

\$~R-22&23

* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

% *Date of Decision: January 03, 2013*

+ **WP(C) 3308/2001**

K.K.BHARDWAJ & ORS. Petitioners
Represented by: Mr. R.K.Saini, Advocate.

versus

THE SECRETARY, MHA & ORS. Respondents
Represented by: Mr.R.V.Sinha, Advocate for R-1&2.
None for R-3&4.

AND

WP(C) 6818/2001

L.L.SATYANARAYANA Petitioner
Represented by: None.

versus

UNION OF INDIA & ORS. Respondents
Represented by: Mr.R.V.Sinha, Advocate for R-1, 2 & 3.
Mr.R.K.Saini, Advocate for R-8.
None for other respondents.

CORAM:

HON'BLE MR. JUSTICE PRADEEP NANDRAJOG
HON'BLE MS. JUSTICE VEENA BIRBAL

PRADEEP NANDRAJOG, J. (Oral)

1. Whereas orders under challenge in WP(C) No.3308/2001 are dated November 02, 2000 and December 22, 2000; the original order and the order dismissing application seeking review. Orders under challenge in WP(C) No.6818/2001 are dated December 14, 2000 and February 14, 2001 i.e. the original order and the order dismissing the application seeking review.

2. The writ petitioners of WP(C) No.3308/2001 had filed OA

No.199/1999 challenging seniority assigned to Manoj Kumar Mittal and S.K.Tanwar, impleaded as respondents No.3 and 4 before the Tribunal, on the ground that the department could not have, while fixing the seniority of DPA Grade 'A' post holders reckon service rendered by said respondents in the department prior to their regular absorption in the department.

3. The department is the National Crime Records Bureau.

4. Whereas the writ petitioners of WP(C) No.3308/2001 had joined as direct recruits as DPA Grade 'A' on various dates between February 1991 to January 1992, Manoj Kumar Mittal and S.K.Tanwar had joined the department on deputation on ad-hoc basis on November 01, 1988 and August 02, 1989 respectively. They were absorbed permanently on November 14, 1991 and March 31, 1993 respectively.

5. The department had accorded them seniority with reference to the date they joined the department on ad-hoc basis.

6. Petitioners' challenge failed on account of the Tribunal relying upon an office order dated October 03, 1989, by highlighting the last three words of the office memorandum : '*whichever is later*'.

7. We may note at the outset that the OM dated October 03, 1989 is in fact amending an earlier OM dated May 29, 1986 in which the aforesaid three words are to be found as the last three words of the last sentence of the OM.

8. The validity of the OM dated May 29, 1986 was questioned before the Supreme Court and at the forefront of the challenge was the expression : '*whichever is later*'. In the decision reported as (2000) 1 SCC 644 SI Rooplal v. Lt.Governor, Supreme Court quashed the expression '*whichever is later*' holding that the effect thereof was to wipe out the entire service rendered by a deputationist.

9. Thereafter, the Department of Personnel & Training issued OM dated March 27, 2001 in which the expression '*whichever is later*' was replaced

with the expression '*whichever is earlier*'. The issue continued to vex the Courts and the prior and subsequent judgments rendered by the Supreme Court are as under:-

- (i) (1987) 4 SCC 576 *K. Madhavan v. Union of India.*
- (ii) (1988) 2 SCC 233 *R. Prabha Devi v. Government of India.*
- (iii) 1994 Supp. (3) SCC 376 *T.K. Ponnuswamy v. Govt. of Tamil Nadu.*
- (iv) (1998) 3 SCC 218 *K. Chandraiah v. K. Anjaiah.*
- (v) (1998) 6 SCC 186 *Union of India v. G.R.K. Sharma.*
- (vi) (2000) 1 SCC 644 *Sub-Inspector Rooplal v. Lt. Governor.*
- (vii) (2006) 8 SCC 129 *Indu Shekhar Singh v. State of UP.*

10. *SI Rooplal*'s case (supra), para 23, would bring out that the Supreme Court was dealing with an executive instruction which had the effect of taking away the service rendered by a deputationist in an equivalent cadre in a parent department or ad-hoc service rendered as a deputationist. However, with reference to the service rules governing absorption and appointment including by way of deputation, the authoritative pronouncement came from the Supreme Court in the decision reported as 2006 (8) SCC 129 *Indu Shekhar Singh v. State of Uttar Pradesh.* In para 19, 20, 21, 22, 24, 25 and 26 of the said decision, the Supreme Court observed as under:-

“19. The terms and conditions of recruitment/appointment to the post, seniority and other terms and conditions of service are governed by statutory rules. The statute provides that only those, who were in the employment of different development authorities, shall be borne to the cadre of the Central services. The U.P. Jal Nigam was not a development authority. It was constituted under a different statute. It was an autonomous body. The employees working with the Jal Nigam might have been deputed to the services of the development authorities, but only by reason thereof they did not derive any right to be absorbed in the services. Ordinarily, an employee has no legal right to be deputed to another organisation. He has also no right to be permanently absorbed excepting in certain situation as was held by this Court in *Union of India v. V.*

Ramakrishnan.

