

CASE NO.:
Appeal (civil) 1262 of 2004

PETITIONER:
State of U.P. and Anr.

RESPONDENT:
Dinkar Sinha

DATE OF JUDGMENT: 09/05/2007

BENCH:
S.B. SINHA & MARKANDEY KATJU

JUDGMENT:
JUDGMENT

S.B. SINHA, J.

1. Whether in the facts and circumstances of this case, the respondent herein was entitled to seniority on the basis of his Commissioned Service in the Army is the question involved in these appeals which arises out of the judgment and order dated 8.02.2002 passed by the Lucknow Bench of the High Court of Judicature at Allahabad in Writ Petition No. 1754 (SB) of 2000.

2. The Governor of the then United Province (now the State of Uttar Pradesh) in exercise of his power under Section 241 of the Government of India Act, 1935 framed U.P. Police Service Rules, 1942 (for short "the 1942 Rules"). The terms and conditions of the services of the employees including recruitment thereto are governed thereby. Rule 21 of the 1942 Rules reads as under:

"Seniority in the Service shall be determined according to the date of the order of appointment in a substantive capacity and if two or more candidates are appointed on the same date, their seniority inter se shall be determined according to the order in which their names appear in the order of appointment:

Provided that-

(1) The inter se seniority of direct recruits selected in one batch shall be determined according to their merit at the selection but a candidate may lose his seniority if he fails to join without sufficient reasons when appointment is offered to him and the decision of the Governor as to the sufficiency of the reasons shall be final;

(2) The inter se seniority of the promotees, selected at one selection, relating to one particular year of recruitment shall be determined according to their seniority in the post from which they are promoted;...

(5) Vacancies are required to be filled on every occasion both by direct recruitment and promotion and the inter se seniority of persons appointed by promotion and direct recruitment against the vacancies of a particular year, shall be determined by arranging their names alternatively, the first name being of the person appointed by promotion, and placing the names of the remaining persons below en bloc.

Explanation.- A direct recruit will not be entitled to seniority of the year earlier to the year of his recruitment solely on the ground that there had been no recruitment in that year."

3. The said Rule upon coming into force of the Constitution of India, continued to remain in force in terms of Article 372 of the Constitution of

India. The President of India proclaimed Emergency on 1.11.1962 under Article 352 of the Constitution of India consequent upon the Chinese aggression. On account of grave threat to the security of India, a large scale recruitment of officers was to be made therefor. To answer the call of the nation, a large number of young persons gave up their softer career options and got themselves recruited to the Armed Forces of the Union of India to serve the motherland. The Emergency so proclaimed was revoked on 10.01.1968.

4. The Governor of U.P. on or about 29.03.1968 framed rules known as U.P. Non Technical (Class-II) Services (Reservation of Vacancies for the Demobilized Officers) Rules, 1968 (for short "the 1968 Rules") for a period of five years whereby and whereunder inter alia reservation to the extent of 20% of the vacant posts were conceived for demobilized officers who had been commissioned in the Armed Forces during the Emergency. For the said purpose, relaxations were also made in certain areas. Rule 4 of the 1968 Rules provided grant of seniority to such demobilized officers by raising a legal fiction, subject however to the condition, that they would be deemed to have entered service at their second opportunity of competing for recruitment.

5. On or about 3.12.1971, in the wake of Indo-Pak war with regard to Bangladesh imbroglio, another external Emergency was proclaimed. A large scale recruitment was also made to Short Service and Emergency Commission wherein again many young persons opted to join the Armed Forces of the Union of India.

6. The Governor of U.P. on or about 6.08.1973 framed rules known as U.P. Non Technical (Class-II) Services (Reservation of Vacancies for the Demobilized Officers) Rules, 1973 (for short "the 1973 Rules") containing similar provisions. However, the extent of reservation was reduced from 20% to 10%. The benefit of the 1973 Rules was extended only to those officers who were commissioned between 1.11.1962 to 10.01.1968 and upto those who joined on or after 3.12.1971 and released at any time thereafter. The 1973 Rules were made applicable for a limited period of five years. It expired on 5.08.1978.

It appears that a GO bearing No. 2003 was issued by the Government of U.P. on 20.08.1977 providing for reservation to the extent of 8% only which was eventually reduced to 2% in Class - II and Class - III Services of the State Government.

