed on behalf of the respondents that this is the position with respect to many of the direct recruits in the present case - and, it will be highly inequitable and arbitrary to treat them as senior. Further, in cases where the rules themselves permit the government to relax the provisions fixing the ratio, the position for the appointees is still better; and a mere deviation therefrom would raise a presumption in favour of the

exercise of the power of relaxation. There would be still a third consideration relevant in this context : namely, what is the conclusion to be drawn from deliberate continuous refusal to follow an executive instruction fixing the quota. The inference would be that the executive instruction has ceased to remain operative. In all these cases, the matter would however be subject to the scrutiny of the court on the ground of mala fide exercise of power. All the three circumstances mentioned above which are capable of neutralising the rigours of the quota rule are present in the cases before us, and the principle of seniority being dependent on continuous officiation cannot be held to have been defeated by reason of the ratio fixed by the 1960 Rules."

The Constitution Bench summing up its decisions, inter alia, held:-

"If it becomes impossible to adhere to the existing quota rule, it should be substituted by an appropriate rule to meet the ends of the situation. In case, however, the quota rule is not followed continuously for a number of years because it was impossible to do so the inference is irresistible that the quota rule had broken down.

Where the rules permit the authorities to relax the provisions relating to the quota, ordinarily a presumption should be raised that there was such relaxation when there is a deviation from the quota rule. If the quota rule is prescribed by an executive instruction, and is not followed continuously for a number of years, the inference is that the executive instruction has ceased to remain operative. "

The said decision of the Constitution Bench in Direct Recruitment Class II Engineering Officers' Association (supra) was followed by this Court in Excise Commissioner, Karnataka and Anr. Vs. V.Sreekanta [1993 (3) Suppl. SCC 53].

Another aspect of the matter may not also be lost sight of. The appellants herein were promoted in a regular manner having been regularized in services with retrospective effect. Their services were not regularized from the date of their initial ad hoc promotion but with effect from the date when the vacancies became available. Their services after regularization would not be by way of a stopgap

arrangement. In Santosh Kumar V. State of Andhra Pradesh [2003 (5) SCC 511] this court has laid down the law in the following terms:-

"...The respondent was admittedly promoted on temporary basis as OSSI prior to the recruitment of the appellant. Once his services were regularised that too in the promotee quota, the appellant being direct recruit cannot make any grievance. In this view it cannot be said that the appellant was an affected person for want of notice before passing the order of relaxation to question the seniority of the respondent."

The direct recruits who were appointed in the years 1990 and 1991, in terms of clause 3 of Annexure 'A' would be considered to have been appointed only after their successful completion of training. They were borne in the cadre in the years 1990-1991 and, thus, prior thereto they cannot claim seniority.

The consequence of imposing the quota-rota rule would become evident if the seniority list of 10.12.1994 is closely scrutinised. Item No.20 thereof refers to a promotee Shri U.Brahma Chari. He was temporarily promoted on 21.5.1981 and his services were regularized with effect from 9.7.1981. The direct recruits whose services have been regularized in March, 1991 and October, 1991 would have been senior to him. As noticed hereinbefore those who have been appointed in 1991 would also be senior to the appellant No.1 whose promotion admittedly was regularized with effect from 27.12.1986.

It is trite that a direct recruit is considered to be borne in the cadre from the date of his recruitment. This aspect of the matter has been considered by a Division Bench of this Court in Suraj Prakash Gupta and Ors. vs. State of J & K and Ors. reported in [2000 (7) SCC 561] wherein almost all the decisions operating in the field including State of West Bengal and Ors vs. Aghore Nath Day and Ors. [1993 (3) SCC 371] and N.K. Chauhan vs. State of Gujarat [1977 (1) SCC 308] were noticed.

This court formulated the following points for consideration:-

"(1) Whether the quota rule had broken down ? Whether excess promotees are to be pushed down ? Whether there is a quota-rota rule ?
(2) Whether the ad hoc/stopgap promotion of Assistant Engineers (and Assistant Executive Engineers) could be made beyond six months and till regularisation, by the Government without consulting the Public Service Commission ? Whether the Government could have regularised the ad hoc service by

executive order dated 2-1-1998 ?
Whether the point raised in para IX
of the written submissions by the
direct recruits that retrospective
regularisation cannot be made in
respect of the ad hoc/stopgap
service and could be made only if
the initial appointment as Assistant
Engineers or Assistant Executive
Engineers was "in accordance with
rules", is correct ?

