PETITIONER:
DR BAL KRISHNA AGARWAL

Vs.

RESPONDENT:
STATE OF U.P.

DATE OF JUDGMENT10/01/1995

BENCH:
AGRAWAL, S.C. (J)
BENCH:
AGRAWAL, S.C. (J)
FAIZAN UDDIN (J)

CITATION:
1995 SCC (1) 614 JT 1995 (1) 471
1995 SCALE (1)116

ACT:

HEADNOTE:

JUDGMENT:
The judgement of the court was delivered by
S.C. AGRAWAL, J--Leave granted.
2. We have heard learned counsel for the parties.
+From the Judgment and Order dated 6-1-1994 of the Allahabad High court in C.M.P.W.PNo. 15566 of 1988
3. This appeal involves the question regarding inter se seniority of the appellant, Dr Bal Krishna Agarwal, and Respondents 4 and 5,Dr Murli Manohar Joshi, and Dr PK. Sharma as Professors in Physics in the Allahabad University (hereinafter referred to as "the University"). The Executive Council of the University by resolution dated 16-7-1978, declared Respondents 4 and 5 as senior to the appellant. Writ Petition No. 15566 of 1988 filed by the appellant against the said resolution of the Executive Council was dismissed by the Allahabad High Court by judgment dated 6-1-1994 on the ground that alternative remedy of reference to the Chancellor under Section 68 of the Uttar Pradesh State Universities Act, 1973 (hereinafter referred to as "the Act") was available to the appellant.
4. Section 31 of the Act provides for appointment of teachers. In subsection (10) of Section 31 it is prescribed that no selection for any appointment shall be made except after advertisement of the vacancy in at least three issues of two newspapers having adequate circulation in Uttar Pradesh. In view of the said provision appointment of teachers in the University could only be made by direct recruitment by inviting applications and promotion from a lower teaching post to a higher teaching post was not envisaged. This led to stagnation and consequent frustration among, the teachers in the various universities governed by the Act. In order to remove this grievance the Government of Uttar Pradesh, by order dated 12-12-1983, framed a Personal Promotion Scheme where under personal promotion was to be given to a teacher on the basis of continuous service rendered in the department for a certain

period. By order dated 25-2-1984 the said order dated 12-12-1983 was modified and it was decided to grant personal promotion to the post of Reader to all those full-time and regularly appointed lecturers on the Government approved posts of universities governed and administered by the Act who possess Ph.D. degrees and have completed 13 years' approved, full-time regular and continuous service and those who are not Ph.D. after 16 years' approved, full-time and regular and continuous service. It was also decided to grant personal promotion to the post of Professor to Readers after IO years' continuous and regular service as Reader from the date of taking over charge after issue of the said order. In the said order it was stated that the personal promotion would be granted to teachers subject to the restrictions set out in sub-paragraphs (1) to (12) of paragraph in the said order. In sub-paragraph (12) it was stated that the seniority of teachers would be regulated as per regulations of the university concerned. By the said letter the Vice-Chancellors of all the State Universities were directed to send the draft regulation for carrying out necessary amendment in the regulations of the university concerned to the Education Department for approval. In order to give effect to the policy contained in the aforesaid orders of the Government of Uttar Pradesh, Section 3 1 -A was inserted in the Act by U.P Act No. 9 of 1985 which came into force on 10-10-1984. Section 3 1 -A provides as under:

> "31-A. Personal promotion to Teachers of University.- (1) Notwithstanding anything to the contrary contained in any other
> 616
> provision of this Act, a Lecturer or Reader in the University substantively appointed under Section 3 1, who has put in such length of service and possesses such qualifications, as may be prescribed, may be given personal promotion, respectively to the post of Reader or Professor.
> (2) Such personal promotion shall be given on the recommendation of the Selection Committee, constituted under clause (a) of sub-section (4) of Section 31, in such manner and subject to such conditions as may be prescribed.
> (3) Nothing contained in this section shall affect the posts of the teachers of the University to be filled by direct appointment in accordance with the provisions of Section 31."

