

CASE NO.:
Writ Petition (civil) 1023 of 1987

PETITIONER:
DELHI JUDICIAL SERVICES ASSN. & ORS.

Vs.

RESPONDENT:
DELHI HIGH COURT & ORS.

DATE OF JUDGMENT: 01/05/2001

BENCH:
G.B. Pattanaik, S.N. Phukan & B.N. Agrawal

JUDGMENT:

With
Writ Petition(civil) No. 1643/1987.

JUDGMENT

PATTANAIAK, J.

L...I...T.....T.....T.....T.....T.....T.....T...J

The unending dispute between the promotees and direct recruits in Delhi Superior Judicial Service has reached the third round in these two writ petitions and we hope and trust that this will be the final round, at least for quite sometime to come. After the judgment of this Court in Singlas case, way back in 1984, disputes arose in the matter of its implementation and the writ petitions filed in this Court under Article 32 on being referred to a Constitution Bench, on a misconceived notion that the validity of the judgment in Singlas case is pending consideration before a Constitution Bench, remained pending for long 16 years and was finally disposed of by the Constitution Bench since reported in 2000(8) SCC 25, Rudra Kumar Sain and Ors. vs. Union of India and Ors. The dispute was the manner in which the inter se seniority has to be computed between the direct recruits and promotees in Delhi Higher Judicial Service. The present two writ petitions were initially also there before the Constitution Bench, but in view of the fact that the subject matter of dispute was different, an order had been passed to de-link these two matters. Be it be stated that the writ petitions which had been filed and were disposed of by the Constitution Bench on 22.8.2000 was at the behest of the promotee officers. The second round of litigation was at the behest of some direct recruits, claiming seniority over some of the promotees and that stood disposed of on 31.1.2001. These two writ petitions are at the behest of promotee officers, one by the Association and another by an individual. While the Association of promotee officers claimed the relief that the vacancies available prior to 1987, when Delhi Higher Judicial Service Rules stood amended, will have to be filled up under the pre-amended rules and, therefore, the advertisement that was issued on

6.4.1987, inviting applications for filling up 10 posts by direct recruitment must be struck down, the other application by an individual promotee officer assails the validity of Rules 7, 8, 16 and 17 of the amended rules, which were brought on 17th of March, 1987. The brief facts necessary for disposal of these two writ petitions may be stated hereunder. In exercise of powers conferred by the proviso to Article 309 of the Constitution, the Lieutenant Governor of Delhi in consultation with the High Court of Delhi made a set of rules governing the conditions of service of the Members belonging to the Delhi Higher Judicial Service called the Delhi Higher Judicial Service Rules, 1970 (hereinafter referred to as the Rules). The Rules came into force on being published in the Gazette in 1971. The said rules define Initial recruitment in Rule 2(g) to mean the first recruitment and appointment made to the service after the commencement of the rules and Rule 5 provides the method of recruitment to the service subsequent to the initial recruitment and Rule 6 provides the method for having the initial recruitment. Rule 16 conferred power on the Administrator to create temporary posts in the service and also to fill up the same in consultation with the High Court by persons from amongst the members of the Delhi Judicial Service. Thus, the temporary posts created by the Administrator were intended to be filled up by promotion from the Delhi Judicial Service. Rule 17 also enables the Administrator to fill up the substantive vacancies in the service by making temporary appointment thereto from amongst the members of the Delhi Judicial Service in consultation with the High Court. Rule 7 provided that recruitment to the Delhi Higher Judicial Service could be from the Bar by direct recruitment but under the proviso, not more than 1/3rd of the substantive posts in the service could be held by the direct recruits. When writ petitions were filed by some of the promotees, O.P. Singla and Ors., making a grievance as to their continuance on ad hoc or temporary basis for years together and as to the discriminatory treatment that is meted out to them, this Court in 1984(4) SCC 450, (O.P.Singla and Anr. vs. Union of India and Ors.) came to hold that the so-called quota provided in Rule 7 has been broken and, therefore, the seniority has to be counted on the basis of continuous length of service only, excluding the stop-gap or fortuitous appointment. Following the judgment of this Court in S.B. Patwardhan vs. State of Maharashtra, 1977(3) SCC 399, the Court was of the opinion that in a situation where quota and rota rule has inevitably broken down, the seniority between the direct recruits and promotees should be determined according to the dates on which they were appointed to their respective posts, so far as direct recruits are concerned and the dates from which the promotees have been officiating continuously either in any temporary posts created in the service or in substantive vacancies to which they were appointed in a temporary capacity. The seniority list was struck down and a fresh seniority list was directed to be prepared on the basis of continuous length of service. Pursuant to the aforesaid decision of this Court, the High Court examined the matter afresh. But as there was no enunciation of the expression stop-gap, ad hoc and fortuitous, the High Court adopted a peculiar procedure and determined the inter se seniority Aggrieved by the same, when writ petitions were filed, those writ petitions having been referred to the Constitution Bench, stood disposed of on 22.8.2000, indicating the error committed by the High Court and directing the High Court to

