

PETITIONER:
UNION OF INDIA

Vs.

RESPONDENT:
H.R. PATANKAR & ORS.

DATE OF JUDGMENT 14/08/1984

BENCH:
BHAGWATI, P.N.
BENCH:
BHAGWATI, P.N.
PATHAK, R.S.
SEN, AMARENDRA NATH (J)

CITATION:
1984 AIR 1587 1985 SCR (1) 400
1984 SCALE (2) 172

ACT:

Indian Administrative Service (Regulation of Seniority) Rules 1954 Rules 3 (3) (a) and 3 (3) (b).

Direct recruits and promotees-Assignment of same year of allotment-Inter se seniority-How determined.

Gradation list-Preparation of-Lacuna in Seniority Rules-Government entitled to issue an executive order.

HEADNOTE:

The first respondent was recruited to the Indian Administrative Service through a competitive examination held in 1955, and assigned the year 1956 as year of allotment to the Service under Rule 3 (3) (a) of the Indian Administrative Service (Regulation of Seniority) Rules, 1954 on August 21, 1961 he started officiating in a senior post. Respondent Nos. 3 to 9 were members of the State Civil Service and they were promoted to the Indian Administrative Service. Respondent Nos. 3 to 7 started officiating continuously in the senior post in the Service w.e.f 9th June 1961. While respondent Nos. 8 and 9 started officiating w.e.f. August 19, 1961. The year of allotment given to Respondent Nos. 3 to 9 was the same as that of respondent No. 1, viz. 1956 and that was given in accordance with Rule 3 (3) (b) of the Seniority Rules.

When the gradation list as on 1st January 1963 was issued by the Government of India, the first respondent found that the Government had placed respondent Nos. 3 to 9 as senior to him in the gradation list on the ground that they had started officiating in a senior post in the Service earlier than the first respondent. The first respondent thereupon made several representation to the Government of India against the aforesaid fixation of seniority but they were ultimately rejected by a communication dated 7th October, 1966.

Being aggrieved, the first respondent filed a writ petition challenging the validity of the said gradation list, but a single Judge of the High Court rejected the contentions of the first respondent, and dismissed the writ petition

The first respondent preferred a Letters Patent Appeal, which was allowed by the Division Bench, holding that the

First respondent was entitled to seniority over respondent Nos. 3 to 9, and that the Government of India was wrong in placing him below respondent Nos. 3 to 9 in the gradation list.

Dismissing the Appeal of the Union of India to this Court,

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HELD :1. The Division Bench of the High Court was right in holding that the first respondent should be assigned seniority over respondent Nos. 3 to 9 in the gradation list. [409E]

401

In the instant case, the only fair and just principle of seniority which can be applied as between officers directly recruited through a competitive examination and officers promoted from the State Civil Service and having the same year of allotment, is to regard direct recruits through a competitive examination as senior to promotees from the State Civil Service. [409C-D]

2. The gradation list has to be prepared in accordance with the principle of seniority laid down by the Government either statutorily or by means of executive order or rule and it is by reference to such principle of seniority laid down by the Government that the validity of the gradation list is required to be judged. The gradation list must follow the enunciation of the appropriate principle of seniority followed by the Government and no principle of seniority can be implied from the inter se seniority fixed in such gradation list. [408F-G] [408F-G]

In the instant case the same year of allotment was assigned to the first respondent as also to respondent Nos. 3 to 9 and between them, the first respondent was appointed to the Indian Administrative Service earlier than respondent Nos. 3 to 9. On the date when the first respondent was appointed to the Indian Administrative Service, the principle of seniority which was in force was one set out in the original sub-rule (3) of Rule 4 and according to this principle if respondent Nos. 3 to 9 had been appointed prior to 11th April 1958 but subsequent to the appointment of the first respondent the first respondent would be entitled to claim seniority over respondent Nos. 3 to 9. [408H; 409A-B]