5. In view of sub-section (1) of Section 31-A personal promotion as envisaged by Section 31-A could be given only after the length of service and the qualifications were prescribed. The word 'prescribed' is defined in Section 2(14) of the Act to mean prescribed by the Statutes. The necessary amendment to give effect to the scheme of personal promotion as envisaged by Section 31 -A of the Act was made in the Statutes of the University by notification dated 21-2-1985 whereby Statute 11.12-B was introduced and the categories of teachers of the University who would be eligible for the personal promotion to the post of Readers and Professors and the mode of such promotion were prescribed.

6. The appellant and Respondents 4 and 5 were employed as Readers in the Physics Department of the University. In October 1983 an advertisement was published inviting

applications for direct recruitment on one permanent post of Professor in the Physics Department of the University. In response to the said advertisement applications were submitted by the appellant and Respondents 4 and 5 along with other applicants. The said applications were considered by the Selection Committee under the Faculty of Science and the Selection Committee, in its report dated 22-7-1984, recommended a panel containing the names of the appellant and Respondents 4 and 5 for appointment on the post of Professor in Physics. The name of the appellant was placed at the top in the said panel. The Selection Committee also considered the appellant and Respondents 4 and 5 for promotion to the grade of Professor under the Personal Promotion Scheme and in its report dated 22-7-1984 the Selection Committee recommended all three of them for such promotion. The said recommendations of the Selection Committee were considered by the Executive Council of the University at the meeting held on 8-11-1984. By Resolution No. 197 the Executive Council accepted the recommendations of the Selection Committee and recorded that the appellant be appointed as Professor in Physics substantively. By Resolution No. 198 the Executive Council accepted the 'recommendations of the Selection Committee under the Personal Promotion Scheme and recorded that the appellant and Respondents 4 and 5 be promoted to the grade of Professor in terms of Government Orders dated 12-12-1983 and 25-2-1984. In the said
617
resolution the names of the appellant and Respondents 4 and 5 were shown in the following order:

1. Dr Bal Krishna Agarwal (appellant)
2. Dr M.M. Joshi (Respondent 4)
3. Dr PK. Sharma (Respondent 5)

7. On the basis of the said resolutions, by order dated 9-11-1984, the appellant was appointed on the post of Professor in Physics. Respondents 4 and 5 were promoted in the grade of Professor under the Personal Promotion Scheme on 9-11-1984. The appointment of the appellant on the post of Professor was on probation for one year and he was confirmed on the said post of Professor with effect from 9-11-1985. The matter of inter se seniority of the appellant and Respondents 4 and 5 was considered by the Seniority Committee of the Faculty of Science in its meeting held on 22-12-1986 and 4-1-1987. The Committee came to the conclusion that the appointments on cadre posts and personal promotion cases constitute two different categories and could not be intermingled for the purpose of determination of seniority and that the seniority of teachers in the cadre posts should be maintained separately from that of the personal promotees and that the teachers appointed on cadre posts of direct recruitment should be treated senior to those teachers appointed under Personal Promotion Scheme irrespective of their date of appointment. The Seniority Committee decided to place the appellant, who was holding the cadre post of Professor, above Respondents 4 and 5 who were promoted to the grade of Professor under the Personal Promotion Scheme. Feeling aggrieved by the said decision of the Seniority Committee Respondents 4 and 5 submitted representations which were considered by the Executive Council in its meeting held on 16-7-1988. The Executive Council altered the seniority as fixed by the Seniority Committee and placed Respondents 4 and 5 above the appellant. The said decision of the Executive Council was assailed by the appellant by filing the writ petition giving rise to this appeal.