re-draw the seniority list on the basis of observations made in the aforesaid Constitution Bench, since reported in 2000(8) S.C.C. 25. It may be stated at this stage that the Govt. of India, Ministry of Law and Justice, communicated the decision to the Judicial Department of Delhi Administration in June, 1986, conveying the sanction of the President of India in respect of the creation of 14 temporary posts of Additional District and Sessions Judges. Since at that point of time under the rules in force, appointment to the temporary posts in the service could be made only by promotion from Delhi Judicial Service, the Association of Promotee officers made a representation to the Chief Justice of the High Court that the newly created temporary posts be filled up by promotion from amongst the members of the Delhi Judicial Service, but that representation having failed to evoke any response from the High Court, a writ petition had been filed in this Court which was registered as Writ Petition No. 1540/1986, praying therein that mandamus be issued to the Lt. Governor of the Delhi Administration as well as the Union of India to fill up the posts of 14 temporary Additional District & Sessions Judges in accordance with the Delhi Higher Judicial Service Rules, 1970. That writ petition was disposed of by an order of this Court dated 18.12.1986, which is quoted herein-below in extenso:

We are indeed happy that the petitioners out of respect for the High Court and having full trust in the High Court have expressed their desire to withdraw the writ petition for the sake of congenial atmosphere between the senior members of the judicial family and the junior members thereof. In the light of consensus emerging at the hearing of the matter we deem it necessary to evolve the formula as outlined hereinafter in order to resolve the problem with expedition and to the satisfaction of all concerned. Counsel appearing for all the parties are agreed that the formula evolved as under is fair and reasonable and all of them are agreeable to the same being embodied in our order, accordingly do so as under:-

I

1. We request the High Court to be good enough to finalise the draft rules latest by January 15, 1987. We request the High Court to strain itself if necessary and to ensure that the draft rules are finalised before the said date and are forwarded to the Delhi Administration and the Union of India for sanction by a special messenger forthwith.

2. We request the Delhi Administration to be good enough to take a decision in regard to the matter pertaining to sanctioning of the draft rules latest by February 9, 1987. We also request the Delhi Administration to treat this as a special case, to cut the delay which ordinarily takes place on account of procedural problems, and take a decision whether or not to grant the sanction on or before the said date. In case sanction is granted the papers be forwarded to the Union of India by a Special Messenger forthwith.

3. We request the Union of India to be good enough to treat this as a special case and to take a decision one way or the other within three weeks of the receipt of the papers from the Delhi Administration. We request that procedural delays may be avoided and a special effort may be made to

ensure that the appropriate decision is taken and is gazette within the aforesaid time span.

4. During the interregnum awaiting the decision of the Delhi Administration and the Union of India we request and authorise the High Court to go ahead with the selection process from amongst the members of the Delhi Judicial Service in the light of the draft rules in anticipation of sanction, so that the selection process is completed to the extent possible by the time the sanction is received.