3. Rule 4 of the Seniority Rules laid down the principles for governing inter se seniority of officers in the Indian Administrative Service. By a notification dated 11th April 1958, Rule 4 was amended by the substitution of a new sub-rule (3) in place of the old one. For determination of inter se seniority of officers appointed on or after 11th April 1958 an amendment was made on 13th August, 1958 which introduced a sub-rule (4) after sub-rule (3) which substantially laid down the same provisions as the sub-rule (3) introduced by the amendment of 11th April 1958. Neither the original sub-rule (3) nor the new sub-rule (3) introduced by the amendment of 13th August 1958 can apply in the instant case of determining inter se seniority of first respondent and respondent Nos. 3 to 9, because even though the first respondent and respondent Nos. 3 to 9 all have the same year of allotment and the first respondent was appointed to the service after the commencement of the Seniority Rules and before 11th April 1958, respondent Nos. 3 to 9 were appointed on 9th June 1961 and 29th August 1961 that is after 11th April 1958. Similarly neither the new sub-rule (3) introduced by the amendment of 14th April 1958 nor the new sub-rule (3) introduced by the amendment of 13th August 1958 would apply for determining inter se seniority between the first respondent and respondent Nos. 3 to 9

because this provision would apply only for determining inter se seniority in respect of officers appointed to the Service on or after 11th April 1958 and the first respondent having been appointed prior to 11th April 1958 would not fall within this category. [404B, 405E; 406E; 407A; D-G]

In the instant case, there was at the material time no rule in the Seniority Rules which laid down the principle for determining inter se

402

seniority between an officer appointed to the Service prior to 11th April 1958 and an officer appointed to the Service on or after that date. There was clearly a lacuna in the Seniority Rules which failed to provide for this situation. The Government of India was in the circumstances entitled to lay down a rule for determining the inter se seniority in such a situation and this could be done by the Government of India even by an executive order. There is nothing in the record to show that the Government of India issued any executive order or rule laying down the principle for determining inter se seniority as between officers appointed prior to 11th April 1958 and officers appointed on or after that date. [407H; 408A; D]

JUDGMENT:

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 173 of 1978.

From the Judgment and order dated the 28th July, 1969 of the Delhi High Court in Letters Patent Appeal No. 21 of 1969.

Harbans Lal and R.N. Poddar for the Appellant.

Anil Naliriya and K.H. Hathi for the Respondent.

S.K. Bagga for the Intervener.

The Judgment of the Court was delivered by

BHAGWATI J. This appeal by certificate is directed against the judgment of the High Court of Delhi allowing the writ petition of respondent No. 1 and striking down the validity of the seniority list issued by the appellant placing the first respondent below respondent Nos. 3 to 9 in the seniority list. The controversy arising in the appeal lies in a narrow compass but in order to arrive at its correct determination, it is necessary to state briefly a few facts leading to the filing of the appeal.

The first respondent was recruited to the Indian Administrative Service through a competitive examination held in 1955 and according to Rule 3(3)(a) of the Indian Administrative Service (Regulation of Seniority) Rules, 1954 (hereinafter referred to as the 'Seniority Rules'), he was assigned the year 1956 as the year of allotment to the Service. He was posted in a junior post on recruitment through competitive examination for the Indian Administrative Service and on 21st August, 1961 he started officiating in a senior post. Respondent Nos. 3 to 9 were on the other hand members of the Gujarat State Civil Service and they were promoted to the Indian Administrative Service and they started officiating continuously in the senior post in the Service w.e.f. 9th June. So far as respondent Nos. 3 to 7 were concerned and with effect

403

from 29th August 1961 so far as the remaining respondents, namely, respondent Nos. 8 and 9 were concerned. The year of allotment given to respondent Nos. 3 to 9 was the same as that of respondent No. 1, namely, 1956 and that was given in accordance with the provisions of Rule 3(3)(b) of the

