

Central Administrative Tribunal
Principal Bench, New Delhi.

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OA-222/2004
And
OA-731/2004 ✓

New Delhi this the 4th day of March, 2005.

Hon'ble Sh. Shanker Raju, Member(J)
Hon'ble Sh. S.K. Malhotra, Member(A)

OA-222/2004

Sh. Manoj Kumar,

-Applicant

(through Sh. G.K. Aggarwal, advocate)

Versus

Union of India & Others

-Respondents

(through Sh. Prvinder Chauhan, counsel for R-1 and Sh. R. Venkataramni.
Sr. Counsel with Sh. S. Rajan and Sh. Ashok Parnigrahi, counsel for
Respondents No. 2 to 8)

OA-731/2004

Sh. .P. N. Singh,

-Applicant

(through Sh. R.Venkatramani, Sr. Counsel with Sh. S. Rajan and
Sh. Ashok Panigrahi)

Versus

Union of India & Others

-Respondents

(through Sh. Parvinder Chauhan, counsel for Respondents No. 1 to 3,
Sh. M.M. Sudan, counsel for Respondent No.4 and Sh. G.K. Aggarwal,
Counsel for Respondent No.5) ✓

1. To be referred to the Reporters or not? YES / ~~NO~~ ✓

2. To be circulated to outlying Benches of the Tribunal? YES ✓

S. Raju
(Shanker Raju)
Member (J)

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Hon'ble Sh. Shanker Raju, Member(J)
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OA-222/2004

Sh. Manoj Kumar,
G-18/11, Sector-15,
Rohini, Delhi-85.

..... Applicant

(through Sh. G.K. Aggarwal, advocate)

Versus

1. Union of India through
Director General (Works),
Head of Central Public Works,
Department of ex-officio Secy.,
Nirman Bhawan,
New Delhi-11.
2. JPN Singh (Mr),
4/33, Lodi Colony,
New Delhi-3.
3. Harish Chandra, AD(H)
4. SB Pathak, AD(H)
5. D.K. Aggarwal, AD(H)
6. O.P. Arora, AD(H)
7. Tejinder Kumar, AD(H)
8. Arjun Prasad, AD(H)

For service on Respondents No. 3 to 8 through
Director General (Works), CPWD (EC-9),
Nirman Bhawan, New Delhi-11.

..... Respondents

(through Sh. Prvinder Chauhan, counsel for R-1 and Sh. R. Venkataramni,
Sr. Counsel with Sh. S. Rajan and Sh. Ashok Parnigrahi, counsel for
Respondents No. 2 to 8)

OA-731/2004

Sh. .P. N. Singh,
Asstt. Director (Horticulture),
Division No.6, I.P. Bhawan,
New Delhi.

Applicant

(through Sh. R Venkatramani, Sr. Counsel with Sh. S. Rajan and
Sh. Ashok Pan'grahi)

Versus

1. Union of India through
Secretary,
Ministry of Urban Development,
Shastri Bhawan,
New Delhi-11.
2. The Director General of Works,
CPWD, Nirman Bhawan,
New Delhi-11.
3. Director (Horticulture),
CPWD, Y-Shape Building,
I.P. Bhawan,
New Delhi.
4. Sh. Gajendra Singh,
Asstt. Director (Horticulture),
Office of Executive Engineer,
Chandigarh Division No.1,
Kendriya Sadan,
Sector-9/A,
Chandigarh.
5. Sh. Manoj Kumar,
G-18/11, Sector-15,
Rohini, Delhi-85.

Respondents

(through Sh. Parvinder Chauhan, counsel for Respondents No. 1 to 3,
Sh. M.M. Sudan, counsel for Respondent No.4 and Sh. G.K. Aggarwal,
Counsel for Respondent No.5)

ORDER

Hon'ble Sh. Shanker Raju, Member(J)

As the issue raised is common, i.e., inter-se seniority of the direct recruits and promotees and the issue involves identical question of law, these OAs are being disposed of by this common order.

2. A brief factual matrix is relevant to be highlighted. Applicant Sh. J.P.N Singh in OA-731/2004 is a promotee Assistant Director whereas Sh. Manoj Kumar applicant in OA-222/2004 is a direct recruit Assistant Director in Horticulture Department of CPWD. Earlier the recruitment rules which were amended in 1999 prescribed in the matter of seniority a ratio of 2 : 1 between direct recruits and promotees. Though the promotees feeling aggrieved with assignment of quota had sought enlargement of quota in the matter of circulation in seniority in respect of the post in OA-1388/1993 no positive directions were issued.