8. The High Court has observed that there was controversy in regard to every question of fact inasmuch as there was a dispute with regard to nature of appointments since the appellant claimed that he had been appointed against a regular vacancy which was assailed by the respondents who asserted that all three had been granted personal promotion and that there was also a dispute regarding the date on which the appellant joined the post of Professor. The High Court was of the view that the question as to whether the impugned order had been passed without affording an opportunity of hearing to the appellant was a question which can be appropriately decided only after investigation in the disputed questions of fact and that this was not a fit case in which the appellant should be allowed to bypass the alternative remedy of reference to the Chancellor provided under Section 68 of the Act. The High Court. therefore, dismissed the writ petition on the ground of availability of alternative remedy and directed that if the representation of the appellant under Section 68 of the Act was filed within a period of two
618
weeks, the bar of limitation would not be applied against the same and it should be decided on merits.

9.The learned counsel for the appellant has urged that the High Court was in error in dismissing the writ petition of the appellant on the ground of availability of an alternative remedy having regard to the fact that the writ petition had been filed in 1988 and it had been admitted and was pending in the High Court for the past more than five years. The learned counsel has also urged that the High Court was not right in saying that there was dispute on questions of fact. According to the learned counsel there is no dispute that the appellant had been selected by the Selection Committee for appointment on the permanent post of Professor which was advertised and the said recommendation of the Selection Committee was accepted by the Executive Council in its Resolution No. 197 dated 8-11-1984. The fact that the name of the appellant was also included in the list of Readers for personal promotion to the grade of Professor in Resolution No. 198 of the Executive Council would not mean that the appointment of the appellant to the post of Professor was by way of personal promotion and not on the basis of selection for the cadre post of Professor which was advertised. The learned counsel also submitted that it is not the case of the appellant that he joined the post of Professor in Physics on 8-11-1984 and that his case is that the appellant as well as Respondents 4 and 5 all joined as Professors in Physics on 9-11-1984.

10.Having regard to the aforesaid facts and circumstances, we are of the view that the High Court was not right in dismissing the writ petition of the appellant on the ground of availability of an alternative remedy under Section 68 of the Act especially when the writ petition that was filed in 1988 had already been admitted and was pending in the High Court for the past more than five years. Since the question that is raised involves a pure question of law and even if the matter is referred to the Chancellor under Section 68 of the Act it is bound to be agitated in the court by the party aggrieved by the order of the Chancellor, we are of the view that this was not a case where the High Court should have non-suited the appellant on the ground of availability of an alternative remedy. We, therefore, propose to go into the merits of the question regarding inter se seniority of the appellant and Respondents 4 and 5. We may, in this context, mention that Respondent 4 has already retired in January

1994.

11.Provisions with regard to seniority of teachers of University are contained in Chapter 18 of the First Statute of the University. Prior to the amendments made by Notification dated 21-2-1985 the statutes having bearing on the seniority of teachers of the University were as under:

"18.05. The following rules shall be followed in determining the seniority of teachers of the University:

(a) A Professor shall be deemed senior to every Reader, and a Reader shall be deemed senior to every Lecturer.

619

(b) In the same cadre, seniority of a teacher shall be determined according to the length of his continuous service in a substantive capacity in such cadre:

Provided that where more than one appointment to posts in a cadre have been made at the same time, and an order of preference or merit was indicated by the Selection Committee or by the Executive Council, as the case may be, the seniority of the persons so appointed shall be governed by the order so indicated.

(c) When any teacher holding substantive post in any University (other than the University of Allahabad) or in any constituent college or in any institute whether in the State of Uttar Pradesh or outside Uttar Pradesh is appointed whether before or after 1-8-1981, to a post of corresponding rank or grade in the University, the period of service rendered by such teacher in that grade or rank in such University shall be added to his length of service.

(d) When any teacher holding substantive post in any college affiliated to or associated with any University is appointed whether before or after the commencement of these Statutes as a Lecturer in the University, then one half of the period of substantive service rendered by such teacher in such college shall be added to his length of service.

(e) Service against an administrative appointment in any University or institution shall not count for the purposes of seniority.

Explanation.- In this Chapter, the expression "administrative appointment" means an appointment made under sub-section (6) of Section 13.