5. We also request and authorise the Delhi High Court to invite applications from the members of the Bar by way of a public advertisement for making direct recruitment in anticipation of the sanction of the draft rules. When the draft rules are sanctioned the applications which are received will be treated as having been made in pursuance of and under the rules as sanctioned and published by the Competent Authority. After the draft rules are sanctioned and published a further advertisement inviting applications from the members of the bar for direct recruits shall be published within a week of the publication of the rules giving a short notice of 15 days to enable those members of the bar who might not have responded to the first advertisement issued in anticipation of the sanction of the rules as indicated hereinbefore to make application. The selection process in respect of direct recruits by way of interviews etc. will begin after all the applications are received pursuant to both the advertisements. The screening of the applications received in response to the first advertisement issued in anticipation of the sanction of the draft rules may be undertaken meanwhile to save time.

6. We further request the High Court to make the selection and forward its recommendations for filling the posts to the Central Government as early as possible and in any case by April 15, 1987.

7. We also request the Central Government to be good enough to expedite the process of making appointments in accordance with law upon the receipt of the recommendation at the earliest.

II

8. Before we part with this matter we consider it appropriate to make a recommendation to the Delhi Administration and the Union of India in regard to a matter of significance which came to force. Most of the judicial officers of the Delhi Judicial Service have been stagnating for very many years for lack of promotional avenue which is inherent in the very nature of the service and limitation of other openings due thereto. This situation results in the judicial officers being less than contented in the absence of incentive or hope for a better future. Such a situation is not conducive to bring out the best in them. It is desirable from every point of view to maintain the morale and efficiency of the judicial officers at the highest throughout their tenure. It strikes us that it would be desirable to adopt the anti-stagnation formula which is applied in many public Corporations by way of creating Special grades carrying a better scale than the existing grade for those who have invested 12 years of service. (We think that 12 years would be appropriate because a selection grade would be available to the judicial officers on the

completion of eight years under the present rules the some upgrading occurs four years later). We strongly recommend that a decision on this issue be taken as early as possible by the Delhi Administration and the Union of India in the larger interest of all concerned.

9. We also recommend to the Delhi Administration and the Union of India to give anxious and early consideration to the request of the Delhi High Court for converting existing temporary posts into permanent posts having regard to the increase in the volume of work and the unlikelihood of decrease in workload in the near future.

In view of the aforesaid formula which has been well received by all the parties who have reacted in a positive manner in the right spirit, the petitioners are withdrawing the writ petition. Liberty to revive the matter in case the situation so demands but not before April 15, 1987. The Writ Petition is disposed of as withdrawn accordingly.

The rules stood amended by a notification issued on 17th of March, 1987 and by the amendment in question the expression in substantive capacity occurring in Rule 2(d) stood deleted. The word substantive in the first proviso to Rule 7 was omitted. Sub-rule 2 of Rule 16 was substituted and the substituted rule provided that the posts created under sub-rule (1) of Rule 16 could be filled up in consultation with the High Court from amongst the members of the Delhi Judicial Service and by direct recruitment from the Bar. By way of explanation, Rules 5, 7, 8, 9, 10 and 11 were made applicable to appointments made under Rule 16. Rule 17 was also substituted by the amended rule which provided for filling up of substantive vacancies in the service by making temporary appointments thereto from persons appointed under Rule 16. In nutshell, the impact of the amended rules was that appointments could be made even to the posts temporarily created under Rule 16, both from the Bar as well as from the promotion from the Delhi Judicial Service, which was hitherto being filled up only by promotion. After the amended rules came into force, an advertisement was issued on 6th April, 1987, inviting applications from the practicing advocates for filling up of 10 temporary posts of Additional District Judges in Delhi Higher Judicial Service. The Association of promotee officers made representation to the High Court on 30.4.1987 against the aforesaid advertisement and the same having been rejected and the order of rejection having been communicated by letter dated 1st June, 1987, the two writ petitions were filed in this Court, one by the association and other by an individual member of the association.

