

CASE NO.:
Appeal (civil) 5573 of 2006

PETITIONER:
State of Uttaranchal & Anr Appellant (s)

RESPONDENT:
Dinesh Kumar SharmaRespondent(s)

DATE OF JUDGMENT: 04/12/2006

BENCH:
Dr. AR. Lakshmanan & Altamas Kabir

JUDGMENT:
JUDGMENT

(Arising out of SLP (C) No. 12966/2005)

Dr. AR.Lakshmanan, J
Leave granted.

This civil appeal is preferred against the final order and judgment of the High Court of Uttaranchal at Nainital, which held that, it was appropriate to consider the grant of discretionary relief to the Respondent in his promotion and consequential benefits.

The brief facts of the present matter are enumerated below.

On 25.10.1977, the respondent, Mr. Dinesh Kumar Sharma was appointed as Subordinate Agriculture Services Group-I on the post of Senior Chemical Assistant, Research (Chemistry) Branch through the Public Service Commission, U.P. Allahabad. Fifteen years service in Subordinate Agriculture Service Group-I is the eligibility criteria for being considered for next higher promotion. In the year 1992-93, respondent became eligible for the said promotion.

On 31.03.1995, the Governor of Uttar Pradesh promulgated U.P. Agricultural Group II Service Rules 1995 providing for the selection, appointments, probation, seniority, promotion etc. Rule 21 states that the date of substantive appointment will be the basis of promotion. On 01.04.1996 and 01.05.1996, two class-II posts in the Hill sub cadre became vacant due to retirement of two officers. These appointments were to be made by Direct Recruitment as well as Promotion. Rule 17 states that, if in any year of recruitment appointments are made both by direct recruitment and promotion a combined select list be prepared by taking the names from the relevant list and "the first name in the list will be of the person appointed by promotion".

On 19.11.1999, the Secretary to government of Uttar Pradesh of the Agriculture Department issued an order conveying that the respondent has been selected for subordinate Agriculture Service Class-I (Chemistry) in the substantive vacancy for the year 1997-98 in the scale of Rs.8000-275-13500, after consultation with the State Public Service Commission.

On 04.04.2001, the U.P Government Agriculture Department issued an order directing that those employees who were already members of the Hill Sub Cadre and posted at Uttaranchal have been finally allocated to Uttaranchal Government in which the name of the respondent was shown at serial No.30.

Thereafter on 17.07.2001 & 27.05.2002, the respondent made two representations to the Department contending that his seniority may be counted from the year 1995-96 with all the consequential benefits as the vacancies fell vacant in that year. Further on 12.06.2002, the respondent made another representation stating that his earlier two representations were not decided upon and that he should be promoted with effect from the date of occurrence of vacancy.

On 01.10.2002, the Government of Uttaranchal issued Office Memorandum conveying its decision of rejecting the claim made by the respondent.

The respondent filed Writ petition No.369/2004 on 21.11.2004 praying the High Court to issue a writ of Mandamus to promote him with effect from 1995-96 with all consequential benefits. However, the respondent in his writ petition has suppressed the fact that the Government had denied the claim the respondent had made by way of representations dated 17.07.2001, 27.05.2002 and 12.06.2002. The appellants filed their counter affidavit stating the rejection of the claim of the respondent in the High Court on 23.03.2005.

The Division Bench of the High Court of Uttaranchal vide its final order and judgment dated 29.03.2005 held that, "the Government is directed to re-consider the matter and send it back to the Commissioner for appropriate orders suitable in the facts and circumstances of the case."

It is against this order of the High Court the appellants are before this Court by way of special leave.

After a perusal of the facts involved here, we feel that the issues that need to be addressed by us in this case are:

i) Whether the respondent has the right to claim promotion and seniority from 1995-96 when the vacancy arose or whether his seniority will be reckoned from the date of substantive appointment which is in the year 1999.

ii) Whether the High Court was justified in overlooking and ignoring the provisions of the U.P. Government Servants Seniority Rules, 1991 and grant a relief in favour of the respondents.

We heard Mr. Gaurav Banerjee, learned Addl. Advocate General, appearing for the appellant the State of Uttaranchal, and Mr. Satyajit A. Desai, learned counsel appearing for the respondent.