7. A new set of Rules known as U.P. Non Technical (Class - II/ Group "B" Services) Appointment of Demobilized Officers Rules, 1980 (for short "the 1980 Rules") was made by the State on or about 19.08.1980 for the purpose of regularizing the appointments of demobilized officers whose selection process had been commenced or concluded under the 1973 Rules but appointments had not been made before the expiry thereof.

Indisputably, the 1980 Rules do not contain any provision in regard to reservation of vacancies for the demobilized officers of the Armed Forces of the Union of India.

8. Interpretation and/ or application of the said Rules and the precedents operating in the field are required to be considered in this case in the aforementioned backdrop.

A process of selection started in the case of the respondent in the year 1973 in the Engineering Corps of the Indian Army. He was selected therefor. He joined the pre-commissioned training on 18.05.1978 and was commissioned as an officer of the Indian Army only from 17.03.1979. In the meanwhile, Emergency was lifted on 27.03.1977. He was discharged from the Indian Army on 18.05.1988. Pursuant to the selection in respect of the vacancies which arose in the year 1984, he joined U.P. Police Service as an ex-Army officer against 8% vacancies reserved for such ex-Army persons in

terms of the aforementioned GO dated 20.08.1977.

9. We may notice that interpretation of the 1968 Rules as also the 1973 Rules came up for consideration before this Court in *Narendra Nath Pande and Ors. v. State of U.P and Ors.*, [1988] 3 SCC 527, wherein it was held:

"...There is a question of competing in the examination. Rule 6 does not provide for any gap to be taken into consideration, yet it is apparent that some reasonable period has to be allowed to a candidate so as to enable him to avail himself of the opportunity of appearing at the competitive examination for his recruitment in the Provincial Civil Service. It cannot be gainsaid that to compete in the examination, a candidate has to make preparation for that. Competitive examinations are generally difficult and, in our opinion, at least two years' time should be allowed to a candidate, after his discharge, for his preparation for the competitive examination and that will be his first opportunity. The second opportunity will arise in the next year, that is, in the third year of his discharge from the armed forces. In other words, he should be allowed three years or competing in the relevant examination for recruitment in the civil service.

14. Even after he becomes successful, he is not recruited immediately. There is the question of availability of vacancies and posting. It is common knowledge that some time is taken for posting. On a proper construction of Rule 6, the period spent by a candidate for competing in the examination which, in our opinion, will not be more than three years, and the period of time taken for his recruitment or posting will also be taken into consideration for the purpose of computing the seniority of a war service candidate. Thus, if a candidate is discharged in the year 1968, he should be given three years' time to avail himself of the opportunity of competing in the examination. Suppose, he is successful in the examination held in 1971 and posted in 1973. In view of Rule 6, he would be deemed to have entered service at the second opportunity of competing for recruitment and the entire period from the date of assumed entry in the service up to his recruitment in 1973 shall be taken into account for the purpose of computing seniority and pay. If, however, a candidate does not avail himself of the opportunity within three years of his discharge from war service or takes the examination but becomes unsuccessful, the period between his discharge and subsequent recruitment will not be taken into account for the purpose of computing the seniority. Rule 6 should be given a reasonable interpretation..."

Yet again, the question in regard to determination of seniority of the Deputy Superintendents of Police in terms of Rule 21 of the 1942 Rules came up for consideration before this Court in *Rana Randhir Singh and Ors. v. State of U.P. and Ors.*, [1989] Supp. 1 SCC 615].

10. With a view to meet the requirements of the judgment of this Court in *Narendra Nath Pande (supra)*, the 1980 Rules were amended in terms whereof Rule 5 was applied limiting to three years' maximum seniority over and above the seniority given for the period served by the candidate in the Armed Forces. Diverse Rules were again framed with which we are not concerned at this stage, but we may note that by U.P. Act No. 29 of 1999, reservation in favour of the ex-servicemen in Group A and B Services in the State of U.P. was abolished.

11. Respondent was placed at Serial No. 137 in the seniority list as belonging to the 1984 batch as a direct recruit. Shri Surendra Singh Negi, a direct recruit of the 1976 batch was placed at Serial No. 14. Respondent made a representation to give to him the benefit of the 1980 Rules, which was rejected by the State Government by an order dated 14.09.2000 stating that:

(i) he joined the Indian Army after the expiry of the Proclamation of Emergency;

(ii) he cannot be considered as a demobilized candidate after the expiry of the 1973 Rules;

(iii) The 1980 Rules had limited applicability, viz., only to those officers whose selection process had commenced and concluded prior to 6.08.1978.