3. Direct recruits had approached this Tribunal in OA-341/1998 for not filling up quota which was dismissed on 12.2.1998 in limine being premature. As the post was not notified, CWP-1208/1998 filed before the High Court of Delhi was also dismissed on 3.3.1998. A Writ Petition No. 2339/1999 filed by the petitioners was disposed of with liberty to approach the Tribunal, which accordingly had resulted in filing of OA-2281/1999 which was disposed of on 15.11.1999 with an observation that there was no embargo as such on the respondents not to fill up the post of the Asstt. Director (Horticulture). During this interregnum MA-969/1996 and RA-2266/1995 in OA-1388/1993 in the light of following statement, made by the learned counsel of the respondents, stood disposed of with the following observations:-

"In this connection, Shri K.B.S. Rajan learned counsel apprehends that the respondents might make recruitment to the post of Assistant Director (Horticulture) on the basis of the unamended recruitment rules even while the amendments to these rules are under process. Shri V.S.R. Krishna, states that this apprehension is unfounded because no action to fill up the post of Assistant Director (Horticulture) has been taken on the basis of the unamended recruitment rules even since the OA was filed on 8.9.95, and it is wholly unlikely that the respondents will now take steps to fill up that post, within the next two months by which time a final decision would have been taken on the amendment.

We noted the submissions made by both counsel and hold that in the event that the apprehension of the applicant is well founded at any stage, they will be at liberty to approach this tribunal to agitate their grievance in accordance with law if so advised.

Both the RA and MA accordingly stand disposed off. No costs."

4. Respondent No.4 was appointed as a direct recruit Asstt. Director on 10.1.1996 in OA-731/2004 whereas applicant in OA-222/2004, a direct recruit, was appointed on 27.8.1996.

5. A seniority list of direct recruit and promotee Asstt. Directors was issued on 1.1.1998 where ratio of 2:1 was maintained. Another list issued on 22.9.1999 shows the same ratio as per recruitment rules in vogue yet another list issued on 30.4.2002 circulated vide O.M. dated 7.5.2002 shows the same position. Seniority list issued on 5.9.2002 in pursuance of an office memorandum dated 5.9.2002 changed the criteria for seniority between direct recruits and promotees and instead of following 2:1 ratio, has adopted criteria laid down in revised rules. The seniority was assigned in view of Ministry of Urban Development CPWD, Directorate of Horticulture, Group-B Post Recruitment Rules, 1999 where the ratio was made 90% by promotion and 10% by recruitment.

6. Applicant in in OA-731/2004 in pursuance of relegation of seniority and grant of seniority to Respondent No.3 from the date when he was not borne on the cadre filed OA-374/2003 whereby by an order dated 19.02.2003 representation was directed to be disposed of. An order passed on 13.1.2004 rejected the claim of the applicant which led to filing of CP-446/2003 which was disposed of on 3.2.2004 with liberty to the applicant. In compliance of the directions in OA-374/2003 on the representation of applicant in OA-731/2004 it has been intimated that vacancies which had occurred upto 1994-1995 have been filled as per the old recruitment rules but thereafter vacancies have been filled as per the revised recruitment rules notified in 1999. As four vacancies had occurred in 1994-1995 they have been rotated as direct recruits in the ratio of 2:1



whereas after notification of new recruitment rules on 20.1.1990 ratio of 9:1 was maintained.

7. The grievance of the applicant in OA-222/2004 is that whereas rotation of quota for seniority should have been in the ratio of 2:1 as per unamended rules as the applicant therein was appointed on regular basis in 1996 and confirmed in 1998, his fixation of seniority under the ratio of 9:1 without affording him an opportunity is de hors the rules and is *violative* of principles of natural justice.