(f)Continuous service in a temporary post to which a teacher is appointed after reference to a Selection Committee, if followed by his appointment in a substantive capacity to that post under Section 31(3)(b) shall count towards seniority.

18.06. Where more than one teacher are entitled to count the same length of continuous service in the cadre to which they belong, the relative seniority of such teachers shall be determined as below:

(i) in the case of Professors, the length of substantive service as Reader shall be taken into consideration;

(ii) in the case of Readers, the length of substantive service as Lecturer shall be taken into consideration;.

(iii) in the case of Professors, whose length of service as Readers is also identical, the length of service as Lecturer shall be taken into consideration.

18.07. Where more than one teacher are entitled to count the same length of continuous service and their relative seniority cannot be

620

determined in accordance with any of the foregoing provisions, then the seniority of such teachers shall be determined on the basis of seniority in age.

18.08 (1) Notwithstanding anything contained in any other Statute, if the Executive Council--

(a) agrees with the recommendation of the Selection Committee, and approves two or more persons for appointment as teachers in the same Department, it shall, while recording such approval, determine the order of merit of such teachers;

(b) does not agree with the recommendations of the Selection Committee and refers the matter to the Chancellor under Section 31(8)(a), the Chancellor shall, in cases where appointment of two or more teachers in the same Department is involved, determine the order of merit of such teachers at the time of deciding such reference;

(2) The order of merit in which two or more teachers are placed under clause (1), shall be communicated to the teachers concerned before their appointment.

By virtue of the amendments that have been introduced in the Statutes by Notification dated 21-2-1985, clause (b) of Statute 18.05 was substituted as under:

" (b) In the same cadre, inter se seniority of teachers, appointed by personal promotion or by direct recruitment, shall be determined according to length of continuous service in a substantive capacity in such cadre:

Provided that where more than one appointment have been made by direct recruitment at the same time and an order of preference or merit was indicated by the Selection Committee or by the Executive Council, as the case may be, the inter se seniority of persons so appointed shall be governed by the order so indicated:

Provided further that where more than one appointment have been made by promotion at the same time, the inter se seniority of the teachers so appointed shall be the same as it was in the post held by them at the time of promotion."

12. The learned counsel for the appellant has submitted that since the appellant, was appointed on the post of Professor in Physics on 9-11-1984, the seniority should be regulated by the provisions contained in the Statutes as they existed on the said date and that the amendments which were made in the Statutes by Notification dated 21-2-1985 would have. no application in the matter of determination of his seniority. Under clause (b) of Statute 18.05, as it stood on 9-11-1984, when the appellant joined as Professor in Physics, appellant, who was holding the selection post of Professor in Physics Faculty, was senior to Respondents 4 and 5 who were promotees under the Personal Promotion Scheme. In this connection, the learned counsel has urged

that although Section 31-A, which provides for personal
621
promotion, was introduced in the Act with effect from 10-10-1984 but the said provision could be given effect to only after the length of service as well as the qualifications were prescribed in the Statutes and that this was done only, by the amendments that were introduced in the Statutes by Notification dated 21-2-1985 and, therefore, personal promotion of Respondents 4 and 5 could have legal effect only from the date of such amendment in the Statutes and that Respondents 4 and 5 should be treated to have been promoted under Personal Promotion Scheme on the grade of Professor in Physics with effect from 21-2-1985. Since the appellant joined as Professor in Physics on 9-11-1984, he should be treated as senior to Respondents 4 and 5.