Learned Addl. Advocate General submitted on behalf of the appellants that the promotion and seniority are determined by applying The U.P. Government Servants Seniority Rules, 1991 and The Uttar Pradesh Agriculture Group "B" Service Rules, 1995. According to these Rules and settled legal position by way of decisions of this Court it is clear that, to claim promotion and seniority from the years 1995-96 when the vacancy arose is unreasonable and unsustainable. It was submitted by the appellants that the High Court was not justified in overlooking and ignoring the U.P. State Agriculture Group II proviso to Article 309 of the Constitution of India which have been held to be binding by a decision of this court in the case of K.V. Subba Rao & Ors. vs. Government of Andhra Pradesh & Ors. 1988 (2) SCC 201, where this Court held that, promotion and seniority shall be reckoned from the date of appointment not retrospectively from the date when the vacancy arose.

It was further submitted that the decision to promote the respondent was taken by the appellants in accordance with the Service Regulations present in U.P and that no interference could be made to such orders. Also that, the High Court was not justified in overlooking the Statute Law as well

as the case laws where it is stated in clear terms that, seniority is determinable with reference to the date of substantive appointment. This was the view taken by this Court in K.V. Subba Rao & Ors. vs. Government of Andhra Pradesh & Ors. (supra) Smt. M. Nirmala & Ors vs. State of Andhra Pradesh & Ors. 1986 (3) SCC 647 and Sanjay K. Sinha-II & Ors vs. State of Bihar & Ors 2004 (10) SCC 734. In all these cases this Court has categorically held that seniority must be reckoned from the date of substantive appointment under the relevant rules and also that the right to frame rules for the determination of inter-se seniority is the prerogative of the State.

Concluding his arguments Learned Addl. Advocate General stated that the High Court was not justified in overlooking and ignoring the provisions of the U.P. Government Servants Seniority Rules, 1991 and various decisions of this Court in the subject and grant a relief in favour of the respondents. It was also contended that the High Court was not justified in overlooking the fact of suppression of material facts indulged by the respondent when he approached the High Court.

Mr. Satyajit.A.Desai, learned counsel appearing for the respondent submitted that the High Court rightly noticed that the appellant authority had failed to appreciate that the vacancy arose in the year 1995-96 i.e. on 01.05.1996 and second vacancy on 01.06.1996 and this fact had come to the knowledge of the Commission, the Commission could have given promotion to the respondent w.e.f. those dates as the respondent was entitled for the same, since the Commission has found him suitable for the post which is evident from the promotion order dated 19.11.1999. Thus the said lapse on the part of the appellant authority in communicating the authentic and correct date of vacancy to the Commission has a serious effect on the consequential benefits of the respondent. Therefore, it was rightly held by the High Court that, 'the order dated 01.10.2002 clearly suffers from the non-application of mind and is hereby liable to be ignored. This is more so in view of the fact that the vacancy had fallen on 01.05.1996 and 01.06.1996 in the recruitment year 1995-1996 for two posts in Hill Sub-cadre II are not disputed by the respondents. Thus in that eventuality the respondent cannot be made to suffer on account of delay in recommendation by the Director of Agriculture for promotion of the respondent.' It was then submitted that, the approach of the appellant authority in holding that "there would be no change in the ranking since the order of substantive appointment was communicated on 19.11.1999 and therefore the promotion can be granted only from the date of substantive appointment" is basically wrong and illegal and dehors the established principles of service jurisprudence and that the said reasoning goes without any support from the concerned service rules as well.

The respondents argued that, it was admitted by the appellant/State before the High Court that the post on promotion quota had become vacant in April 1996 and another post had become vacant in May 1996 on the respective retirement of Shri Mohan Prakash Joshi and Sri Krishna Pandey and the respondent being the senior-most employee and belonging to the hill-cadre ought to have been appointed against the first available vacancy i.e. April, 1996. However, Shri Shyam Singh who was from the plain cadre came to be appointed wrongly out of turn. Since the promotion of the respondent has been recommended on these vacancies, it becomes all the more necessary that promotion and seniority has to be given effect to from the year 1995-96 when the vacancy actually arose. Rule 17 of the Uttar Pradesh

Agriculture Group "B" Service Rules, 1995 and Rule 8 of the U.P. Government Servants Seniority Rules, 1991, specifically provide that the vacancy should be counted from the year when it is created. It further emphasizes that in case of direct selection and selection by promotion if created in the same year in that situation the person coming through promotion quota should be treated as senior.

It was submitted that the denial of the effect to the promotion from 1995-96 affects the overall seniority of the appellant as well as his seniority in Class II for all purposes including pension. This is more so in view of the fact that the respondent has been already officiated on the said promotional post from 28.05.1994 itself as per the directions of the Additional Director, Uttaranchal. Moreover, it is an admitted fact that the record of the respondent has throughout been absolutely clean and unblemished and thus in the absence of any adverse remarks against him there is no justification to deny him promotion w.e.f. May 1996.