12. Respondent aggrieved thereby filed a writ petition before the Lucknow Bench of the High Court of Judicature at Allahabad. Those who were above him in the seniority list, being 118 in number and who would have been affected if a relief had been granted, were, however, not impleaded as parties in the said petition.

We may furthermore notice that on 19.12.2000, the Uttar Pradesh Non-Technical (Class - II/ Group "B") Services (Appointment of Demobilized Officers) (Second Amendment) Rules, 2000 (for short "the 2000 Rules") were framed. These Rules have been given retrospective effect, i.e., from 6.08.1978. However, on 3.02.2001, the State made third amendment in the 1980 Rules restoring the original position prevailing before coming into force of the 2000 Rules as the said Rules were held to be illegal having been framed in violation of the judgment of this Court in Ram Janam Singh v. State of U.P. and Anr., [1994] 2 SCC 622].

By reason of the impugned judgment, the said writ petition has been allowed.

13. The learned counsel appearing on behalf of the appellants and the intervenor, would, in support of these appeals, inter alia submit:

(i) The 1980 Rules cannot be said to be retrospective in nature nor the same is in continuation of the 1973 Rules and in that view of the matter, the High Court committed a manifest error in passing the impugned judgment.

(ii) The 1980 Rules have a limited application insofar as the same sought to protect only those officers in whose cases the recruitment process started in the year 1973 and were not applicable in the cases of those who were recruited after it came into force.

(iii) Whereas the 1973 Rules provided for reservation, the 1980 Rules did not provide for any, save and except to a limited extent and, thus, the same could not be applied in the case of the respondent.

(iv) Respondent was recruited against the vacancies which arose in the year 1984 only in the year 1988 and, thus, having been appointed in the State's service only on 17.03.1979, the 1980 Rules or the 1973 Rules could not have any application in the case of the respondent.

(v) The Seniority was given only to the Emergency Commissioner officers.

(vi) In view of the decision of this Court in Ram Janam Singh v. State of U.P. and Another (1994) 2 SCC 622, wherein law has been laid down as to who would get the benefit of the 1980 Rules, the impugned judgment must be held to be bad in law.

14. Mr. Nagendra Rai, learned senior counsel appearing on behalf of the respondent, on the other, submitted:

(i) Respondent was selected in 1976 and having been given seniority during the period of Emergency, the 1973 Rules, as incorporated by reference, the 1980 Rules will apply.

(ii) In view of the decision of this Court in Dilbag Singh v. State of U.P. and Ors., [1995] 4 SCC 495 as well as that of a 3-Judge Bench of this Court in Mahesh Chand and Ors. v. State of U.P. and Ors., [2000] 10 SCC

492, Rule 5 of the 1980 Rules must be held to have a wider application and would also cover cases where the 1973 Rules would apply.

(iii) In any event, the respondent having acquired a vested right in terms of the 1973 Rules, the impugned judgment should not be interfered with.

15. Admittedly, the 1968 Rules governed the field during the period November, 1962 and January, 1968, but the same would have no application in the instant case. Applicability of the 1973 Rules is in question. The said Rules, as noticed hereinbefore, remained in force only for a period of five years from the date of its commencement, i.e., 6.08.1973.

Rule 3 of the 1973 Rules provided for reservation of vacancies inter alia for those who were Emergency Commissioned Officers before 10.01.1968 and again on or after 3.12.1971.

The 1980 Rules defined demobilized officers in the following terms:

"Demobilised Officer" means Disabled defence Service Officer, Emergency Commissioned Officer and the short service commissioned officer, of the Armed Forces of the Union who was commissioned on or after November 1, 1962 but before January 10, 1968 or on or after December 3, 1971 and released at any time thereafter."

Rule 4 of the 1980 Rules provided for appointment stating:

"4. Appointment .-A person selected for appointment to a non-technical Class II/Group 'B' service or post against the vacancies reserved for demobilised officers, as a result of recruitment, the process of which was concluded or commenced prior to August 6, 1978, in accordance with the provisions of the Uttar Pradesh Non-technical (Class II) Services (Reservation of Vacancies for Demobilised Officers) Rules, 1973 (hereinafter to be referred to as the said rules), shall be eligible and be considered for appointment against the vacancies reserved for demobilised officers under the said rules:

Provided that the reserved vacancies shall be utilised first for the appointment of disabled defence service officers, and, if any such vacancies still remain unfilled, the same shall then be made available to other emergency commissioned officers and short service commissioned officers.