(3) Whether the direct recruits
could claim a retrospective date of
recruitment from the date on which
the post in direct recruitment was
available, even though the direct
recruit was not appointed by that
date and was appointed long
thereafter ?"

As regards the quota rule, the Court referring to
the dicta of the Constitution Bench in Direct
Recruitment Class II Engineering Officers' Association
(supra) held that quota rule as far as possible should
be followed.

Ban on direct recruitment was an outcome of a
policy decision of the corporation. The legality of
the said policy decision on the part of the
corporation was not questioned by the direct recruits
on the ground of mala fide or otherwise. A suitable
candidate was, thus, not available in terms of the
extant regulations, which should receive a broad
interpretation. When in terms of a policy decision, no
appointment can be made, the question of finding out a
suitable candidate would not arise. Having regard to
the policy decision of the corporation the question of
considering the candidature of any person for direct
recruitment at the relevant time, thus, did not arise.
The said policy decision evidently had presumably been
taken keeping in view the financial health of the
corporation. It is well settled that only because
certain vacancies existed, the employer cannot be
forced to employ persons against their will. If the
ban order was not questioned and the same had been
followed over a period of more than 10 years, an
inference has to be raised that the quota rule had
broken down.

The following observations of this Court in Suraj
Prakash Gupta (supra) are furthermore worth noticing:
"We shall next refer to the
contention for the direct recruits
that "rota-quota" rule is to be
applied. Before us, it is not
disputed by the learned counsel for
the direct recruits that in the
Recruitment Rules, 1978, there is
only a quota rule and that no rota
rule has been expressly prescribed."

It categorically held that the principles of
"rota" cannot be employed to the quota rule and the

same can break down because of past practice. Even this aspect of the matter has not been considered by the High Court.

As regard point No.3 the Division Bench in Suraj Prakash (supra) took into consideration a large number of earlier decisions of this Court and held that services of ad hoc/stop gap service of promotees can be regularized. The court noticing the decisions relating to the employees governed by the service regulations framed by the State of Andhra Pradesh (which are in pari materia with the rules in question) in no uncertain terms held that services of an employee can be regularized with retrospective effect. This court while arriving at the said conclusion also relied upon a large number of decisions arising from other states which also support the legal principle that the regularization of the promotees with retrospective effect is permissible in law. It was categorically held:-

"Service of the promotees which is regularized with retrospective effect from the date of vacancies within the quota counts for seniority."

This court in no uncertain terms repelled the contention that if promotees occupied the quota belonging to the direct recruits they had to be pushed down whenever direct recruitment was made, stating:-

"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 born in the service."

The direct recruits of 1990 and 1991 by reason of the impugned seniority list could not, thus, have been placed over and above the appellants.

Furthermore, in a case of this nature this court shall not consider the matter relating to allocation of vacancy in term clause (1) of Appendix 'A' as a rigid formula; in terms whereof even the promotees would be denied seniority from the date of regularisation. The regulation governing the field clearly suggest that in a case of this nature the promotees should be held to be senior to the direct recruits. Regulation 3 clearly states that respective dates of first appointment in service shall be the determinative factor. If the rules governing appointment contained in Appendix 'A' could not be given effect to for good and valid reasons, the quota rule, if any, must be held to have broken down. In any event as Regulation 18 permits

regularisation of promotion with retrospective effect; in absence of any challenge to the office order dated 31.1.1988, the court must give effect thereto in terms whereof the appellants were placed on probation with effect from 21.07.1986 which must be considered to be the crucial date for determining the seniority. The regulations in my opinion should be read in a manner so that a meaningful effect thereto can be given.