It was submitted that the contentions regarding suppression of facts by the respondent before the High Court, as raised by the appellant authority in the present appeal are completely unjustified, baseless, unfair and inconsequential and that the substantive prayer of the respondent before the High Court was regarding the issuance of a writ of mandamus thereby directing the appellant to promote the respondent w.e.f. 1995-96 when the vacancies actually arose and to give all the consequential benefits therein. It was submitted that the order dated 1.10.2002 was before the High Court and it had given sufficient consideration by discussing it thread-bare while passing the impugned order in question. Thus it is clear that the respondent was not acting malafide or suppressing vital facts from the High Court.

We heard the parties in detail and have perused all the records placed before us in this Court and we are of the view that the arguments of the appellants merit acceptance.

With regard to the issue as to whether the respondent has the right to claim promotion and seniority from 1995-96 when the vacancy arose or whether seniority will be reckoned from the date of substantive appointment which is 1999, it can be observed that an employee will be considered member of a cadre from the date of his/her substantive appointment in the cadre after selection.

Substantive appointment is defined under Rule 3 (k) of the Uttar Pradesh Agriculture Group "B" Service Rules, 1995 where:

"Substantive appointment" means the appointment not being an ad-hoc appointment, on a post in the cadre of the service, made after selection in accordance with the rules and if there are no rules, in accordance with the procedure prescribed for the time being by executive instructions issued by the Government.

Therefore it is clear that unless a selection is made in accordance with the rules and in the absence of rules, in accordance with the procedure prescribed for the time being by executive instructions issued by the Government and there can be no automatic promotion or appointment to any post on the recommendation of the Public Service Commission, unless the government sanctions such promotion and appointment.

The perusal of Rule 17 of the Uttar Pradesh Agriculture Group "B" Service Rules, 1995 and Rule 8 of the U.P. Government Servants Seniority Rules, 1991, deserves importance at this stage. Rule 17 states that:

If in any year of recruitment appointments are made both by direct recruitment and by promotion, a

combined select list in respect of the concerned selection shall be prepared by taking the names of candidates from the relevant lists, in such manner that the prescribed percentage is maintained, the first name in the list being of the person appointed by promotion.

This being so, Rule 21 states that:

Seniority- The seniority of persons substantively appointed in any category of posts shall be determined in accordance with the Uttar Pradesh Government Servants Seniority Rules, 1991, as amended from time to time.

Rule 8 of the 1991 Rules state that:

8. Seniority where appointments by promotion and direct recruitment:

(1)\005

(2)\005

(3)\005

Provided that

(i)\005

(ii) where appointment from any source fall short of the prescribed quota and appointment against such unfilled vacancies are made in subsequent year or years, the persons so appointed shall not get seniority of any earlier year but shall get the seniority of the year in which their appointments are made, so however, that their names shall be placed at the top followed by the names in the cyclic order of the other appointees;

(iii)\005

It is clear from the above that a person appointed on promotion shall not get seniority of any earlier year but shall get the seniority of the year in which his/her appointment is made. Therefore, in the present fact situation the respondent cannot claim promotion from the date of occurrence of the vacancy which is 1995-96 but can only get promotion and seniority from the time he has been substantively appointed i.e. from 1999. Likewise, the seniority also will be counted against the promotion/appointment in the cadre from the date of issuance of order of substantive appointment in the said cadre, i.e. from 19.11.1999.

In a recent judgment of this court in Uttaranchal Forest Rangers Association (Direct Recruit) & Ors vs. State of U.P. & Ors 2006(9) Scale 577, (Dr. AR. Lakshmanan and Tarun Chatterjee) this Court was of the view that seniority has to be decided on the basis of Rules in force on the date of appointment, no retrospective promotion or seniority can be granted from a date when an employee has not even been borne in the cadre. Similar view was taken by this Court in the case of K.C. Joshi vs. Union of India 1992 Suppl (1) SCC 272.

In State of Bihar & Ors vs. Akhourri Sachidananda Nath & Ors 1991 Suppl. (1) SCC 334, this Court observed that:

"12. In the instant case, the promotee respondents 6 to 23 were not borne in the cadre of Assistant Engineer in the Bihar Engineering Service, Class II at the time when the respondents 1 to 5 were directly recruited to the post of Assistant Engineer and as such they cannot be given seniority in the service of Assistant Engineers over the respondents 1 to 5. It is well settled that no person can be promoted with retrospective effect from a date when he was not borne in the cadre so as to adversely affect others. It is well settled by several decisions of

this Court that amongst members of the same grade seniority is reckoned from the date of their initial entry into the service. In other words, seniority inter-se amongst the Assistant Engineers in Bihar Engineering Service, Class II will be considered from the date of the length of service rendered as Assistant Engineers. This being the position in law the respondents 6 to 23 can not be made senior to the respondents 1 to 5 by the impugned Government orders as they entered into the said Service by promotion after the respondents 1 to 5 were directly recruited in the quota of direct recruits. The judgment of the High Court quashing the impugned Government orders made in annexures, 8, 9 and 10 is unexceptionable."

