

CASE NO.:
Appeal (civil) 5013 of 2000

PETITIONER:
M.Srinivasa Prasad & Ors

RESPONDENT:
The Comptroller & Auditor General of India & Ors

DATE OF JUDGMENT: 29/03/2007

BENCH:
H.K. SEMA & V.S.SIRPURKAR

JUDGMENT:
J U D G M E N T
(with C.A.No.5504 of 2003)

H.K.SEMA, J.

These two appeals raise a common question of facts and law and they are being disposed of by this common judgment. For the sake of brevity, we are taking facts from Civil Appeal No.5504 of 2003.

The undisputed facts are that the appellants are direct recruits to the post of Section Officer (Commercial Audit) in the Audit and Accounts department. Their services are governed by the recruitment Rules known as Indian Audit and Accounts Department Section Officer (Commercial Audit) Recruitment Rules, 1988 framed by the President of India under Article 148(5) of the Constitution of India.

The Rule inter alia provides the method of recruitment is by promotion failing which by transfer/transfer on deputation and failing both, by direct recruitment. The Rule also provides that the period of probation is two years. Note to Rule 11 provides that during the period of probation they should qualify in the Section Officer's Grade Examination (SOGE) for appointment as regular Section Officers.

It is contended by learned counsel for the respondents that having accepted the terms and conditions of appointment they are stopped from challenging the same.

The appellants were appointed on various dates on certain terms and conditions common to all. The terms and conditions inter alia read:-

1. The period of probation will be two years. This may however be increased or decreased at the discretion of the appointing authority. His/her appointment will be purely temporary and will be terminable at one months notice on either side.

2. During the period of probation he/she will have to undergo a regular course of training for such a period at such place and in such manner as may be prescribed. He/she may also be assigned regular duties during the period of training.

3. During training the Section Officers Grade Examination (SOGE) will be conducted. He/She will have to qualify the SOGE (Both) Part I and II Examination within the period of probation. Those who fail to qualify the above exam are liable to be discharged from service. Candidates who

pass this examination will be posted as regular Section Officer (Audit).

4. xxx xxx xxx xxx

5. xxx xxx xxx xxx

6. On satisfactory completion of probation he/she will be eligible for confirmation in the office where he/she is posted on a regular basis as Section Officer (Audit) subject to his/her being considered fit in all respect for permanent retention in the service. His/her confirmation in the Section Officer cadre will not however give him/her any special claim to seniority. The seniority of direct recruits to the cadre vis-à-vis Departmental candidates passing regular Section Officer (Audit) Grade Part II Examination will be fixed in accordance with the seniority rules as at present viz that a directly recruited Section Officer (Audit) shall rank immediately below the last Section Officer (Audit) Grade Examination passed person officiating in the Section Officer (Audit) cadre on the date on which he takes over charge as Section Officer (Audit)".

The controversy arose when the seniority of the appellants as Section Officer was reckoned w.e.f. the date they were qualified in the Section Officer Grade Examination for appointment as regular Section Officers. Aggrieved thereby they preferred O.A. They claimed that the initial appointment as probation be reckoned towards the seniority for the purpose of promotion from Section Officer to AAO.

It is clear that in the Recruitment Rules of 1988 the Rule is silent as to how the seniority of the direct recruits be fixed.

The Comptroller and Auditor General's Manual of Standing Orders (Administrative) Volume 1 was issued by an executive instruction.

Paragraph 5.6.6. provides that the seniority of the direct recruits to the post of Section Officers on passing Part II of the Section Officers Grade Examination shall be regulated by the following method:

(i) A directly recruited Section Officer shall rank immediately below the last Section Officers Examination passed member of the staff officiating in the Section Officers grade on the date on which he takes over charge as a regular Section Officer. If an officiating Section Officer reverts at any time to his previous post, the reversion not being on account of his proceeding on leave, he shall lose his seniority vis-à-vis all those recruited directly, who are appointed as Section Officer upto the date on which he again begins to officiate continuously.