8. Learned Senior Counsel Sh. R. Venkatramni with Sh. S. Rajan , advocate in OA-731/2004 contended that the process of revision of recruitment rules having been initiated in 1993 when OA-1388/2004 was filed, the statement of learned counsel of respondents therein was on the apprehension of the applicants' counsel that posts may not be filled under unamended recruitment rules. The assurance given not to fill up the posts clearly shows that the posts are to be filled and seniority regulated in so far as rota quota is concerned would be in consonance with the revised amended recruitment rules promulgated in 1999. In the above backdrop it is stated that grant of seniority in the ratio of 2:1 operating the quota would be against this undertaking and Respondent No.4 who was even not borne in service as the applicant was promoted on 30.1.1975 whereas respondent was appointed on 10.1.1996 as direct recruit. In the light of decision of the Apex Court in Suraj Prakash Gupta Vs. State of J&K (2000(7)SCC 561) the impugned order is a nullity.

9. Learned senior counsel further stated that as per consolidated orders on seniority promulgated on 3.7.1986 vide DoP&T O.M. seniority of direct recruits and promotees as per rule 2.4.2 seniority now assigned is not sustainable. Learned counsel stated that in the light of decision in Dr. Ramulu & Anr. Vs. S. Suryaprakash Rao & Ors. (1997(3) SCC 59 it is

open for Government during the interregnum when process of amendment of the existing rules has been initiated not to fill up any vacancies.

10. Learned counsel further stated that the aforesaid stand not to fill the vacancies was also taken by the respondents in the reply filed on 19.8.1998 before the High Court in CWP-2329/1999. Taking cue from that it is stated in OA-2281/1999 that if the rules are amended the vacancies which had become available for direct recruitment have to be filled up in accordance with the revised rules. Relying upon the decision of the Constitution Bench of the Apex Court in Shankarsan Dash Vs. U.O.I. (1991(3)SCC 47), it is contended that it is not obligatory upon the Government to fill up any of the vacancies and does not have any enforceable right to be appointed.

11. Responcent No.4 represented through Sh. M.M. Sudan vehemently opposed the aforesaid contentions and stated that applicant stood appointed against a clear vacancy on 10.1.1996 and accordingly the undertaking given to the Court on 11.11.1996 would have no application. Moreover, it is stated that the process of recruitment of the applicant through U.P.S.C. had initiated on 26.2.1995 and as a trite law, applicant who was appointed against the vacancies notified on 19.8.1994 much before the conscious decision of the Government to stay the process of filling up the vacancies was taken. Accordingly the seniority of the respondent was correctly fixed.

12. Official respondents represented through Sh. Parvinder Chauhan, learned counsel stated that the proposal to revise the recruitment rules for the post of Assistant Director was pending and the process for filling up the vacancies was stopped in the year 1995 as there was a proposal to revise the recruitment rules. Accordingly, it is stated that as per the statement made by the learned counsel on 11.11.1996, the Tribunal has taken note of it in OA-2281/1999 on 16.11.1999. This was also



communicated to the High Court in CWP-2329/1999. Accordingly it is stated that after amended rules came into effect as per revised recruitment rules proposal was sent to UPSC which was turned back. Thereafter seeking opinion of the DoP&T and Ministry of Law and Cadre Controlling Ministry. It was decided that vacancies prior to stoppage of the process of filling up the vacancies during 1994-1995 were to be filled up as per the unamended recruitment rules and rest of the vacancies would be filled as per the revised recruitment rules.

13. In OA-222/2004 Sh. G.K. Aggarwal, learned counsel of the applicant contends that it is a nullity if statutory rules are substituted for recruitment rules which are framed under Article 309 of the Constitution of India which cannot be stayed and any executive instruction or assurance would apply if there is a vacuum failing which law shall prevail. In the above context, it is stated that the applicant was appointed on 27.8.1996 and at that time rotation was in the ratio of 2:1 which would have determined the seniority. Accordingly not only in 1998 and 1999 but also in April 2002 the same ratio was adopted to determine the seniority of the applicant but subsequently in September 2002 without affording an opportunity to the applicant his seniority has been relegated.

14. Shri Aggarwal states that having determined the seniority under 2:1 ratio department has acquiesced and estopped from acting to the contrary and statement made by the learned counsel on 11.11.1996 was factually incorrect and oblivious of the fact that against a clear vacancy applicant had already been appointed on 27.8.1996. The appointment letter does not indicate as to its being subjected to revised recruitment rules.

15. Shri Aggarwal further states that the rules amended in 1999 have not been specifically made to operate retrospectively and as such rotation of quota for the purposes of seniority for the vacancies which were filled

up before a amendment was to be carried out as per the old recruitment rules in vogue at that time.