This court in Vinodanand Yadav & Ors v. State of Bihar & Ors, 1994 Suppl. (2) SCC 44, held:

"On an issue regarding the inter se seniority among the direct recruits and promotees the Court applying the ratio of State of Bihar v. Akhouri Sachindananda Nath held that the appellants who were direct recruits shall be considered senior over the promotees not borne on the cadre when the direct recruits were appointed in service. Hence the gradation list drawn under which promotees were given seniority over direct recruits could not be sustained and was thereby set aside".

We are also of the view that the right to constitute the selection committee against the vacancy is vested in the government, and after adopting the due procedure of selection, the respondent had been substantively appointed by an order issued by the Secretary, Agriculture, Government of U.P dated 19.11.1999 and this decision of the Government in our view does not call for interference. The order is reproduced as under:

"Government of U.P
Agriculture: Section-I
No. 5653/12-1-99-232/96
Lucknow,
19.11.1999
OFFICE- MEMO

Regarding promotions of Sub-ordinate-Agricultural Services Class-I (Chemistry Branch) as reserved for temporary posts and also for the appointments to regular posts in Agricultural Services Group 'B' Service Rules 1995 as provided therein and according to the provision of U.P.Public Service Commission Advisory Committee for the promotions of selected candidates (Procedure & Rules of 1970) and according to the advice and on the basis of the circumstantial provisions of U.P.Public Service Commission, Allahabad, regarding the selection procedural basis the Hon'ble Governor had recommended the name of Shri. Dinesh Kumar Sharma of Sub-ordinate Agricultural Services Class-I (Chemistry Branch) for being filled against the vacancy so created and existed in the year 1997-98 to the post of Assistant Mrida Chemist to the pay scale of Rs.8000/--275/--13,500/- being Regular Temporary appointment is hereby being recommended.

2. Accordingly Shri Sharma is being appointed to the vacant post of Asst. Mrida Chemist at Haldwani, Nainital.

Sd/-
Kesav Desh Raju
Secretary"

The representations of the respondent dated 17.07.2001 and 27.05.2002 were received by the office of respondent No.1. The said representations of the respondent had been decided by the appellant by a well reasoned and speaking order vide its office memo dated 01.10.2002. It is pertinent to mention here that the respondent had concealed this fact, that his representation has been decided by respondent No.1 long before filing of this writ petition. Thus, the respondent by misleading the Court has obtained the order dated 25.11.2004 from the High Court that the appellant shall decide the representation which has been already decided by the appellant on 01.10.2002.

Another issue that deserves consideration is whether the year in which the vacancy accrues can have any relevance for the purpose of determining the seniority irrespective of the fact when the persons are recruited. Here the respondent's contention is that since the vacancy arose in 1995-96 he should be given promotion and seniority from that year and not from 1999, when his actual appointment letter was issued by the appellant. This cannot be allowed as no retrospective effect can be given to the order of appointment order under the Rules nor is such contention reasonable to normal parlance. This was the view taken by this Court in the case of Jagdish Ch. Patnaik & Ors. vs. State of Orissa & Ors. 1998(4) SCC 456.

Coming to the question of whether the High Court was justified in overlooking and ignoring the provisions of the U.P. Government Servants Seniority Rules, 1991 and grant a relief in favour of the respondents, it will be helpful to reproduce the High Court's order:

"From the perusal of the aforesaid order, it is clear that the authority has not applied its mind on the facts of the case as stated by the petitioner, in the representation, and has rejected the representation on the ground that since the appointment letter was issued to the petitioner on 19.11.1999, therefore he is entitled to his seniority from that date. Even if the recruitment year is changed the order of appointment cannot be made with retrospective effect. The authority has failed to appreciate that if the fact of vacancy being accrued in the recruitment year 1995-96 i.e. on 1st May, 1996 and second vacancy on 1st June 1996 had come to the knowledge of the Commission the Commission could have given the promotion to the petitioner w.e.f. these dates, as the petitioner was entitled for the same and the Commission has found him suitable, which is evident from the promotion order dated 19.11.1999. Therefore, this could have consequently affected the consequential benefits available to the petitioner had his promotion being made w.e.f. the date of promotion of falling of vacancy. Therefore, the order dated 1st October, 2002 suffers from non application of mind and is hereby liable to be ignored."