Explanation-The notification of vacancies or the advertisement thereof by the Commission shall, among others, be a process of recruitment within the meaning of this rule."

16. Rule 5 of the 1980 Rules provided for seniority and pay of persons appointed against the vacancies referred to in the 1973 Rules, the relevant portion whereof reads, thus:

"5. Seniority and pay.-(1) Seniority and pay of persons appointed against the vacancies referred to in the said rules shall be determined on the assumption that they entered the service concerned at the second opportunity of competing for recruitment, and they shall be assigned the same year of allotment as successful candidates of the relevant competitive examination:..."

17. Seniority may not be a fundamental right, but is a civil right. [See *Indu Shekhar Singh and Ors. v. State of U.P. and Ors.*, [2006] 8 SCC 129, *Bimlesh Tanwar v. State of Haryana and Ors.*, [2003] 5 SCC 604 and *Prafulla Kumar Das v. State of Orissa*, [2003] 11 SCC 614. Infringement of the said right would be permissible only if there exists any rules validly framed under a statute and/ or the proviso appended to Article 309 of the Constitution of India. It cannot act in a vacuum. Any rule taking away

such rights would deserve strict construction.

18. The 1968 Rules, the 1973 Rules and the 1980 Rules were framed with a view to encourage young men to join Indian Army. They were made with a view to meet particular exigencies. Whereas the 1968 Rules and the 1973 Rules were primarily made for providing reservation to vacancies for demobilized officers, the 1980 Rules sought to achieve a different purpose, as it does not provide for any reservation.

Whereas Rule 3(1) of the 1973 Rules provided for reservation of 10% to the Emergency Commissioned or Short Service Commissioned officers who were commissioned during the period mentioned therein, Rule 4 thereof conferred benefit on persons appointed only in that category. Benefit of seniority and pay was to be extended on such employees on assessment of their second opportunity of competing. Such second opportunity was to be counted from the date of birth in respect of minimum age for competing. The State made the said provision only for a section of employees who might have intended to sacrifice their soft career during the period of Emergency as recruitment process in their case might have started during the period when the 1973 Rules were in force but could not be completed. The 1980 Rules seek to give limited retrospective effect by conferring benefits in regard to appointment to the reserved post for the demobilized officers whose process of recruitment was to be completed or commenced before 6.08.1978 in accordance with the 1973 Rules. Rule 5 of the 1980 Rules, however, is in pari materia with Rule 6 of the 1973 Rules.

19. Respondent had never contended that his case was governed by the 1973 Rules. He proceeded on the basis that only because the process of selection started in the year 1975, and he having been selected when the 1973 Rules were applicable, his case for recruitment did not come within the purview of the reserved category of candidates as envisaged under the 1973 Rules which, it will bear repetition to state, was in force only upto 5.08.1978.

20. Submission of Mr. Rai that the respondent having joined the pre-commissioned training in 1976 would be entitled to the benefit of the 1973 Rules or thereby rights were accrued to him, in our opinion, has no merit.

The 1980 Rules, as noticed hereinbefore, only have a limited operation by regularizing appointments of demobilized officers whose selection process had been commenced or concluded under the 1973 Rules but appointments had not been made before the expiry thereof. There was no provision for reservation of vacancies for the demobilized officers of the Armed Forces of the Union of India.

21. The 1973 Rules was a temporary statute. It died its natural death on expiry thereof. The 1980 Rules does not contain any repeal and saving clause. The provisions of the relevant provisions of the General Clauses Act will, thus, have no application. Once a statute expires by efflux of time, the question of giving effect to a right arising thereunder may not arise. In any event, in this case, no such right accrued to the respondent. Reservation to the extent of 2% might have been fixed by reason of a Government Order issued in the year 1977 but the same had nothing to do with the 1973 Rules or with the 1980 Rules. Provision for reservation made in general by the State in exercise of its executive power could not have conferred a benefit in terms of the provisions of a rule which seeks to apply to a particular category of employees in the service.

22. The 1980 Rules neither repealed nor replaced the 1973 Rules. The question of continuation of the 1973 Rules by the 1980 Rules, thus, did not and could not arise. The 1980 Rules provided for a new set of rules. They were to have a limited application, viz., regularization of appointment of demobilized officers.