16. Official respondents through Sh. Parvinder Chauhan has put forth identical contentions as raised in OA-731/2004. However, Respondents No. 2 to 8 represented through Senior counsel Sh. R. Venkataramni vehemently opposed these contentions and submitted that a conscious decision was taken not to fill up the vacancies till the rules are amended, the appointments made before or after should be operated by the amended recruitment rules. He raises the same proposition of law which he has raised in J.P.N. Singh's case (supra).

17. We have carefully considered the rival contentions of the parties and perused the material placed on record.

18. It is trite law that panel for promotion in case an amendment is carried out in the recruitment rules pertaining to the vacancies which had fallen before the amendment shall be governed by the unamended recruitment rules. We are fortified this by a decision of the Apex Court in Y.V. Rangaiah & Ors. Vs. J. Sreenivasa Rao & Ors. (1983 SCC(L&S) 382).

19. As per the decision in U.O.I. Vs. N.R. Banerjee & Ors. (JT 1996(11) SC 605), it is incumbent upon the DPC to hold its meeting on accrual of vacancies year-wise.

20. In the decision of the Constitution Bench in Shankarsan Dash Vs. U.O.I. (JT 1991(2) 380) it is held that even inclusion of name of a candidate in the merit list does not confer any right to be appointed and the State is under no legal duty to fill up all or any of the vacancies. However, in the above decision it is also observed that duty not to fill up the vacancies would not be construed to mean that State has licence to act in an arbitrary manner and this decision to fill up the vacancies has to be taken bona fide for proper reasons.

21. In the above backdrop, we must advert to a statement made by the learned counsel of the respondents in MA-1338/1993. The aforesaid statement has emanated from the apprehension of the learned counsel of the applicant that during the interregnum when the recruitment rules are being amended, the respondents might not take action to fill up the post of Asstt. Director on the basis of un-amended rules. The assurance given is that the OA was filed in 1993 and it is highly unlikely that the respondents would take steps to fill up the post. This has been construed as a mantra and estoppel for suspension of rules.

22. The aforesaid statement does not contemplate the factual position as existed earlier to 11.11.1996. Earlier to this statement, by way of direct recruitment not only Respondent No.4 in OA-731/2004 but also applicant in OA-222/2004 were appointed as direct recruits after completion of the selection process from the UPSC and had already joined the post. It is also no more res integra that under the unamended recruitment rules for the purposes of rotation of quota of direct promotees, the ratio earmarked is 2:1 and as per DoP&T O.M. of 1986 as per Rule 2.4.2, seniority would be operated accordingly.

23. Apex Court in Central Council for Research in Ayurveda & Siddha & Anr. Vs. Dr. K. Santhakumari (2001(5)SCC 60) in the light of practice and procedure and on the issue of concession and admission before Court by the counsel, observed as under:-

"In the instant case, the selection was made by the Departmental Promotion Committee. The Committee must have considered all relevant facts including the inter se merit and ability of the candidates and prepared the select list on that basis. The respondent, though senior in comparison to other candidates, secured a lower place in the select list, evidently because the principle of "merit-cum-seniority" had been applied by the Departmental Promotion Committee. The respondent has no grievance that there were any mala fides on the part of the Departmental Promotion Committee. The only contention urged by the respondent is that the Departmental Promotion Committee did not follow the principle of "seniority-cum-fitness". In the High Court, the appellants herein failed to point out that the promotion is in respect of a "selection post" and the principle to be applied is "merit-cum-seniority". Had the appellants

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pointed out the true position, the learned Single Judge would not have granted relief in favour of the respondent. If the learned counsel has made an admission or concession inadvertently or under a mistaken impression of law, it is not binding on his client and the same cannot ensure to the benefit of any party.

This Court in *Uptron India Ltd. Vs. Shammi Bhan* pointed out that a wrong concession on question of law made by counsel is not binding on his client and such concession cannot constitute a just ground for a binding precedent."

24. If one has regard to the above a wrong concession or a wrong statement of an Advocate will neither bound the client nor the other party can seek benefit on the basis of such a concession. Mutatis mutandis this interpretation would apply to a statement made by counsel of respondents which is patently against law and facts. In the light of settled position postulating seniority and appointment to be governed by the recruitment rules in vogue, unmindful of the fact that the direct recruits who had already been appointed made a statement which is not a positive one and does not tend to operate as an order or reflect a decision of the Government not to fill up the posts.