"The fact that the vacancy had fallen on 1st May, 1996 and 1st June, 1996 in the recruitment year 1995-96 are not disputed by the respondents. The petitioner cannot be made to suffer on account of delay in recommendation by the Director of Agriculture for promotion of the petitioner. The petitioner cannot be

held responsible and cannot be made to suffer as such became entitled to be considered for promotion on 1st May, 1996. Therefore, the government is directed to re-consider the matter and send it back to the Commission for appropriate orders suitable in the facts and circumstances of the case. Subject to the above, the writ petition is disposed off finally."

This observation of the High Court in our view is erroneous. The High Court while observing that, "the appellants rejected the representation of the respondents on the ground that since the appointment letter was issued to the respondent on 19.11.1999, he is entitled to his seniority from that date. The authority has failed to appreciate that if the fact of vacancy being accrued in the recruitment year 1995-96 i.e. on 1st May, 1996 and second vacancy on 1st June 1996 had come to the knowledge of the Commission the Commission could have given the promotion to the petitioner w.e.f. these dates, as the petitioner was entitled for the same and the Commission has found him suitable, which is evident from the promotion order dated 19.11.1999", has committed an error in understanding and appreciating Rule 17 and 21 of the Uttar Pradesh Agriculture Group "B" Service Rules, 1995 and Rule 8 of the U.P. Government Servants Seniority Rules, 1991, which categorically states that the date of 'substantive appointment' will be the date that shall be taken for determining promotion, seniority and other benefits.

It is also to be noted that the representation of the respondent dated 17.07.2001 and 27.05.2002 were received by the office of appellant. The said representations of the respondent have been already decided by the appellant by its well reasoned and speaking order vide its office memo dated 01.10.2002. It will be of benefit to reproduce the office memo here:

"Government of Uttaranchal
Agricultural and Agricultural Marketing Section
No. 133/V.I.P/ Aagri/232/96
Dehradun: Dated: 1. October 2002

OFFICE MEMO

Shri D.K. Sharma Asstt. Director (Soil Testing and Exhibition Centre) Regional Land Testing Laboratory, Rudrapur, Udham Singh Nagar, in his applications dated 17.07.2001 and 27.05.2002 has stated that vacancies had arisen on the retirement of Shri Mohan Prakash Joshi and Shri Krishna Pandey, Agricultural Service, Grade-II, Department of chemistry, from Government Service on 30.04.1996 and since the vacancies existed prior to July 1996 in accordance with the UP Agricultural Services Group B Rules, his promotion should have been effected in the vacancy arising in the selection year 1995-96 from 1.05.1996, while he was promoted against the vacancies arising out of the selection year 1997-98 and therefore his promotion should be made against the vacancy arising in the year 1995-96 and Addl. Director Agricultural and Land Preservation in his letter No. Estab-1/Class II/2001-02/1648 dated 15.09.2001 had recommended the same.

2. In regard to the application of Shri Sharma, whose promotion was made in consultation by the UP Public Service Commission, Allahabad, in accordance with the

Public Service(Procedure) Rules, 1970, towards the vacancies for the Recruitment year 1997-98 vide Office Memo No. 5653 dated 19.11.1991; I am to state that even if the recruitment year of Shri Sharma is to be taken as 1995-96 rather than 1997-98 even then the date of substantive appointment would remain the same being the date the order had been issued. Since Shri Sharma's promotion in respect of the vacancies of the Recruitment year 1997-98 was issued on 19.11.99, therefore the date on which the said order of promotion has been issued being 19.11.1999 it shall remain the date of Shri Sharma's substantive appointment after promotion. As regards the question of entitlement of Shri Sharma to the benefit of the selection grade salary upon selection against the vacancies of 1995-96, the benefit of selection grade salary is available only in the promoted post if the officer is working in the said post for the stipulated period. The grant of promotion pay is for the service after the date of the promotion and not from the date the vacancy arose in the recruitment year.

3. In the light of the above, the applications of Shri D.K. Sharma dated 17.07.2001 and 25.05.2002 are hereby disposed off.

B.P. Pandey
Secretary."

In our opinion, the High Court should not have interfered with this finding of the Appellants and directed them to "consider" the representation of the respondent, which in effect will amount to the reconsideration of the claim made by the respondent.

In the result, we allow the civil appeal filed in this court by the Appellant, the State of Uttaranchal and set aside the judgment dated 29.03.2005 of the High Court of Uttaranchal. However, we are not ordering costs.