Not only the nomenclature of the 1980 Rules is different from that of the

1973 Rules, the purport and object is also different. Whereas the 1973 Rules provided for reservation of vacancies for the demobilized officers, the 1980 Rules provided for appointment of demobilized officers to a limited category of employees.

23. The 1980 Rules to the aforementioned effect has been given a retrospective effect, i.e. from 6.08.1978 only for achieving the said purpose noticed hereinbefore. By reason thereof, thus, the 1973 Rules had not been kept alive. We may at this juncture notice that Lahoti, J. (as the learned Chief Justice then was) in *Ramji Purshottam (Dead) by LRs. And Ors. v. Laxmanbhai D. Kurlawala (Dead) By LRs. And Anr.*, [2004] 6 SCC 455 stated:

"14. Justice G.P. Singh states in *Principles of Statutory Interpretation* (9th Edn., 2004, at p. 462)-

"[T]he fact that a prospective benefit under a statutory provision is in certain cases to be measured by or depends on antecedent facts does not necessarily make the provision retrospective. ... the rule against retrospective construction is not always applicable to a statute merely 'because a part of the requisites for its action is drawn from time antecedent to its passing'."

In *Shah Bhojraj Kuverji Oil Mills and Ginning Factory v. Subhash Chandra Yograj Sinha* the Constitution Bench held that Bombay Act 57 of 1947 is a piece of legislation passed to protect the tenants against the evil of eviction. And the benefit of the provisions of the Act ought to be extended to the tenants against whom the proceedings are pending on the date of coming into force of the legislation."

24. In *Dilbag Singh* (supra), whereupon strong reliance has been placed by Mr. Rai, the appellant therein was commissioned on 22.09.1974 and in the aforementioned situation, it was held that the selection process having started after 1973 and he having been appointed during the period when the 1973 Rules had been into force, by reason of Rule 5 of the 1980 Rules, the 1973 Rules must be deemed to be in operation till then. The decision of this Court in the fact of that case may be correct but then it is distinguishable in the sense that in the instant case the respondent had joined Commissioned Service only in the year 1979. Whether he was selected as a Commissioned officer or whether he had undergone pre-commissioned training is not relevant for applicability of the 1980 Rules. What was relevant is as to from which date he became a Commissioned Officer. If he became a Commissioned Officer only after 5.08.1978, i.e., after the expiry of the 1973 Rules, the question of his getting any benefit under the 1973 Rules would not arise.

The same principle has been reiterated in *Mahesh Chand* (supra) wherein this Court held:

"6. The scope of Rule 5 is wider. It regulates the seniority and pay of persons appointed against vacancies referred to in the 1973 Rules. Therefore, while it may cover those who are appointed under Rule 4, it also covers all others who are appointed against vacancies referred to in the 1973 Rules. That being so, the judgment in the case of *Dilbag Singh* which construed Rule 5, does not require reconsideration on the ground that Rule 4 was omitted from consideration."

It is, therefore, evident that the 1980 Rules would cover only those persons who were appointed against the vacancies referred to in the 1973 Rules and not those who joined much later.

25. The purport for which such benefits had been given has been considered in *Ram Janam Singh* (supra), wherein it has been held:

"14. Can it be said that the persons who had joined Army after the

declaration of emergency due to foreign aggression and those who joined after the war came to an end stand on the same footing? Those who joined Army after revocation of emergency joined Army as a career. It is well known that many persons who joined army service during the foreign aggression, could have opted for other career or service. But the nation itself being under peril, impelled by the spirit to serve the nation, they opted for joining Army where then risk was writ large. No one can dispute that such persons formed a class by themselves and by rules aforesaid an attempt has been made to compensate those who returned from war if they compete in different services. According to us, the plea that even persons who joined army service after cessation of foreign aggression and revocation of emergency have to be treated like persons who have joined army service during emergency due to foreign aggression is a futile plea and should not have been accepted by the High Court. It need not be impressed that whenever any particular period spent in any other service by a person is added to the service to which such person joins later, it is bound to affect the seniority of persons who have already entered in the service. As such any period of earlier service should be taken into account for determination of seniority in the later service only for some very compelling reasons which stand the test of reasonableness and on examination can be held to be free from arbitrariness."

26. Respondent in this case admittedly joined the services after the Emergency was over. Furthermore, he joined the State service only in the year 1988 when the 1980 Rules ceased to have any force.

27. For the reasons aforementioned, we are of the opinion that the impugned judgment cannot be sustained. It is set aside accordingly. The appeals are allowed. No costs.