Seniority Rules. The seniority amongst direct recruits through competitive examination and promotees from the State Civil Service was governed by the Seniority Rules and according to the first respondent, since they were all assigned the same year of allotment, the first respondent as a direct recruit through a competitive examination was entitled to rank higher in seniority than respondent Nos. 3 to 9 who were promoted from the State Civil Service. But, when the gradation list as on 1st January 1963 was issued by the Government of India, the first respondent found that the Government of India had placed respondent Nos. 3 to 9 as senior to him in the gradation list, on the ground that they had started of officiating in a senior post in the Service earlier than the first respondent. The first respondent thereupon made several representations to the Government of India against the fixation of his seniority vis-a-vis respondent Nos. 3 to 9 but the Government of India ultimately rejected his representation by a communication dated 7th October, 1966. The first respondent thereupon filed a writ petition in the High Court of Delhi challenging the validity of the gradation list showing him as junior to respondent Nos. 3 to 9. The writ petition came up for hearing before a single Judge of Delhi High Court and the learned Judge rejected the contentions of the first respondent and dismissed the writ petition. Respondent No. 1 thereupon preferred a Letters Patent Appeal before a Division Bench of the Delhi High Court and the Division Bench did not agree with the view taken by the learned single Judge and held that the first respondent was entitled to seniority over respondent Nos. 3 to 9 and that the Government of India was wrong in placing him below respondent Nos. 3 to 9 in the gradation list. The Division Bench on this view allowed the Letters Patent Appeal and issued a writ directing that the gradation list be corrected by showing the first respondent as senior to respondent Nos. 3 to 9. The Union of India thereupon preferred the present appeal on the basis of certificate granted under Article 133(1)(c) of the Constitution.

The short question which therefore arises for consideration
404

is as to the relative seniority of the first respondent vis-a-vis respondent Nos. 3 to 9. Since the only rules in force for determining inter se seniority of officers in the Indian Administrative Service at the material time were the Seniority Rules, it is necessary to refer to them for the purpose of resolving this question. Rule 4 of the Seniority Rules laid down the principles for governing inter se seniority of officers in the Indian Administrative Service and this Rule as it originally stood at the time of promulgation of the Seniority Rules on 8th September, 1954 was in so far as material in the following terms:

"Rule 4. Seniority of officers-(1) The seniority of officers inter se shall be determined in accordance with the provisions hereinafter contained in this Rule.

(2) The seniority of officers in service at the commencement of these rules shall be as has been determined or may be determined by the Central Government in accordance with the orders and instructions in force immediately before the commencement of these rules.

Provided that where the seniority of an officer appointed in accordance with sub-rule (1) of Rule 8 of the Recruitment Rules has not been determined before the commencement of these rules, his seniority shall be

determined in accordance with the provision in sub-rule (3).

(3) The seniority of officers appointed to the service after the commencement of these rules who are assigned the same year of allotment shall be in the following order that is to say:

- (i) officers appointed to the service on the results of a competitive examination in accordance with rule 7 of the Recruitment Rules ranked inter se in accordance with rule 10 of the Indian Administrative Service (Probation) Rules, 1954;
- (ii) officers appointed to the service by promotion in accordance with sub-rule (1) of rule 8 of the Recruitment Rules ranked inter se in the order of the date of their appointment.

405

Provided that if the date of appointment of more than one such officer is the same their seniority inter se shall be in the order in which their names are arranged on the date of their appointment to the Service in the Select List prepared having regard to the requirements of the Indian Administrative Service (Appointment by Promotion) Regulations framed under sub-rule (1) of rule 8 of the Recruitment Rules."

Now if this Rule 4 had continued in the same form in which it was originally promulgated, there can be no doubt that under Sub-Rule (3) of that Rule, respondent No. 1 being as direct recruit appointed on the result of a competitive examination would have clearly been senior to respondent Nos. 3 to 9 who were promotees from the State Civil Service. Sub-rule (3) of Rule 4 would have clearly applied to determine their inter se seniority, because they were all assigned the same year of allotment, namely, 1956 and according to sub-rule (3) of Rule 4, direct recruits through competitive examination were en bloc entitled to seniority over promotees from the State Civil Service having the same year of allotment. But, by a notification dated 11th April, 1958, Rule 4 was amended by the substitution of a new sub-rule (3) in place of the old one and this new sub-rule (3) so far as relevant provided inter alia as follows:.

