

IN THE CENTRAL ADMINISTRATIVE TRIBUNAL

NEW DELHI

(10)

O.A. No. 439 of 1986.

~~Page No.~~

1990

DATE OF DECISION 23-5-1990.Sh. Rafat Ullah

Petitioner

Applicant in personAdvocate for the Petitioner(s):

Versus

Union of India and others

Respondents

Mrs. Raj Kumari Chopra

Advocate for the Respondent(s)

CORAM

The Hon'ble Mr. B.S. Sekhon, Vice Chairman.

The Hon'ble Mr. D.K. Chakravorty, Administrative Member.

1. Whether Reporters of local papers may be allowed to see the Judgement? yes
2. To be referred to the Reporter or not? yes
3. Whether their Lordships wish to see the fair copy of the Judgement? yes
4. Whether it needs to be circulated to other Benches of the Tribunal? yes

D.K. Chakravorty
(D.K. Chakravorty)
Administrative Member

B.S. Sekhon
(B.S. Sekhon)
Vice Chairman

23-5-90

(11)

CENTRAL ADMINISTRATIVE TRIBUNAL,
PRINCIPAL BENCH,
NEW DELHI

O.A. No. 439 of 1986

Date of decision 23-5-1990

Shri Rafat Ullah

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Applicant

versus

1. Union of India through the Secretary to the Govt. of India, Ministry of Finance, North Block, New Delhi.
2. Secretary, Ministry of Personnel, Public Grievances & Pension, (Deptt. of Personnel & Training) North Block, New Delhi.
3. Central Board of Direct Taxes through its Secretary, North Block, New Delhi-110001.
4. Chief Commissioner (Admn.) & Commissioner of Income-tax, Delhi-I, 3rd Floor, Central Revenues Bldg., I.P. Estate, New Delhi-110002.
5. Inspecting Asstt. Commissioner of Income-tax (H. Jr. Admn.), 3rd Floor, Central Revenues Building, I.P. Estate, New Delhi-110002.

Present: Applicant in person.

Mrs. Raj Kumari Chopra, counsel for the respondents.

B.S. SEKHON:

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The short ~~question~~ falling for consideration in the instant reference is regarding correct assignment of seniority to the applicant in the cadre of UDCs. Applicant had initially claimed the reliefs for fixation of his seniority with effect from the date in the year 1964 in which the vacancies against which applicant's appointment was made were reserved for direct recruitment and departmental promotion; he be promoted ^{as} (1) Head Clerk, (2) Supervisor

and (3) Inspector with retrospective effect and his seniority in these cadres be fixed accordingly. Applicant had also claimed arrears of salary to which he would be entitled from the aforesaid promotions and fixation of time limit for implementing the decision of the Tribunal. The other reliefs claimed by the applicant are for a direction to the respondents to adopt uniform criteria for promotion to the post of Inspector from that of UDC^{and} to declare him as having passed the departmental examination of ITOs. During the course of arguments, applicant stated that he does not press the other reliefs and confines his arguments to the assignment of seniority in the cadre of UDCs and to the consequential reliefs flowing there-from. The factual matrix germane to the determination of the aforesaid question lies within a short compass.

Applicant was recruited directly as UDC with effect from 8-12-67. He was confirmed in the said post with effect from 2nd August, 1973 and was promoted as Tax Assistant with effect from 31-5-78. He was confirmed in the post of Tax Assistant on 30-3-83. Applicant's name in the seniority list of UDCs as on the dates indicated hereinafter was shown at Sr.Nos. specified against the same:-

<u>Date</u>	<u>Sr.No.</u>
1.9.69	272
1.9.1972	155
1.9.1973	143
<u>1.9.74:</u>	
a) Original	211
b) Revised	334
c) Revised	274
d) Revised	485
1.9.1979	48
<u>1.9.1980</u>	
a) Original	485
b) Revised	346