(ii) xxx xxx xxx xxx

(iii) A direct recruit is appointed a Section Officer on regular basis only on satisfactory completion of the period of probation prescribed in the recruitment rules even though he passes the

examination before that period his seniority is also effective on his actual taking over charge as a regular section officer".

Rule 12 of Indian Audit & Accounts Deptt. Recruitment Rules, 1989 deals with the recruitment by promotion and it provides, 'Section Officers (Audit) who have qualified Section Officers Grade Examination and have three years of regular service in the grade'.

The seniority in Section Officers cadre is governed by paragraph 5.6 of the executive instructions. It reads:-

"5.6.1(i) Each Civil Audit Office and Civil Accounts Office and each Railway Audit Office has its own Section Officers cadre except where any such office is re-organized into two or more independent offices and so long as the cadre is not separated for the offices into which it has been reorganized.

(ii) The interse seniority of Section Officers (Commercial) is based on All India basis under separate orders issued by the Comptroller and Auditor General of India.

(iii) Similarly the seniority Section Officers (Defence Audit each) and Section Officers (posts and Telecommunications Audit) each is fixed separately.

5.6.2 xxx xxx xxx xxx

5.6.3 xxx xxx xxx xxx

5.6.4 xxx xxx xxx xxx

5.6.5 xxx xxx xxx xxx

5.6.6. The seniority of the direct recruits to the post of Section Officers on passing Part II of the Section Officers Grade Examination shall be regulated by the following principles:

(i) A directly recruited Section Officer shall rank immediately below the last Section Officers Examination passed member of the staff officiating in the Section Officers grade on the date on which he takes over charge as a regular Section Officer. If an officiating Section Officer reverts at any time to his previous post, the reversion not being on account of his proceeding on leave, he shall lose his seniority vis.a.vis all those recruited directly, who are appointed as Section officers up to the date on which he again begins to officiate continuously.

Note : The terms last Section Officer's Grade Examination passed member of the staff refers to one who has passed in an earlier examination and not in the examination in which the direct recruit has come out successful.

(ii) As between direct recruits themselves.

(a) One who completely passes the Section officers' Grade Examination earlier shall rank senior to those who pass the examination at a later date, irrespective of the date of their recruitment or of the date of passing Part I of the Section officers Grade Examination.

(b) Amongst the persons who pass in the same Section Officers' Grade Examination, relative seniority shall be determined according to the year of recruitment i.e. those belonging to an earlier batch of recruitment shall be senior to those belonging to a subsequent batch.

(c) Where the direct recruits belonging to the same batch of recruitment pass the same Section Officers' Grade Examination, the Chartered Accountants as a class will rank senior most, inter se seniority among them being fixed with reference to the date of passing the Chartered Accountants (final) examination, the person passing in an earlier examination ranking senior to the one passing in subsequent examination. The cost and works Accountants as a class will be ranked below the Chartered Accountants, the inter se seniority among them being determined on the same lines as for Chartered Accountants. When the date of passing the Chartered Accountants (final)/ICWA (final) examination is the same, the relative seniority within the relevant class of persons will be determined according to seniority in age. All other persons will rank as a class below the Chartered Accountants and Cost and Works Accountants, the inter se seniority among them being fixed in accordance with the rank secured at the time of selection for appointment. If for the purposes of ranking, two or more of them have been bracketed, the older person shall be the senior.

(iii) A direct recruit is appointed as a Section Officer on regular basis only on satisfactory completion of the period of probation prescribed in the Recruitment Rules even though he passes the examination before that period, his seniority is also effective on his actually taking over charge as a regular Section Officer.

(iv) Once the seniority of a directly recruited Section Officer is fixed in an office he is for further advancement, governed by the same provisions as laid down for other Section Officers."

Para 4.8 of the said Manual of Standing Orders

Vol.1 provides:

"Recruitment to the grade of Assistant Audit Officer (AAO) in the IA & AD is made by promotion from the grade of Section Officers who have qualified in Section Officer Grade

Examination and have three years of regular service in the grade as on the crucial date on the basis of seniority subject to fitness.