Mr. P.N. Misra, the learned senior counsel, appearing for the Association contended that the posts having been created prior to the amended rules having come into force, those posts could be filled up only in accordance with the un-amended rules and necessarily, therefore, could be filled up by promotion from the Members of the Delhi Judicial Service, in terms of Rule 16, as it stood prior to the amendment and in this view of the matter, the advertisement that was issued to fill up 10 posts by way of direct recruitment is contrary to law and is liable to be struck down. Mr. Misra further contended that on a

construction of Rule 7(b), even if it is held that the posts were required to be filled up in accordance with the amended rules, 14 posts having been created, only 1/3rd of those posts could be filled up by direct recruitment and, therefore, the advertisement is contrary to the provisions of Rule 7(b) proviso.

Mr. G.P. Thareja, appearing in-person, in addition to the contentions raised by Mr. Misra, further contended that Rules 7, 16 and 17 violate Article 233 as well as Article 16(1) of the Constitution and as such the same must be struck down. He also further contended that even on the basis of calculations made by the High Court itself, the number of posts available for direct recruits could be 9 and not 10.

Mr. A. Mariarputham, appearing for the High Court of Delhi, on the other hand contended that earlier order of this Court dated 18.12.1986 having been passed in Writ Petition No. 1540/86, which petition had been filed by the promotees, urging that the newly created temporary posts could be filled up only by promotion from amongst the members of the Delhi Judicial Service, having unequivocally indicated to go ahead by inviting applications from the members of the Bar by way of public advertisement for making direct recruitment in anticipation of the sanction of the draft rules, the contention that the temporary posts created could be filled up only by promotion from the members of the Delhi Judicial Service is wholly unsustainable. The learned counsel further contended that on a proper construction of Rule 7(b), it would be apparent that though recruitment to the post of Delhi Higher Judicial Service could be made both by promotion as well as by direct recruitment from the Bar, but under the proviso, not more than 1/3rd of the posts in the service could be held by direct recruits. This being the position and taking into account the total number of posts in the Delhi Higher Judicial Service, the High Court was fully justified in issuing advertisement for filling up of 10 posts by direct recruitment and as such there is no infirmity in the same, requiring interference by this Court. He further contended that so-called challenge to the validity of the Rules on the ground that it contravenes Article 233 or Article 16 is of no substance as the amendment in question have been brought about in the light of observations made by this Court and at any rate there is no contravention of either Article 16 or Article 233, and as such the writ petitions are liable to be dismissed.

In view of the submissions made at the Bar, the first question that requires consideration is whether the temporary posts having been created prior to the amendment of the Rules, is it the law that those posts could be filled up only in accordance with the un-amended rules and not otherwise? There is no dispute that 14 temporary posts of Additional District & Sessions Judge were created in June, 1986 and it is also not disputed that as the posts in question were not filled up, which could be filled up at that point of time only by giving promotion to the Delhi Judicial Service, the association had approached this Court in Writ Petition No. 1540/86. Mr. P.N. Misra, relying upon the decision of this Court in the case of Y.V. Rangaiah and Ors. vs. J. Sreenivasa Rao and Ors., 1983(3)