20. Respondents 2 to 4 were deputed to the Ghaziabad Development Authority on their own. They were presumed to be aware that they were not borne in the cadre of centralised services. The Rules do not provide for appointment by way of transfer. Appointment by way of absorption of a deputed employee would amount to fresh appointment which may be subject to the offer given by the Authority. The Development Authority is a statutory authority. So is the Jal Nigam. The Schedules appended to the Rules provide for posts to be filled up by promotion or by direct recruitment or by both. Schedule IV provides for the posts which are outside the purview of the Public Service Commission and are required to be filled up by promotion only, whereas Schedule V specifies those posts which are outside the purview of the Public Service Commission, but are to be filled up through direct recruitment only. It is not disputed that the State of U.P. has since issued a notification on 9-12-2002 whereby and whereunder Rule 7(1) of the 1985 Rules stood substituted, in terms whereof the past services of only those officers and employees were to be counted who would finally be absorbed in the services in terms of Section 5-A(2) of the Act on the criterion of continuous length of service, including the services rendered in a Development Authority, Nagar Mahapalika, Nagar Palika or Improvement Trust on similar posts. Respondents 2 to 4 were not and could not have been absorbed under Section 5-A(2) of the Act and thus evidently Rule 7(1) is not attracted. The only rule, which provides for seniority, is Rule 28. Rules 7 and 28, as noticed hereinbefore, occur in different chapters providing for different situations.

21. Respondents 2 to 4, therefore, were not entitled to the benefits of Rule 7. In terms of the Rules, there is no provision for appointment by way of transfer. There is also no provision for appointment on permanent absorption of the deputed employees. The only provision which in the fact situation obtaining in the present case would apply and that too in the event the State intended to absorb the employees of the Jal Nigam, would be Section 7(1) of the Act and sub-rule (2) of Rule 37 of the

1985 Rules.

22. Seniority, as is well settled, is not a fundamental right. It is merely a civil right. (See *Bimlesh Tanwar v. State of Haryana* (2003) 5 SCC 604 (para 49) and also *Prafulla Kumar Das v. State of Orissa* (2003) 11 SCC 614.)

.....

24. The question which arises is as to whether the terms and conditions imposed by the State in the matter of absorption of Respondents 2 to 4 in the permanent service of the Ghaziabad Development Authority is *ultra vires* Article 14 of the Constitution of India.

25. The State was making an offer to the respondents not in terms of any specific power under the Rules, but in exercise of its residuary power (assuming that the same was available). The State, therefore, was within its right to impose conditions. The respondents exercised their right of election. They could have accepted the said offer or rejected the same. While making the said offer, the State categorically stated that for the purpose of fixation of seniority, they would not be obtaining the benefits of services rendered in the U.P. Jal Nigam and would be placed below in the cadre till the date of absorption. The submission of Mr Verma that the period for which they were with the Authority by way of deputation, should have been considered towards seniority cannot be accepted simply for the reason that till they were absorbed, they continued to be in the employment of the Jal Nigam. Furthermore, the said condition imposed is backed by another condition that the deputed employee who is seeking for absorption shall be placed below the officers appointed in the cadre till the date of absorption. Respondents 2 to 4 accepted the said offer without any demur on 3-9-1987, 28-11-1991 and 6-4-1987 respectively.

26. They, therefore, exercised their right of option. Once they obtained entry on the basis of election, they cannot be allowed to turn round and contend that the conditions

are illegal. (See *R.N. Gosain v. Yashpal Dhir, Ramankutty Guptan v. Avaraand Bank of India v. O.P. Swarnakar.*) Furthermore, there is no fundamental right in regard to the counting of the services rendered in an autonomous body. The past services can be taken into consideration only when the Rules permit the same or where a special situation exists, which would entitle the employee to obtain such benefit of past service.....”

11. The Supreme Court, in *Indu Shekhar Singh's* case (supra), clarified the ratio in *SI Rooplal's* case (supra) as also two other decisions of the Supreme Court by observing in paragraphs 38 to 48 as under:-

“38. In *K. Madhavan v. Union of India* whereupon Mr Verma placed strong reliance, this Court was considering a case where deputation was made to CBI. The said decision was rendered in a situation wherein the original Rule 5 of the 1963 Rules providing for 85% of the recruitment by way of transfer or deputation was altered to 75%. In that case, the earlier services rendered by the appellants therein were directed to be considered having regard to the statutory rules governing the field. Therein no question of a person joining the services after resigning from his old post arose. It is only in that situation, the Court opined that there was not much difference between deputation and transfer.