Note: The direct recruits will be selected on the basis of an entrance examination conducted by Comptroller and Auditor General of India or any authority specified by him. During the period of probation they should qualify in the Section Officers Grade Examination (SOGEx) for appointment as regular Section Officers".

A fascicule reading of the Rules and the Manual two things clearly emerge: (a) The passing of qualifying examination/departmental examination (SOGEx) prescribed for the purpose of determining the seniority and (b) A Section Officer passing an examination first would have precedent over a person who passes the examination later.

We have already noticed that the Rules are silent insofar as with regard to the determination of seniority. In order to supplement the Rules, the standing orders by executive instructions, as noticed above, have been brought out to fill the gap unfilled by the statutory Rules.

It is vehemently contended by Mr. M.N. Krishnamani, learned senior counsel for the appellants that the general principle is that the seniority be reckoned from the date of appointment. He further contended that the executive instructions cannot supplement the rules. He also contended that merely accepting the terms and conditions of appointment would not debar the appellants from claiming seniority from the date of appointment. We do not agree with these contentions. It is also contended by Mr. Krishnamani that once the incumbent passed the departmental/qualifying examination his seniority would relate back to the date of appointment. To support his contention, Mr. Krishnamani learned senior counsel, referred to the decision of this Court in the case of Mohan Lal vs. State of Himachal Pradesh, (1997) 4 SCC 416, where this Court pointed out in paragraph 8 as under:-

"8. A reading of this rule relating to conduct of examination would indicate that the Government shall hold the examinations twice a year between 3rd week of April and 1st week of November, or on such other dates as are notified by the Excise and Taxation Commissioner. The examination so conducted by the Institute of Public Administration, Shimla shall be in the manner prescribed in Paragraph (ii) of Rule 4 of the Rules. It is, therefore, clear that the Government is required to conduct the examinations twice a year and the candidates are required to pass the examinations within two years from the date of joining the post on probation. The Rule does not give four chances to every candidates. They shall pass the departmental examination within two years. On successful completion of probation and declaration thereof, his seniority would relate back to the date of appointment".

(emphasis supplied)

This Court has taken that view because in that case the Rule itself provides namely Rule 11(3)(i) of the H.P. Excise

and Taxation Department (Inspectorate Staff, Class III) Service. Rule 11(3)(i) reads:-

11.(3) On the completion of the period of probation of a person and passing the prescribed examination the appointment authority may \026

(a) if his work and conduct is found satisfactory-

(i) confirm such person from the date of his appointment if appointed against a permanent vacancy; or

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The facts of that case have no application in the present case.

The sole controversy to be determined is that as to whether by an executive instructions/standing orders to fill the gap not covered by the Rules and not inconsistent with the Rules if framed can be validly made and enforceable?

The question posed is no more res integra. A Constitution Bench of this Court in Sant Ram Sharma vs. State of Rajasthan, AIR 1967 SC 1910, has considered the similar question and held in paragraph 7 as under:-

"We proceed to consider the next contention of Mr. N.C. Chatterjee that in the absence of any statutory rules governing promotions to selection grade posts the Government cannot issue administrative instructions and such administrative instructions cannot impose any restrictions not found in the Rules already framed. We are unable to accept this argument as correct. It is true that there is no specific provisions in the Rules laying down the principle of promotion of junior or senior grade officers to selection grade posts. But that does not mean that till statutory rules are framed in this behalf the Government cannot issue administrative instructions regarding the principle to be followed in promotions of the officers concerned to selection grade posts. It is true that Government cannot amend or supersede statutory Rules by administrative instructions, but if the rules are silent on any particular point Government can fill up the gaps and supplement the rules and issue instructions not inconsistent with the rules already framed."

(emphasis supplied)

In Union of India vs. H.R. Patankar, 1984 (supp.) SCC 359, a similar view was taken by this Court. It was held 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.

We have already noticed that the statutory rules are silent about the determination of inter se seniority. This was made clear by the Comptroller and Auditor General's Manual of Standing Orders (Administrative). In view thereof, these

appeals are devoid of merits and are accordingly dismissed.
No costs.

JUDIS