S.C.C. 284, and the decision of this Court in B.L. Gupta and Anr. vs. M.C.D., 1998(9) S.C.C. 223, vehemently contended that the posts being available prior to the amendment coming into force, it was obligatory for the authority to fill up those posts in accordance with the rules, then in force and even after the amendment those posts could be filled up only in accordance with the un-amended rules. Mr. Misra contends that the rights of the members of the Delhi Judicial Service to get promotion to the Delhi Higher Judicial Service in respect of posts created prior to the amendment of the rules, cannot be taken away by inaction on the part of the concerned authority in not filling up the same and issuing advertisement only after the rules having coming into force. In Rangaiah's case [1983 (3) S.C.C. 284] this Court on consideration of the relevant rules as well as the instructions issued by the Government, came to hold that a list of approved candidates was required to be prepared as on 1.9.1976 for making appointments to the grade of Sub-Registrar Grade II by transfer, but no such list having been prepared and instead, the same having been drawn up in 1977, by which time the amended rules have come into force, it was held that the legitimate right and expectations of those, who were entitled to be included in the list which ought to have been prepared in September, 1976 cannot be frustrated on account of the fact that the panel had not been prepared and it was so prepared only in the year 1977. It is on this conclusion, the Court had held that the vacancies available prior to 1.9.76 ought to be filled up under the un-amended rules. The aforesaid decision will have no application to the case in hand inasmuch as in Delhi Higher Judicial Service there is no requirement of preparation of any panel or list of candidates eligible for promotion by any particular date. Then again, merely because posts were created under Rule 16, it was not obligatory for the appointing authority to fill up those posts immediately. That apart, the most important feature is the earlier order/direction by this Court dated 18.12.1986, which unequivocally indicated that the High Court should start the process of selection by direct recruitment in accordance with the draft rules which the Court had seen at that point of time. In other words, this Court on being aware of the fact that temporary posts have been created and a grievance has been made by the members of the Delhi Judicial Service that those posts were required to be filled up only by way of promotion from them in accordance with the rules as it stood then, a direction had been given that the posts should be filled up both by promotion and by direct recruitment in accordance with the draft rules, in the event the said draft rules ultimately come into force. This being the position, it is difficult for us to accept the contention of Mr. Misra, appearing for the association that the posts were required to be filled up only by way of promotion under the pre-amended rules notwithstanding the fact that the advertisement itself was issued subsequent to the rules being amended and notwithstanding the fact that this Court earlier had indicated that the process of selection even by direct recruitment should take effect, without waiting for the rules being finally enforced. The other decision in Guptas case [1998(9) S.C.C. 223], what the Court was considering is that the rules of 1995 being prospective in nature, the vacancies arisen earlier to that, whether could be filled up under the pre-amended rules or the amended rules. Relying upon three earlier decisions of this Court referred to in paragraph (9) of the judgment, the Court held

that the vacancies which had occurred prior to the amended rules were required to be filled up under the old rules and not by the amended rules. This decision undoubtedly could have supported Mr. Misra's contention to a great extent, had not there been the order of this Court dated 18.12.1986 in Writ Petition No. 1540/86. The very dispute namely whether a mandamus could be issued to fill up the temporarily created posts by giving promotion to the officers of the Delhi Judicial Service was before this Court and the Court then evolved a formula which was held to be fair and reasonable and, therefore on the agreement of parties, the said formula was embodied in the order. In other words, the Delhi Judicial Service Association, which was petitioner in this Court, agreed to the formula evolved by this Court to be embodied. While embodying the formula, this Court had indicated that the High Court of Delhi should invite applications from the members of the Bar by way of public advertisement for making direct recruitment in anticipation of the sanction of the draft rules and further stated that after the draft rules are sanctioned and published, a further advertisement, inviting applications from the members of the Bar for direct recruitment shall be published to enable those members of the Bar, who might not have responded to the first advertisement issued in anticipation of the sanction of the rules. In the teeth of the aforesaid order, the conclusion is irresistible that 14 temporary posts created even prior to the amendment of the rules could not have been filled up only by promotion from the Delhi Judicial Service as contended by Mr. Misra, the learned senior counsel appearing for the Association. On the other hand, the earlier order of this Court unequivocally stipulates that those posts should be filled up in accordance with the rules to be amended, which at that stage was only in a draft form. That apart, the process of selection not having been started and even the advertisement itself not having been issued and such advertisement having been issued only subsequent to the amendment of the Rules, it is futile to contend that the posts could be filled up under the pre-amended rules, merely because the posts had been created while the amended rules have not come into force. We, therefore, do not find any substance in the first submission of Mr. Misra, the learned senior counsel appearing for the Association.