39. A difference between transfer and deputation would be immaterial where an appointment by transfer is permissible, particularly in an organisation like CBI where personnel are drawn from different sources by way of deputation. It is one thing to say that a deputationist may be regarded as having been appointed on transfer when the deputation is from one department of the Government to another department, but it would be another thing to say that employees are recruited by different statutory authorities in terms of different statutory rules. In a given case, the source of recruitment, the qualification, etc., may be different in different organisations. The statutory authorities, it is trite, are not and cannot be treated to be the departments of the Government. Their employees are governed by the rules applicable to them. Their services are not protected under

Article 311 of the Constitution.

40. The State can (*sic* cannot) compel an employee to go on deputation from its parent department to another public sector undertaking unless a statutory rule exists in this behalf. In absence of such a rule, no employer can force an employee to join the services of another employer. Thus, *K. Madhavan*, in our opinion, has no application in the instant case.

41. *K. Anjaiah v. K. Chandraiah* was again a case where this Court was concerned with multi-source recruitment.....

42. Therein, thus, existed a provision for appointment by way of absorption of the deputationist. The said regulation was declared unconstitutional by the Tribunal.....

Such a finding was, thus, arrived at by way of reading down the Rules so as to uphold the constitutionality of the said provision and not by laying any law in that behalf upon interpreting Rule 9(2).

43. Having noticed the aforementioned decisions of this Court, we may now notice *Sub-Inspector Rooplal* which is the sheet anchor of the judgment rendered by the High Court.

.....

47. The decisions referred to hereinbefore, therefore, lay down a law that past services would only be directed to be counted towards seniority in two situations: (1) when there exists a rule directing consideration of seniority; and (2) where recruitments are made from various sources, it would be reasonable to frame a rule considering the past services of the employees concerned.

48. The said decisions, in our considered view, have no application in this case, having regard to the provisions of Section 5-A of the Act, in terms whereof no provision

exists for recruitment of deputationists. Recruitment of deputationists, in fact, is excluded therefrom.....”
(Emphasis Supplied)

12. A close perusal of the aforesaid decisions, particularly the portions underlined by us in the paragraphs quoted from Indu Shekhar's case (supra) succinctly brings out that the decisions of Supreme Court in K. Madhavan, K. Chandraiah and SI Rooplal's cases and Indu Shekhar's cases (supra) operate in different fields. Whereas K. Madhavan, K. Chandraiah and SI Rooplal's cases deal with a situation where one of the sources for appointment to a cadre in the transferred department is deputation, Indu Shekhar's case deals with a situation where the deputation was not provided as a source of appointment to a cadre under the Recruitment Rules of the transferred department and the government had permanently appointed the deputationist in the transferred department in exercise of its residuary powers.

13. Be that as it may, we need not pen any further inasmuch as deciding OA No.324/2006, the Tribunal has taken a view contrary to the view taken by it when OA No.199/1999 filed by K.K.Bhardwaj and others was dismissed by the Tribunal. The view taken by the Tribunal has since compelled the respondents to re-fix the seniority and while so doing, M.K.Mittal and S.K.Tanwar have been assigned seniority from the date they were regularly absorbed in the National Crime Research Bureau and the position is to the satisfaction of the writ petitioners.

14. Under the circumstances, noting as above, WP(C) No.3308/2001 stands disposed of setting aside the decision dated November 02, 2000 as also the order dated December 22, 2000 dismissing OA No.199/1999 and RA No.424/2000. No mandamus is issued to the respondents noting that the respondents have since taken necessary corrective action and thus need not perform any executive act or pass an order.

15. We record that aforesaid stand of the respondents No.1 to 3 in WP(C) No.3308/2001 has been noted by us with reference to an additional affidavit filed on behalf of respondents No.1 to 3 on November 24, 2010.

16. As regards WP(C) No.6818/2001 is concerned, we find that the petitioner therein had filed OA No.344/1996 claiming that even his seniority should be fixed on the same principles on which seniority of Manoj Kumar Mittal and S.K.Tanwar was fixed. He failed.

17. Needless to state, in view of the corrective action now taken by the department no relief can be granted to the writ petitioner of WP(C) No.6818/2001 but we cannot restrain ourselves from noting that two different benches of the Tribunal seized with a similar issue have unfortunately reached two opposite directions. Unfortunately, while deciding the OA filed by K.K.Bhardwaj and others the Tribunal lost sight of the principle of how the ratio of a case has to be culled out. A little incisive look into the circular which the Tribunal was dealing with could have illuminated the Tribunal a little better.

18. We summarize. WP(C) No.6818/2001 is dismissed. WP(C) No.3308/2001 stands disposed of in terms of paragraph 14 above.

19. We leave the parties to bear their own costs.

(PRADEEP NANDRAJOG)
JUDGE

(VEENA BIRBAL)
JUDGE

JANUARY 03, 2013//dk//