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The seniority list as on 1-9-1980 was circulated in February, 1981 and the revised seniority list in June, 1981. In the revised seniority list, applicant's name was shown at Sr.No.346 and of Shri Hari Chand, stated to be applicant's junior, at Sr.No.129. Shri P.G.Khandelwal, who joined alongwith the applicant on 8-12-67 has been shown at Sr.No.133. According to the applicant, the seniority lists of 1974 and 1980 were prepared/revised on the basis of date of confirmation of UDCs and not on the basis of their initial date of appointment. Nor on the basis of the date when the vacancies were created for direct recruitment or promotion. According to the applicant it is only in the cadre of UDCs that the respondents have arbitrarily adopted the criterion of determining the seniority on the basis of date of confirmation, which is violative of Articles 14 and 16 of the Constitution and by incorrectly applying the general principles regarding determining the seniority of various categories of persons employed in Central services which were in force prior to 1st March, 1986 on which date the modified criterion was brought into force. Elaborating, the applicant has stated that as per the practice in vogue prior to 1st March, 1986, the slots meant for direct recruits or promotees which could not be filled up were left vacant and that the direct recruits or promotees' case may be adjusted against the vacant slots and that he should have been adjusted against the slots for direct recruitment as he was recruited against a substantive vacancy of direct recruitment created in 1964 and that the determination of the seniority by the respondents is also in violation of the decisions of the Supreme Court.

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2. The defence as set up in the counter is that the applicant was recruited against the direct recruitment quota of 1966 and not of 1964 and he has been given seniority accordingly. Applicant is stated to have been appointed against a purely temporary vacancy and it had been clarified in the offer of appointment that retention in the service and confirmation in the department is subject to passing of the departmental test prescribed for confirmation. As the applicant qualified the departmental examination after a good deal of delay, his confirmation was made on 2-8-73. It had been further clarified that the seniority of UDCs was prepared according to the general principles contained in the Ministry of Home Affairs Memo No.9/11/55-RPS dated 22.12.1959 according to which circular, the permanent officials ranked senior to the persons officiating in the cadre. The juniors of the applicant had been assigned seniority as they had qualified in the departmental examination earlier to the applicant. The changes in the seniority list are stated to have been effected from time to time due to revision of the seniority lists as per the instructions of the CBDT. Respondents have also justified their action on the basis of proviso to para 4 of circular No. 11/5/64/Ad.VII dated 1.7.64 issued by the CBDT. Denying the averments about the attraction of Articles 14 and 16 of the Constitution, respondents have stated that the general principles for determining seniority relied upon by the petitioner are applicable to all other categories except the cadre of UDCs.

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3. We have heard the arguments addressed by the Applicant in person and by the learned counsel for the Respondents and have also given our earnest consideration to the pleadings and the material on record.

4. Before proceeding further, we deem it proper to mention here that in his representation dated 5th March, 1986 (Annexure-5) addressed to the Chief Commissioner (Admn.) and Commissioner of Income-tax, Delhi-I, New Delhi, Applicant has placed reliance upon the decisions of the Supreme Court and has also pointed out that in the cadre of Lower Division Clerks, Stenographers, Inspectors and I.T.Os, the date of confirmation has not been made a criterion for reckoning seniority and that it is only in the lone cadre of Upper Division Clerks in which the seniority has been fixed in an arbitrary manner without any consideration of rules and law. Applicant has also stated in the representation that in the seniority list of Upper Division Clerks as on 1.9.1980 which was circulated in June, 1981, he was shown at serial No. 346 whereas his juniors Shri Hari Chand and Shri P.G. Khandelwal who were appointed on 20.3.1968 and 8.12.1967 respectively were shown at Sr. Nos. 129 and 133.

5. Applicant was, admittedly, recruited against the direct recruitment quota of 50%. The parties have, however, joined issue on the point as to whether the Applicant was recruited for the vacancy created in 1964 or against the direct recruitment quota vacancy of 1966. Leaving aside the aforesaid minor controversy for the moment, it may be stated that the main dispute between the parties is regarding the issue as to whether the seniority is to be reckoned from the date of appointment as contended by the Applicant or from the date of confirmation as asserted by the Respondents. Before grappling with the aforesaid controversy it will appear to be

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appropriate to refer to the important terms and conditions of the offer of appointment and to the order of appointment is of the Applicant. As/borne out from Annexure-I enclosed to the counter filed by the Respondents, the Applicant ^{duly} had been selected for appointment in a temporary vacancy of U.D.C. His retention and confirmation in the department was subject to his passing the test in Hindi and any other test which may be prescribed before confirmation. He was put on probation for a period of two years which could be extended at the discretion of the appointing authority. Material portion of order of appointment Annexure-1 is in the following terms:-