So far as the second contention of Mr. Misra is concerned, it depends upon an interpretation of Rule 7(b) as amended. Rule 7(b) provides that recruitment after the initial recruitment shall be made by direct recruitment from the Bar provided that not more than 1/3rd of the posts in the service shall be held by direct recruits. The expression Service has been defined in Rule 2(e) to mean the Delhi Higher Judicial Service. The expression direct recruitment has been defined in Rule 2(i) to mean a person who is appointed to service from the Bar. The expression Initial Recruitment has been defined in Rule 2(g) to mean the first recruitment and appointment made to the service after the commencement of these rules. On a plain reading of the proviso, it conveys the only meaning that while making direct recruitment from the Bar to fill up the posts in Delhi Higher Judicial Service, care should be taken so that not more than 1/3rd of the posts in the service could be held by direct recruits at any point of time. Necessarily, therefore, the rules provide a maximum number of posts which could be filled up by direct recruits and it

does not say that 1/3rd of the number of vacancies at a given point of time is required to be filled up by direct recruits. The embargo under the proviso is that the High Court, while is entitled to fill up the posts in Delhi Higher Judicial Service both by promotion and by direct recruitment from the Bar, but cannot make direct recruitment so as to exceed 1/3rd of the total number of posts in the service. At the relevant point of time when the advertisement was issued, the total number of posts in the service being 53, 39 permanent and 14 temporary and the number of direct recruits at that point of time in Delhi Higher Judicial Service being 8, the advertisement issued by the High Court being for recruitment by direct recruits for 10 posts, would not constitute an infraction of the proviso to Rule 7(b), as contended by Mr. Misra on the interpretation of the aforesaid provision. We, therefore, are unable to persuade ourselves to agree with the second submission of Mr. Misra, appearing for the Association.

Coming to the question as to whether the amended rules, particularly Rules 7, 16 and 17 can be held to be violative of Article 233 or Article 16 of the Constitution, we fail to understand how Article 233 can at all be held to have come into play. The contention of Mr. Thareja is that by providing in Rule 7 that not more than 1/3rd of the posts could be filled up by direct recruitment, there has been a decline in the standard of appointees in the lowest level and the talented people are not willing to enter the judicial service, which in turn affects the efficiency and intelligence of the officers in the cadre and this in turn must be held to be violative of Article 233. The learned counsel also further contended that providing 1/3rd of the posts in the cadre, both temporary and permanent to be filled up by direct recruits results in the denial of equality of opportunity and violates Article 16(1) as well as it is discriminatory and violates Article 14. We see no substance in the aforesaid contention. Article 233 itself provides for appointment of District Judges and while Clause (1) lays down that the appointment could be made by the Governor in consultation with the High Court, exercising jurisdiction in relation to the State by promotion from the Subordinate Judicial Service, Clause (2) provides for appointment by a person not already in service of the Union or the State as District Judge, provided he has

been an Advocate for not less than seven years. In other words, Clause (2) itself provides for appointment by direct recruitment from the members of the Bar. The Delhi Higher Judicial Service having been framed in consultation with and on recommendations of the High Court and the rules having provided for filling up the posts in Delhi Higher Judicial Service by promotion as well as by direct recruitment with the rider that the direct recruits cannot be more than 1/3rd of the total number of posts, the contention that such rule violates Articles 14, 16 and 233 is wholly misconceived. In fact the question no longer remains res integra, the same, having been raised and answered by this Court in the case of Orissa Judicial Services Association, Cuttack and anr. vs. State of Orissa and Ors. , AIR 1991 Supreme Court 382. In the aforesaid premises, the contention of Mr. Thareja cannot be sustained. In the premises as aforesaid, both the writ petitions fail and are dismissed.

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