

PETITIONER:
V. BHASKER RAO AND ORS.

Vs.

RESPONDENT:
STATE OF A.P. AND ORS.

DATE OF JUDGMENT 23/03/1993

BENCH:
KULDIP SINGH (J)
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KULDIP SINGH (J)
KASLIWAL, N.M. (J)

CITATION:
1993 AIR 2260 1993 SCR (2) 547
1993 SCC (3) 307 JT 1993 (4) 506
1993 SCALE (2) 175

ACT:
Andhra Pradesh State Higher Judicial Service Rules 1, 2, 4 and 6. Andhra Pradesh State and Subordinate Service Rules, Rule 10(a) (i)-Andhra Pradesh Higher Judicial Service-District and Sessions Judges-Direct Recruits and Promotees-Inter se seniority-Fixation of-On the basis of continuous length of service.

HEADNOTE:
Recruitment to the Andhra Pradesh Higher Judicial Service is governed by "The Andhra Pradesh State Higher Judicial Service-Special Rules". Rule 1 constitutes the service. Category 1 consists of District and Sessions Judges 1st grade and Category 11 consists of District and Sessions Judges, Second Grade. Appointment to Category 1 is from Category 11. Appointment to Category 11 is from two sources by transfer from amongst the Subordinate Judges and by direct recruitment from the Bar.
The petitioner were direct recruits whereas respondents 4 to 16 were promoted from the Subordinate judiciary. The respondents were Initially appointed on temporary basis in the year 1978/1979 but they were made substantive in the year 1983. The petitioners who were appointed substantively in the year 1981 claimed seniority over the said respondents, and filed the Writ Petition under Article 32 of the Constitution of India for relief.
It was contended on their behalf that: (1) The Service consists of only permanent posts, there is no provision under the Special Rules for adding temporary posts to the cadre, consequently the appointment of respondents 4 to 16 to the post of District and Sessions Judges, Second Grade on temporary basis can at best be treated under Rule 10(a)(i) of the Andhra Pradesh State and Subordinate Service Rules. (2) The temporary service rendered by the respondents 4 to 16 being outside the cadre- cannot be counted towards seniority. (3) Porviso to Rule 2 and Rule 6 of the Special Rules have to be read together, and as such the permanent vacancies having been made available for them in the year 1983 their service
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prior to that date cannot be counted towards seniority.

The respondents contested the writ petition by contending that the petitioners were appointed in the year 1981 and since then till the year 1988, twelve seniority lists have been published showing the petitioners below respondents 4 to 16, and at no point of time they challenged the seniority lists in the Court. Even when the Writ Petition T.H.B. Chalapathi & Ors. v. High Court of Andhra Pradesh & Ors., was pending in the High Court they did not intervene. The petitioners were thus guilty of gross delay and laches and as such are not entitled to get relief in the Writ Petition. Dismissing the writ petition, this Court,

HELD: 1. (i) Rule 1 has to be interpreted to mean that the service under the Special Rules consists of all the posts-permanent and temporary-which have been designated as District and Sessions Judge Second Grade. Even otherwise in the absence of any prohibition under the Special Rules, the State Government can always create temporary posts as additions to the cadre. [554 B]

(ii) Rule 10(a)(i) of the Andhra Pradesh State and Subordinate Service Rules has no application to the Andhra Pradesh Higher Judicial Service which is governed by the Special Rules. Rule 10(a)(i) provides for emergency appointments made on stop gap basis to meet a temporary exigency. Apart from that the temporary appointments under the said Rules are made without following the procedure prescribed under the Rules governing the relevant Service. [554 C-D]

In the instant case, the appointments of respondents 4 to 16 were made under Rule 2 of the Special Rules by the State Government in consultation with the High Court. The Special Rules provide a complete scheme for the appointment and seniority of the members of the Service. [554 D]

2. Temporary posts of District and Sessions Judges Second Grade being part of the Service, the seniority has to be counted on the basis of length of service including the service against the temporary posts. [554 F]

3. Rule 6 of the Special Rules is in no way dependent on the proviso to Rule 2 of the Special Rules. Both are to be operative independently. In

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the scheme of the rules, the seniority rule is not dependent on the quota Rule. Quota has been provided for the direct recruits only against permanent posts. The seniority rule permits the counting of total period of service from the date a person is on duty against a post in the category.

[554 G-H]

In the instant case, even though the petitioners were appointed substantively to the service earlier to respondents 4 to 16 but in view of Rule 6 they cannot be declared senior on the basis of continuous length of service. Respondents 4 to 16 have been rightly given seniority above the petitioners. [555 A]

JUDGMENT:

ORIGINAL JURISDICTION: Writ Petition (C) No. 1237 of 1988.

(Under Article 32 of the Constitution of India).

P.P. Rao and Ms. K Amreshwari, B. Rajeshwar Rao and Vimal Dave for the Petitioners.

V.R. Reddy, Addl. Solicitor General, K. Madhaya Reddy, G. Prabhakar, B. Kanta Rao, A. Ranganathan and A.V. Rangam for the Respondents.