"Establishment -Class III - UDCs - Appointment of

Shri Rafat Ullah has been appointed as Upper Division Clerk in the scale of Rs. 130-5-160-8-200-EB-8-256-EB-8-280-10-300 and such allowances as may be sanctioned by the Govt. of India from time to time in a temporary capacity w.e.f. 8-12-1967 (F.N) until further orders. On appointment as such he was posted to the office of the Income Tax Officer, Distt.VI, New Delhi with effect from the same date."

Applicant was confirmed as U.D.C. w.e.f. 2nd August, 1973 after he had cleared the prescribed departmental examination. Shri P.G. Khandelwal and Shri Hari Chand joined as L.D.C. on December 8, 1967 and March 20, 1968 respectively. In the impugned seniority list Shri P.G. Khandelwal has been assigned seniority at Sr. No. 133, Shri Hari Chand at Sr. No. 129 and the Applicant at Sr. No. 346. It may not be out of place to point out that Applicant's representation dated 5-3-1986 (Annexure-5) for fixation of his seniority at the appropriate place was not considered and accepted for the reason that the issue regarding fixation of seniority

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stood challenged in the Delhi High Court. This is borne out from Annexure R/4. Applicant was also advised vide Annexure R/4 that the case had been transferred to the Principal Bench of the Tribunal and his case could not be considered till final disposal of the cases in question.

6. The next point which falls for consideration is as to whether the seniority in the instant case is to be determined on the basis of O.M. No. 35014/2/80-Estt.(D), dated 7th February, 1986 (Annexure-3). This question need not detain us for long for the simple reason that Para 7 of the said O.M. provides that the orders shall take effect from 1st March, 1986 and that the seniority already determined in accordance with the principles existing on the date of issue of these orders will not be reopened. It has been further laid down in Para 7 that in respect of the vacancies for which recruitment action has already been taken, on the date of issue of these orders either by way of direct recruitment or promotion, seniority will continue to be determined in accordance with the principles in force prior to the issue of the said O.M. It is evident from the aforesaid para that the seniority of the Applicant and others situated like him is to be determined on the basis of principles which were in force prior to the coming into force of the O.M. i.e. prior to 1st March, 1986.

The opening portion of the aforesaid O.M. recites that general principles of determination of seniority in the Central Services are contained in the Annexure to Ministry of Home Affairs O.M. No. 9/11/55-RPS, dated 22nd December, 1959, and that the general principles of seniority laid down in paragraph 3 and also vide O.M. dated 22.12.1959 which had also been made applicable to the Respondent - department

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from 1964 onwards are in the following terms:-

- "3. Subject to the provisions of para 4 below permanent officers of each grade shall be ranked senior to persons who are officiating in that grade.
4. Direct Recruits:- Notwithstanding the provisions of above para, the relative seniority of all direct recruits shall be determined by the order of merit in which they are selected for such appointment, on the recommendations of the UPSC or other selecting authority, persons appointed as a result of an earlier selection being senior to those appointed as a result of a subsequent selection.
- Provided that where persons recruited initially on temporary basis are confirmed subsequently in an order different from the order of merit indicated at the time of their appointment, seniority shall follow the order of confirmation and not the original order of merit."

7. Banking upon the above extracted proviso the learned counsel for the Respondents submitted that the seniority is to be reckoned from the date of confirmation and not from the date of original order of merit or appointment and that the Applicant's grievance is wholly unjustified. In support of his contention, the learned counsel for the Respondents also sought to draw sustenance from the notings recorded in the Ministry of Home Affairs which are reproduced in para 6 (D) of the counter. The aforesaid notings pertain mainly to the clarification on the point as to whether quota of 50:50 was again to be maintained at the time of confirmation. This is a separate issue and will be dealt with at the appropriate place.