"Sub-Rule 3.-The seniority of officers appointed to the service on or after the day of April 11, 1958, who are assigned the same year of allotment shall be in the following order, that is to say-

- (i) Officers appointed to the service on the results of a competitive examination in accordance with rule 7 of the Rectt. Rules and officers appointed to the service by promotion in accordance with sub-rule (1) of rule 8 of the those Rules ranked inter se in the order of the dates on which they start officiating continuously in senior posts, the date of officiation in the case of the latter officers being the same as the date taken into account for the purpose of assignment of year of allotment under sub-rule (3) of rule 3:

406

Provided that-

- (a) the seniority inter se of officers appointed to the service on the results of a competitive examination in accordance with rule 7 of the Recruitment Rules and ranked in accordance with rule 10 of the Indian Administrative Service (Probation) Rules, 1954 shall not be affected;
- (b) Where the date of commencement of continuous

officiation in a senior post of an officer appointed to the service in accordance with rule 7 of the Recruitment Rules is the same as that of an officer appointed to the service under sub-rule (1) of rule 8 of those rules, the former shall rank senior to other officer;

- (c) Where the date of commencement of continuous officiation in senior posts of more than one officer appointed to the service in accordance with sub-rule (1) of rule 8 of the Recruitment Rules in the same, their seniority inter se shall be in the order of their dates of appointment to the service, and where the date of appointment is also the same, in the order in which their names are arranged on the date of their appointment to the service in the select list prepared having regard to the requirements of the Indian Administrative Service (Appointment by Promotion) Regulations framed under sub-rule (1) of rule 8 of the Recruitment Rules."

This new sub-rule (3) was on its plain terms prospective in operation and it governed the inter se seniority of only those officers appointed to the Indian Administrative Service on or after 11th April 1958 and did not apply for determining inter se seniority where one of the competing officers were appointed prior to 11th April 1958. This was clear enough on a plain grammatical construction of the new sub-rule (3) but the Government of India thought that its intention should not be left in any doubt whatsoever and therefore on 13th August 1958 the Government of India again amended Rule 4 by substituting sub-rule (3). The new sub-rule (3) introduced by this amendment substantially reproduced the original sub-rule (3) for determining inter se seniority of officers appointed before 11th April 1958 and so far as the determination

407
of inter se seniority of officers appointed on or after 11th April 1958 was concerned, the amendment inserted a new sub-rule(4) after sub rule (3) which substantially laid down the same provisions as the sub-rule (3) introduced by the amendment of 11th April 1958. Obviously, the object of making this amendment on 13th August 1958 was to clarify that the principle of seniority laid down in the original sub-rule (3) would continue to apply for determining inter se seniority of officers appointed prior to 11th April 1958 and the inter se seniority of officers appointed on or after 11th April 1958 would be governed by the principle of seniority laid down in sub-rule (3) introduced by the amendment of 11th April 1951.

Now it is obvious that neither the original sub-rule (3) nor the new sub-rule (3) introduced by the amendment of 13th August 1958 can apply in the present case for determining inter se seniority of first respondent and respondent Nos. 3 to 9, because though the first respondent and respondent Nos. 3 to 9 all have the same year of allotment and the first respondent was appointed to the service after the commencement of the Seniority Rules and before 11th April 1958, respondent Nos. 3 to 9 were appointed on 9th June 1961 and 29 August, 1961 that is after 11th April 1958. The old sub-rule (3) as also the new sub-rule (3) introduced by the amendment of 13th August 1958 apply only when the inter se seniority to be determined is that between officers appointed to the service prior to 11th April 1958 and if any one or more of the competing officers is appointed to the service or on after 11th April 1958 this