The Judgment of the Court was delivered by

KULDIP SINGH, J. The petitioners and respondents 4 to 16 are

District and Sessions Judges in the State of Andhra Pradesh. The petitioners are direct recruits whereas the respondents were promoted from the Subordinate judiciary. The respondents were initially appointed on temporary basis in the year 1978/1979 but they were made substantive in the year 1983. The petitioners who were appointed substantively in the year 1981 claim seniority over the respondents by way of this petition under Article 32 of the Constitution of India.

The recruitment to the Andhra Pradesh Higher Judicial Service (the Service) is governed by the Rules called "The Andhra Pradesh State Higher Judicial Service Special Rules" (the Special Rules). Rules 1, 2, 4 and 6 of the Special Rules which are relevant are as under:

"Rule 1. Constitution:- The service shall consist of the following categories:-

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Category-1 :- District and Sessions Judges
1st Grade.

Category-II :- District and Sessions Judges, Second Grade including Chairman, Andhra Pradesh Sales Tax Appellate Tribunal, Chief Judge, City Civil Court, Additional Chief Judge, City Civil Court, Chief Judge, Court of small Causes, Chief City Magistrate, Chairman, Tribunal for Disciplinary Proceedings, Presiding Officers, Labour Courts and Addl. District and Sessions Judges.

Rules 2. Appointment :- (a) Appointment to Category-1 shall be made by promotion from Category-II and appointment to Category-II shall be made:-

(i) by transfer from among:-

(a) Sub-Judges in the Andhra State Judicial Service; or in the Hyderabad State Judicial Service; and

(ii) by direct recruitment from the Bar:

Provided that 33-1/3% of the total number of permanent posts shall be filled or reserved to be filled by direct recruitment.

Explanation:- In the determination of 33-1/3% of the total number of permanent posts, fractions exceeding one-half shall be counted as one and other fractions shall be disregarded.

(b) All promotions shall be made on grounds of merit and ability, seniority being considered only when merit and ability are approximately equal.

Rule 4. Probation:- Every person appointed to Category-II otherwise than by transfer, shall, from the date on which he joins duty be on probation for a total period of one year on duty.

Rule 6. Seniority:- The seniority of a person appointed to Category 1 or Category 2 shall be determined with refer-

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ence to the date from which he was continuously on duty in that category."

We may briefly notice the scheme of the Special Rules. Rule 1 constitutes the Service. Category-1 consists of District and Sessions Judges' 1st grade and Category-II consists of District and Sessions Judges Second grade. Rule 1 does not say that Service shall consist of only permanent posts. All

the posts designated as District and Sessions Judges Second grade under Category-II are part of the service under Rule 1. In other words, as and when a post of District and Sessions Judge Second grade is created permanent or temporary it becomes part of the Service under Rule 1 of the special Rules. Rule 2 provides the method of appointment. Appointment to Category-1 is from Category-II. Appointment to Category II is from two sources. By transfer from amongst the Subordinate Judges and by direct recruitment from the Bar. Proviso to Rule 2 states that 33-1/3% of the total number of permanent posts shall be filled or reserved to be filled by direct recruitment. All the posts of District and Sessions Judges Second grade are part of the Service but quota for the direct recruits is provided only in the permanent posts. Rule 6 of the Rules provides for the fixation of seniority. Under Rule 6 the seniority of persons appointed to Category-1 or Category-II posts is fixed on the basis of continuous length of service in their respective posts.

On the plain reading of the Special Rules the salient features of the Service can be culled out as under:

1. Rule 1 provides for the constitution of the Service. All the posts of District and Sessions Judges Second grade created from time to time are part of the Service. The natural corollary is that the Service consists of permanent as well as temporary posts.
2. The recruitment to Category-II of the service is by transfer from amongst the Subordinate Judges and also by direct recruits from the Bar.
3. 33-1/3% of the total number of permanent posts in Category-II of the Service are to be filled by way of direct recruitment.
4. The seniority under Rule 6 is to be determined with reference to the date from which a person is continuously on duty. Whether the person

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is continuously on duty against a temporary post or permanent post is of no consequence. A person is entitled to the fixation of his seniority on the basis of continuous length of service rendered either against permanent post or temporary post.

The three petitioners were appointed as District and Sessions Judges Second grade by direct recruitment on October 12, 1981. Petitioners 1 and 2 joined service on October 23, 1981 and petitioner 3 on October 30, 1981. Respondents 4 to 16 were appointed District and Sessions Judges Second grade by transfer from amongst the Subordinate Judges during the years 1978/79. It is not disputed that permanent vacancies in their quota became available in the year 1983. We, therefore, proceed on the basis that the petitioners were appointed substantive members of the Service earlier to respondents 4 to 16.