8. As regards the central issue i.e. whether the seniority is to be reckoned from the date of confirmation or from the date of appointment, we may point out here that

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Applicant was appointed to the post of U.D.C. after he ^{in a} ~~he was selected in a regular manner~~ He was to complete the period of probation which could be extended and was also to pass the prescribed examination prior to confirmation. Applicant was not holding the post of U.D.C. on adhoc basis or as a stop-gap arrangement nor his appointment was irregular in any sense. It is also admitted on both hands that Applicant had been holding the post of U.D.C. uninterruptedly till the date of his confirmation and subsequent thereto also. Applicant relies upon the dictum of the Supreme Court in S.B. Patwardhan and others Vs. State of Maharashtra and others¹.

While dealing with Rule 8(iii) of the Bombay Service of Engineers Class II Rules, 1960 which provides for seniority of the promotees to be determined from the date of their confirmation, The Supreme Court made the following weighty observations in para 39 of Patwardhan (supra):-

"Instead of adopting an intelligible differentia, rule 8(iii) leaves seniority to be determined on the sole touchstone of confirmation which seems to us indefensible. Confirmation is one of the inglorious uncertainties of Govt. service depending neither on efficiency of the incumbent nor on the availability of substantive vacancies. A glaring instance widely known in a part of our country is of a distinguished member of the judiciary who was confirmed as a District Judge years after he was confirmed as a Judge of the High Court. It is on the record of these writ petitions that officiating Deputy Engineers were not confirmed even though substantive vacancies were available in which they could have been confirmed. It shows that confirmation does not have to conform to any set rules and whether an

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employee should be confirmed or not depends on the sweet will and pleasure of the government."

It was further observed in Para 43 of the aforesaid judgment that vice of clause 8(iii) is that it leaves the valuable right of seniority to depend upon the mere accident of confirmation. That under Articles 14 and 16 of the Constitution, is impermissible and therefore, we must strike down rule 8(iii) as being unconstitutional. Patwardhan (supra) has also been affirmed by the Apex Court in the land mark judgment rendered in The Direct Recruit Class II Engineering Officers' Association and others Vs. State of Maharashtra and others². This decision has been rendered by a Bench of Five Judges presided over by the Chief Justice of India. We may extract the pertinent observations made by the Supreme Court in paragraph 13 of the aforesaid judgment:-

"When the cases were taken up for hearing before us, it was faintly suggested that the principle laid down in Patwardhan's case was unsound and fit to be over-ruled, but no attempt was made to substantiate the plea. We were taken through the judgment by the learned counsel for the parties more than once and we are in complete agreement with the ratio decidendi, that the period of continuous officiation by a government servant, after his appointment by following the rules applicable for substantive appointments, has to be taken into account for determining his seniority; and seniority cannot be determined on the sole test of confirmation, for, as was pointed out, confirmation is one of the inglorious uncertainties of government service depending neither on efficiency of the incumbent nor on the availability of substantive vacancies. The principle for deciding inter-se seniority has to conform to the principles of equality spelt out by Articles 14 and 16. If an appointment is made by way of stop-gap arrangement,

without considering the claims of all the eligible available persons and without following the rules of appointment, the experience on such appointment cannot be equated with the experience of a regular appointee, because of the qualitative difference in the appointments. To equate the two would be to treat two unequals as equal which would violate the equality clause. But with the appointment is made after considering the claims of all eligible candidates and the appointee continues in the post uninterruptedly till the regularisation of his service in accordance with the rules made for regular substantive appointment, there is no reason to exclude the officiating service for purpose of seniority. Same will be the position, if the initial appointment itself is made in accordance with the rules applicable to substantive appointment as in the present case. To hold otherwise will be discriminatory and arbitrary. This principle has been followed in innumerable cases and has been further elaborated by this Court in several judgments including those in Baleshwar Das versus State of U.P. and others; (1981) 1 SCR 449, and Delhi Water Supply and Sewage Disposal Committee and others versus R.K. Kashyap and others; (1989) Supp. ISCC 194, with which we are in agreement. In Narendra Chaudha and others versus Union of India and others; (1986) 1 SCR 211, the officers were promoted although without following the procedure prescribed under the rules, but they continuously worked for long periods of nearly 15-20 years on the posts without being reverted. The period of their continuous officiation was directed to be counted for seniority as it was held that any other view would be arbitrary and violative of articles 14 and 16. There is considerable force in this view also. We, therefore, confirm the principle of counting towards seniority the period of continuous officiation following an appointment made in accordance with the rules prescribed for regular substantive appointments in the service."