25. Assuming the above is correct, then it would apply prospectively from 11.11.1996 and the posts which had already been filled up on regular basis after following due process would not be affected by this statement. Moreover, a Constitution Bench of the Apex Court in *Prafulla Kumar Das & Ors. Vs. State of Orissa & Ors.* (2004 SCC (L&S) 121) ruled that right to seniority being a condition of service is not a fundamental right and the seniority can be altered even with prospective effect in its discretion by the Government being a civil right was held not to be a vested or accrued right. However, we do not find rotation the basis of seniority in the ratio of 9:1 has been made to operate retrospectively. The Apex Court in *Chandravathi P.K. & Ors. Vs. C.K. Saji & Ors.* (2004 SCC (L&S) 544) held that retrospective effect of rules framed though permissible but has to be shown explicitly by making express provision or by necessary implication.



Unless the rules are framed under Article 309 of the Constitution of India explicitly provide retrospectively would always be prospective in operation. Recruitment Rules promulgated on 15.11.1999 clearly postulate their application from the date of publication in official gazette. Accordingly, the ratio of 9:1 in rotation of quota for the purpose of seniority between direct recruits and promotees would be applicable from 15.11.1999. Those who had been validly appointed as direct recruits earlier, their seniority has to be governed by the unamended recruitment rules.

26. As regards filling up of the posts not being an obligation on the State, the decisions in Shankarsan Dash as well as Prafulla Kumar cases would have no application as in the present cases as the direct recruitment had already taken place and the applicants were appointed and Respondent No.4 in OA-731/2004 and applicant in OA-222/2004 were appointed on 10.1.1996 and 27.8.1996 respectively, their seniority and rotation of quota has to be governed by the unamended recruitment rules. In so far as decision of the respondents taken on 13.1.2004, we find that in 1994-1995 four vacancies which occurred had been filled as per old recruitment rules though later on vacancies had been operated under the revised recruitment rules but there is no challenge by any person except J.P.N. Singh. We do not intend to make any observation in this regard on merit. However, we must cite the decision of the Apex Court in Syed T.A. Naqshbandi Vs. State of J&K & Or. (2003(9)SCC 592) wherein it is clearly laid down that conditions of service are to be governed by the statutory rules or orders, in absence whereof unless the rules are amended any policy decision would not operate the field. Taking cue from the above, the amended recruitment rules have come into being on 15.11.1999 and the direct recruits having been appointed to the post earlier to it, in so far as rotation and assignment of seniority is concerned, would be governed by the unamended rules.

27. We also find in the case of Manoj Kumar that earlier his seniority was fixed in the ratio 2:1 which was reflected in the seniority list issued in 1998 and 1999 as well as the seniority list circulated on 30.4.2002. Having settled the seniority, respondents memo dated 5.9.2002 is a post decisional hearing whereby seniority has been operated in rotation of quota in the ratio 9:1. Relegation of seniority of Manoj Kumar is not in consonance with the principles of natural justice and as held by the Apex Court in Vinoo Kumar Sharma Vs. U.O.I (2001(4) SCC 675) non accord of prior opportunity vitiates the respondents' action.

28. Another aspect of the matter is that the respondents have unsettled the seniority on the basis of which the applicants have improved their position to their advantage. A conscious decision of the respondents now being over turned would be hit by doctrine of acquiescence and they are estopped from acting to the detriment of direct recruits appointed before amendment of the recruitment rules which would be de hors the statutory rules.

29. From the foregoing discussion, we hold that seniority assigned to J.P.N. Singh in OA-731/2004 is in accordance with rules and the change of seniority of applicant Manoj Kumar in OA-222/2004 is de hors the rules. Resultantly, OA-731/2004 is dismissed. OA-222/2004 is allowed. Seniority list dated 5.9.2002 in so far it relates to applicant is set aside. The seniority already assigned to the applicant in the seniority list circulated on 7.5.2002 shall be restored within 3 months from the date of receipt of a copy of this order and in that event he would be entitled to all consequential benefits. No costs.

30. A copy of this order be placed in both the files.

Member(A)

/vv/

Handwritten signature
11/7/05
S.D. (J.S.)

Member(J)