In Rudra Kumar Sain and Ors. vs. union of India and Ors. [2000 (8) SCC 25] a Constitution Bench Of this Court while considering the relevant provisions of Delhi Higher Judicial Services Rules held that the concept of 'cadre' is larger than the 'service' under the recruitment rules. While following the earlier decision of this Court in O.P. Singla and Anr. Vs. Union of India & Anr.[1984 (4) SC 450] it was observed:

"We are also unable to accept the contention of Mr. Subramaniam that until the principle of "quota" provided in Rule 8 is made applicable to appointments under Rules 16 and 17, such appointees, under Rules 16 and 17 cannot claim continuous length of service for their seniority. Such a contention appears to have been considered and negatived in Singla case ((1984) 4 SCC 450 : 1984 SCC (L&S) 657 : (1985) 1 SCR 351). The judgment of this Court in Singla case ((1984) 4 SCC 450 : 1984 SCC (L&S) 657 : (1985) 1 SCR 351) is obviously intended to evolve some equitable principle for determination of inter se seniority of a group of officers, when the Rule of seniority contained in Rule 8(2) has been held to be not operative because of breaking down of "quota and rota" Rule. To meet the peculiar situation, the Court evolved the principle that continuous length of service should be the criteria for inter se seniority between the direct recruits and the promotees, provided, the promotees did possess the required qualification as per Rule 7 and the appointments had been made under Rules 16 and 17, after due consultation and/or approval of the High Court, which in our view also is the most appropriate basis, evolved in the fact-situation. This being the position, we see no justification for reconsidering the decision of this Court in Singla case ((1984) 4 SCC 450 : 1984 SCC (L&S) 657 : (1985) 1 SCR 351). That apart, the Recruitment Rules have been amended in the year 1987 and the aforesaid principle, which had

been evolved in Singla's case ((1984) 4 SCC 450 : 1984 SCC (L&S) 657 : (1985) 1 SCR 351) would apply for determining the inter se seniority between the promotees and direct recruits, all of whom had been appointed to the Higher Judicial Service, prior to the amendment of the Rules in question, which was made in the year 1987."

The court further held that if a strict construction to the different provisions of the rules is given then all the temporary appointees under Rule 16 who might have rendered 5 to 10 years of service would be denied of their right for the purpose of seniority observing:

"It is this impasse created on account of inaction of the authorities and on account of non-adherence to the provisions of the Rules strictly, which persuaded the Court in Singla case ((1984) 4 SCC 450 : 1984 SCC (L&S) 657 : (1985) 1 SCR 351) to evolve the principles for working out equities and that principle has to be followed by the High Court in drawing up the seniority list."

Furthermore when two interpretations are possible; the one which promotes justice and equity should be preferred. Although hardship cannot not be a ground for striking down a law but when two views are possible, it is permissible in law that the court shall interpret the statutory provision in such a manner so that possible hardship is avoided.

In Mahadeo Oil Mills and Others Vs. Sub-Divisional Magistrate Araria and Others [AIR 1978 Patna 86], it was held:

"...I am aware of the well settled rule of construction that the argument from inconvenience and hardship is a dangerous one and is only admissible in construction of statutory provisions where there are alternative methods of construction. But another principle which has to be borne in mind is that if too literal an adherence to the words of an enactment appears to produce an absurdity and injustice, it will be the duty of the Court of construction to avoid such a result in case the enactment is capable of any other fair interpretation. As Maxwell on the Interpretation of Statutes, Twelfth Edition, points out at p.43,

"It was stated in this way by Parke B.: 'It is a very useful rule, in the construction of a statute, to

adhere to the ordinary meaning of the words used, and to the grammatical construction, unless that is at variance with the intention of the legislature, to be collected from the statute itself, or leads to any manifest absurdity or repugnance, in which case the language may be varied or modified, so as to avoid such inconvenience, but no further.' 'If', said Brett L.J. 'the inconvenience is not only great, but what I may call an absurd inconvenience, by reading an enactment in its ordinary sense, whereas if you read it in a manner in which it is capable though not its ordinary sense, there would not be any inconvenience at all, there would be reason why you should not read it according to its ordinary grammatical meaning.'

Yet again in Commissioner of Income Tax, Bangalore Vs. J.H. Gotla, Yadagiri [(1985) 4 SCC 343], this Court held:

"47...Though equity and taxation are often strangers, attempts should be made that these do not remain always so and if a construction results in equity rather than in injustice then such construction should be preferred to the literal construction..."

For the aforementioned reasons I respectfully dissent with the opinion of Brother Kapadia, J., I would allow this appeal.