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Conclusions have been summed up in Para 47. We may usefully reproduce the same:-

"(A) Once an incumbent is appointed to a post according to rule, his seniority has to be counted from the date of his appointment and not according to the date of his confirmation.

The corollary of the above rule is that where the initial appointment is only ad hoc and not according to rules and made as a stop-gap arrangement, the officiation in such post cannot be taken into account for considering the seniority.

(B) If the initial appointment is not made by following the procedure laid down by the rules but the appointee continues in the post uninterruptedly till the regularisation of his service in accordance with the rules, the period of officiating service will be counted.

(C) When appointments are made from more than one source, it is permissible to fix the ratio for recruitment from the different sources, and if rules are framed in this regard they must ordinarily be followed strictly.

(D) If it becomes impossible to adhere to the existing quota rule, it should be substituted by an appropriate rule to meet the needs of the situation. In case, however, the quota rule is not followed continuously for a number of years because it was impossible to do so the inference is irresistible that the quota rule had broken down.

(E) Where the quota rule has broken down and the appointments are made from one source in excess of the quota, but are made after following the procedure prescribed by the rules for the appointment, the appointees should not be pushed down below the appointees from the other source inducted in the service at a later date.

(F) Where the rules permit the authorities to relax the provisions relating to the quota, ordinarily a presumption should be raised that there was such relaxation when there is a deviation from the quota rule.

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(G) The quota for recruitment from the different sources may be prescribed by executive instructions, if the rules are silent on the subject.

(H) If the quota rule is prescribed by an executive instruction, and is not followed continuously for a number of years, the inference is that the executive instruction has ceased to remain operative.

(I) The posts held by the permanent Deputy Engineers as well as the officiating Deputy Engineers under the State of Maharashtra belonged to the single cadre of Deputy Engineers.

(J) The decision dealing with important questions concerning a particular service given after careful consideration should be respected rather than scrutinised for finding out any possible error. It is not in the interest of service to unsettle a settled position.

With respect to Writ Petition No. 1327 of 1982, we further hold:

(K) That a dispute raised by an application under article 32 of the Constitution must be held to be barred by principles of res judicata including the rule of constructive res judicata if the same has been earlier decided by a competent court by a judgment which became final."

On the basis of the dictum of the Supreme Court in the aforesaid authorities and the authorities referred to in paragraph 13 extracted above, it can be safely stated that the reckoning of seniority from the date of confirmation of the U.D.Cs is erroneous and that the correct mode of determining the seniority in the facts and circumstances of this case is on the basis of the date of initial appointment as U.D.C. It may be incidentally stated that it is only in the case of U.D.Cs that the seniority is reckoned from the date of confirmation and not from the date of entry into service and that this

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rule is not being followed in respect of other cadres controlled/administered by Respondent-department.

9. In the premises, we hold that the correct mode of seniority in the facts and circumstances of this case of U.D.Cs is from the date of their initial appointment and not from the date of their confirmation.

10. In view thereof, impugned seniority list is liable to be quashed. We may also mention that the prescription of the quota whether by Direct Recruitment Rules or by executive instructions is not per se illegal/bad. It is not a case where the quota rule had been broken down or had been rendered un-workable or had been implemented arbitrarily or unreasonably so as to attract the applicability of the principle laid down in Narender Chadha & others Vs. Union of India and others. While re-determining the seniority, the Respondents shall keep these observations in view.

11. In view of what has been said and discussed above, impugned seniority list (Annexure-2) is hereby quashed. Respondents are directed to re-assign seniority to the Applicant in the light of observations and findings recorded here-ib-above. It is scarcely necessary to add that the Respondents shall follow the due procedure including the principles of natural justice while re-casting the seniority list. Respondents are directed to recast the seniority list within a period of six months from the date of receipt of copy of this order. The Applicant shall also be entitled to the consequential benefits. Application is disposed of accordingly. In the circumstances, we make no order as to costs.

(D.K. Chakraverty)
Administrative Member

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(B.S. Sekhon)
Vice Chairman

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