13. Shri Sanyal, the learned Senior Counsel appearing for Respondent 5, has, however, urged that since the validity of appointment of Respondents 4 and 5 with effect from 9-11-1984 has not been assailed by the appellant, he should not be permitted to raise this question at this stage. It is no doubt true that the validity of promotion of Respondents 4 and 5 has not been assailed by the appellant but all that he is pointing out is that in view of the provisions contained in Section 31-A of the Act the promotion of Respondents 4 and 5 under the Personal Promotion Scheme could be made only after the length of service and qualifications were prescribed by the Statutes and provisions in this regard were made in the Statutes only on 21-2-1985. In other words, what the appellant is saying is that the promotion of Respondents 4 and 5 to the grade of Professor can be regarded to have been made legally only with effect from 21-2-1985. This does not involve a challenge to the validity of their promotion but only raises the question about the date from which it can be given effect to in law. We are of the opinion that in view of the provisions contained in Section 3 1 -A and Section 2(14) of the Act there is no escape from the conclusion that Respondents 4 and 5 could not be given promotion under the Personal Promotion Scheme till the necessary provisions prescribing the length of service and the qualifications for such promotion were made in the Statutes and since this was done by Notification dated 21-2-1985, promotion under the Personal Promotion Scheme could not be made prior to 21-2-1985. The Executive Council in its Resolution No. 198 dated 8-11-1984 had accepted the recommendations of the Selection Committee for promotion of Respondents 4 and 5 on the basis of Government Orders dated 12-12-1983 and 25-2-1984. At that time Section 31 of the Act provided for appointment of teachers by direct recruitment and did not envisage promotion from a lower teaching post to a higher teaching post. The orders of the Government aforementioned could not be given effect till necessary amendment was made in the Act making provision for personal promotion. This was done by introducing Section 3 1 -A by U.P. Act No. 9 of 1985 with effect from 10- 10-1984. But Section 3 1 -A could be given effect only after the necessary provision was made in the Statutes prescribing the length of service and the qualifications for personal promotion. This was done by the notification dated 21-2-1985. The promotion of Respondents 4 and 5 to the grade of Professor under the Personal Promotion Scheme could, therefore, not be made prior to 21-2-1985
622
and it has to be treated to have been made with effect from 21-2-1985. The inter se seniority of the appellant and Respondents 4 and 5 has to be determined on that basis.

14. Shri Sanyal has also contended that since the seniority of the appellant and Respondents 4 and 5 was determined by the Executive Council after the Statutes had been amended by notification dated 21-2-1985 the criterion for fixing the seniority would be that laid down in the Statutes on the date when such determination was made and that the seniority was properly determined in accordance with the provisions of the Statute 18.05 as amended by Notification dated 21-2-1985. We are unable to agree. Even under the Statutes as amended by Notification dated 21-2-1985, it is laid down in clause (b) of Statute 18.05 that in the same cadre, inter se seniority of teachers, appointed by personal promotion or by direct recruitment, shall be determined according to length of continuous service in a substantive capacity in such cadre. Since the promotion of Respondents 4 and 5 can be treated to be valid only with effect from 21-2-1985 their service in the cadre of Professor has to be counted from 21-2-1985 while the service of the appellant has to be counted from 9-11-1984. The appellant is, therefore, entitled to be placed above Respondents 4 and 5 insofar as seniority in the cadre of Professor is concerned.

15. Shri Arun Jaitley, the learned counsel appearing for Respondent 4, has invited our attention to Statute 18.06 and has submitted that since the appellant and Respondents 4 and 5 joined as Professors on the same date and have the same length of continuous service in the cadre of Professor, their inter se seniority should be determined by virtue of the length of their service as Readers and on that basis Respondents 4 and 5 would rank senior to the appellant since they had longer length of service as Readers than the appellant. This contention also proceeds on the basis that Respondents 4 and 5 were validly promoted to the grade of Professor on 9-11-1984 and the said contention would have no validity if it is held that promotion of Respondents 4 and 5 to the grade of Professor under the Personal Promotion Scheme could only be legally effected from 21-2-1985.

16. For the reasons aforementioned, it must be held that the appellant should have been treated as senior to Respondents 4 and 5 in the cadre of Professor in Physics and the Executive Council was not justified in placing him junior to the said respondents. The appeal is, therefore, allowed, the judgment of the High Court dated 6-1-1994 is set aside and the writ petition filed by the appellant is allowed and it is directed that the appellant should be treated as senior to Respondents 4 and 5 as Professor in the Physics Department of the University. There is no order as to costs.

623