We may at this stage notice Rule 10(a)(i) of the Andhra Pradesh State and Subordinate Service Rules (the State Rules). The State Rules are general rules which are applicable to all the services in the State of Andhra Pradesh. Needless to say that to the extent the Special Rules are applicable to the Service the State Rules are excluded. Rule 10(a)(i) of the State Rules is as under:

"10. Temporary appointment. (a)(i) Where it is necessary in the public interest to fill emergently a vacancy in the post borne on the cadre of a service, class or category and if the filling of such vacancy in accordance with the rules is likely to result in undue delay,

the appointing authority may appoint a person temporarily otherwise than in accordance with the said rules."

Mr. P.P. Rao, learned counsel for the petitioners has raised the following contentions for our consideration:

1. That the Service consists of only permanent posts under the Special Rules. There is no provision under the Special Rules for adding temporary posts to the cadre. The appointment of respondents to the posts of District and Sessions Judges Second grade on temporary basis can at best be treated under rule 10(a)(i) of the State Rules.

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2. The temporary service rendered by respondents 4 to 16 being outside the cadre cannot be counted towards seniority.

3. Proviso to Rule 2 and Rule 6 of the Special Rules have to be read together and doing so the permanent vacancies having been made available for respondents 4 to 16 in the year 1983 their service prior to that date cannot be counted towards seniority.

Before dealing with Mr. Rao's contentions, we may notice two preliminary contentions raised by Mr. K. Madava Reddy, learned counsel for the respondents.

Mr. Madava Reddy has invited our attention to the judgment of a Division Bench of Andhra Pradesh High Court in T.H.B. Chalapathi and others v. High Court of Andhra Pradesh and others, Writ Petition Nos. 1968/82, 52/83 and 12282/85 decided on December 28, 1985. Those writ petitions were filed before the Andhra Pradesh High Court by the direct recruits to Category-II of the Service claiming seniority over the persons who were appointed to category-11 on temporary basis earlier to them. Similar questions were raised as are being raised by Mr. P.P. Rao before us. By a well-reasoned judgment the High Court rejected all the contentions of the direct recruits and dismissed the writ petitions. It is not disputed that Special Leave Petition No.1035 of 1986 against the said judgment was dismissed by this Court on January 30, 1988. Mr. Madava Reddy plausibly contends that all the contentions which are being raised by the petitioners in this Court, having been rejected by the High Court and special leave petition against the judgment of the High Court having been dismissed by this Court the same cannot be agitated once over again.

Mr. Madava Reddy then contended that the petitioners were appointed in the years 1981 and since then till the year 1988 twelve seniority lists have been published showing the petitioners below respondents 4 to 16. At no point of time they challenged the seniority lists in the Court. Even when the writ petitions filed by Chalapathi and others were pending they did not intervene before the High Court. The petitioners, according to Mr. Madava Reddy, are guilty of gross delay and laches and as such are not entitled to get relief by way of this petition under Article 32 of the Constitution of India.

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We see considerable force in both the contentions raised by Mr. Madava Reddy. We are, however, of the view that it would be in the larger interest of the Service to dispose of this petition on merits.

We see no force in the contention of Mr. Rao that the Service consists of only permanent posts under the Special Rules. We have already interpreted Rule 1 to mean that the Service under the Special Rules consists of all the posts permanent and temporary which have been designated as District and Sessions Judges Second grade. Even otherwise

in the absence of any prohibition under the Special Rules the State Government can always create temporary posts as additions to the cadre. Rule 10(a)(i) of the State Rules has no application to the Service which is governed by the Special Rules. Rule 10(a)(i) provides for emergency appointments made on stop gap basis to meet a temporary exigency. Apart from that the temporary appointments under the said Rules are made without following the procedure prescribed under the Rules governing the relevant service. The appointments of respondents 4 to 16, on the other hand, were made under Rule 2 of the Special Rules by the State Government in consultation with the High Court. We are of the view that the Special Rules provide a complete scheme for the appointment and seniority of the members of the Service. Rule 10(a)(i) of the State Rules has no application to the Service Constituted under the Special Rules. We, therefore, reject the contention raised by Mr. Rao.

Having taken the view that the Service under the Special Rules consists of permanent as well as temporary posts the second contention of Mr. Rao loses its ground. Temporary, posts of District and Sessions Judges Second grade being part of the Service the seniority has to be counted on the basis of length of service including the service against a temporary post.

The third contention of Mr. Rao is mentioned to be rejected in view of Rule 6 of the Special Rules. Rule 6 of the Special Rules is in no way dependent on proviso to Rule 2 of the Special Rules. Both are to be operative independently. In the scheme of the rules the seniority rule is not dependent on the quota Rule. Quota has been provided for the direct recruits only against permanent posts. The seniority rule permits the counting of total period of service from the date a person is on duty against a

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post in the category. Even though, the petitioners were appointed substantively to the service earlier to respondents 4 to 16 but in view of Rule 6 they cannot be declared senior on the basis of continuous length of service against temporary as well as permanent posts respondents 4 to 16 have been rightly given seniority above the petitioners.

We, therefore, find no force in any of the contentions raised by Mr. Rao.

The writ petition is consequently dismissed. No costs.

N.V.K.

Petition dismissed.

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