provision on its plain terms would not apply. Similarly neither the new sub-rule (3) introduced by the amendment of 11th April 1958 nor the new sub-rule (3) introduced by the amendment of 13th August 1958 would apply for determining inter se seniority between the first respondent and respondent Nos. 3 to 9, because those provisions would apply for determining inter se seniority only in respect of officers appointed to the service on or after 11th April 1958 and the first respondent having been appointed prior to 11th April 1958 would not fall within this category. There can therefore be no doubt that there was at the material time no rule in the Seniority Rules which laid down the principle for determining inter se seniority between an officer appointed to the service prior to 11th April 1958 and an officer appointed to the service on or after that date. There was clearly a lacuna in the Seniority Rules which failed to provide for this situation. The Government of India

408

was in the circumstances entitled to lay down a rule for determining inter se seniority in such a situation and this could be done by the Government of India even by an executive order. It is now well settled law that even if there are no statutory rules in force for determining seniority in a service or even if there are statutory rules but they are silent on any particular subject, it is competent to the Government by an executive order to make appropriate Seniority Rules or to fill in the lacuna in the statutory rules by making an appropriate seniority rule in regard to the subject on which the statutory rules are silent. The Government of India could have therefore in the present case issued an executive order laying down a rule for determining inter se seniority between officers appointed to the service prior to 11th April 1958 on the one hand and officers appointed to the service on or after that date on the other. But the learned counsel appearing on behalf of the Union of India could not show from the record any such executive order made by the Government of India. There is nothing in the record to show that the Government of India issued any executive order or rule laying down the principle for determining inter se seniority as between officers appointed prior to 11th April 1958 and officers appointed on or after that date. The only argument which could be advanced by the learned counsel appearing on behalf of the Union of India was that such an executive order or rule must be implied from the gradation list issued by the Government of India where respondent No. 1 was shown as junior to respondent Nos. 3 to 9. But this argument is plainly unsustainable because the gradation list has to be prepared in accordance with the principle of seniority laid down by the Government either statutorily or by means of an executive order or rule and it is by reference to such principle of seniority laid down with the Government that the validity of the gradation list is required to be judged. The gradation list must follow the enunciation of the appropriate principle of seniority by the Government and no principle of seniority can be implied from the inter se seniority fixed in such gradation list. That would be putting the cart before the horse. If such an argument were to prevail, it would mean the end of the law, for the gradation list would then not be based on any principle or norm determining seniority but it would be open to the Government to issue the gradation list without being fettered by any principle or norm to guide it in the preparation of the gradation list.

The question then arises as to what principle must be followed determining inter se seniority between respondent Nos. 3 to 9.

409

Now admittedly the same year of allotment was assigned to the first respondent as also respondent Nos. 3 to 9 and between them, the first respondent was appointed to the Indian Administrative Service earlier than respondent Nos. 3 to 9. Moreover, on the date when the first respondent was appointed to the Indian Administrative Service, the principle of seniority which was in force was one set out in the original sub-rule (3) of rule 4 and according to this principle if respondent Nos. 3 to 9 had been appointed prior to 11th April, 1958 but subsequent to the appointment, of the first respondent, the first respondent would have been entitled to claim seniority over respondent Nos. 3 to 9. How then, can respondent Nos. 3 to 9 be assigned seniority over the first respondent when they came to be appointed subsequent to 11th April 1958. The only fair and just principle of seniority which can be applied in such a situation, as between officers directly recruited through a competitive examination and officers promoted from the State Civil Service and having the same year of allotment, is to regard direct recruits through a competitive examination as senior to promotees from the State Civil Service. We are therefore of the view that the Division Bench of the High Court was right in holding that the first respondent should be assigned seniority over respondent Nos. 3 to 9 in the gradation list.

We accordingly dismiss the appeal and uphold the judgment of the Division Bench of the High Court, though for different reasons. We direct that the first respondent shall be shown as senior to respondent Nos. 3 to 9 in the gradation list. There will be no order as to costs of the appeal.

N.V.K. Appeal dismissed.

410