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CENTRAL ADMINISTRATIVE TRIBUNAL, ALLAHABAD

CIRCUIT BENCH

LUCKNOW

T.A. No. 1031/87
(W.P. No. 1210/82)

R.C. Saxena

Applicant

versus

Union of India & others

Respondents

Hon. Mr. Justice U.C. Srivastava, V.C.
Hon. Mr. A.B. Gorthi, Adm. Member.

(Hon. Mr. Justice U.C.S., V.C.)

This is a transferred case under section 29 of the Administrative Tribunals Act, 1985. The applicant originally filed a writ petition before Lucknow Bench of the Allahabad High Court challenging the notification dated 22nd December, 1959 and 12th April 1978 as void and for a mandamus commanding the Respondents to count ^{his} seniority from the date of appointment.

The petitioner started his service in the Postal and Telegraph Department of Government of India as time Scale Clerk. In the year 1967 the applicant sought his transfer from Kanpur Division to Lucknow Division on his request under para 38 of Post and Telegraph Manual with the result he was placed at bottom as per rule/ the new Division. According to the applicant that for promotion to the post of Sectional Supervisor from the post of Clerk in the seniority in a circle like U.P. circle is taken into account not divisional seniority in

which even local and casual promotional arrangements are made. The confirmation on clerical posts according to the applicant are made amongst the clerks on the basis of allocation of permanent posts among the various divisions and also ignoring the basis length of service. The applicant's seniority on the basis of his confirmation in 1978.

In the Office Memorandum issued by Home Ministry provided Government of India dated 22nd June 1949/length of service and not confirmation to be the basis of determination of seniority while office memorandum of 22nd December, 1959 which provided determination of seniority from the date of confirmation neither touches clerks not even otherwise applies to him as he was appointed prior to 22nd December, 1959.

The validity of O.M. dated 22nd December, 1959 which he has challenged was not decided in the ^{Ravi} case of Rao's Verma vs. Union of India (AIR 1972 SC 671) did not touch the question of validity and the seniority may be determined in this case as the same is arbitrary discriminatory and results into valuable long period of service, ^{lacks} any rational basis cartailing and delaying the chances of the promotion.

The gradation list prepared thereafter included the applicant's name and his junior including one who entered in service some 12 years thereafter was confirmed as on 1st March, 1977.

The D.G. Post and Telegraph vide circular dated 12.4.78 providing two criterion in the same class of employees and similarly placed having same qualification and experience. Those who joined before

22nd December, 1959 are entitled to seniority with their length of service irrespective of the confirmation while those joining later can count seniority from the date of confirmation. This O.M. is confined to employees appointed between 1949 and 1959 i.e. between the dates of issuance of these O.M.s. The applicant has challenged the same also on similar grounds as O.M. of 1959.

The O.M. of 1959 is in the nature of Executive Instruction issued in exercise of powers ~~guaranteed~~ ^{granted} under Article 162 of the Constitution of India. In the absence of Rules the executive instructions partake the nature of rules. If statutory service Rules are framed under Article 309 of the Constitution of India it is the statutory rules which would prevail. But in respect of matters on which statutory Rules are silent their place would still be taken by Executive Instructions which supplement the Rules though do not supplement it. The O.M. of 1959 lays down the principles of seniority in Central Services. They have been classified into 6 categories. The first category includes Ex Government servants, employees discharged because of certain diseases and permanent displaced government servants who will continue to be governed by O.M. as noted against these categories. The second category is of those who were appointed in substantive capacity to a grade prior to issuance of O.M. of 1959, the third category is of direct Recruits, the fourth category is of promotees, the fifth category is that of transferees and the sixth is that of persons appointed as adhoc without consultation with Union Public Service Commission. The O.M. which also deals with relative seniority between Direct recruits and promotees deals with the specific categories separated wherever necessary.

The office Memorandum of 1949 provides that one of the principles laid down in the same is that permanent officers of each grade would be ranked senior to persons who were officiating in that grade and the effect in the same was that the same seniority must be determined by the date of confirmation and not on the basis of length of service as was provided in the office Memorandum of 22nd June, 1949. The office Memorandum was in respect of those who were appointed subsequent to the issuance of the same and not those who were appointed earlier as they were to be governed by the Memorandum of 1949.

The learned counsel for the applicant contended that this office Memorandum is discriminatory and is arbitrary, hit by Article 14 of the Constitution of India in as much as it places those who were appointed earlier but for the some reason or other not confirmed to junior to those who were appointed subsequently or otherwise get confirmation earlier and in this connection made reference to certain cases decided by the Hon'ble Supreme Court of India.

In the case of N.K. Chauhan and others vs. State of Gujarat and others (AIR 1977 S.C. 254) in which case the dispute of seniority was between direct recruits and promotedes and it was observed that seniority will depend on the length of continuous officiating service and cannot be opted by later arrival from the open marked save to the extent to which excess promotedes could have been pushed out as indicated earlier. This case has no relevancy to the instant case.

In the case of S.B. Patwardhan vs. State of Maharashtra (1977 (3) SCC, 399) it was observed also

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a case of promotion seniority between direct recruits and promotees. The court in the said case struck down Rule 8 (b) and 9 of the Recruitment Rules of Bombay Service of Engineers. The court observed that confirmation is one of the ~~flexible and uncertain~~ to govt. servants depending neither with the inefficiency of the incumbent nor on the availability of substantive vacancy..... It shows that confirmation does not have to remain but in said rules whether any employee should be confirmed or not depends on the sweet will and pleasure of the Government.

In Baleshwardas vs. State of U.P. and others

(1984 SCC 226) the court pointed out that for the purpose of seniority appointment to the service in a substantive capacity was necessary but this observation was made with reference to Rule 23 of U.P. Service of Engineers (Junior and Senior Scale Irrigation Branch). But the rule of continuous service will not apply to every case if the rules are to the contrary for rules that seniority is governed from the date of confirmation it is the date of confirmation which will be starting point. In the instant case there is no statutory rules and in the absence of statutory rules, the office ^{hold govt. to} memorandum will ~~the full~~ silence, ^{Since} the statutory rules are not there, the executive instructions are to continue to apply, ^{to} In case the same are valid and not hit by Article 14 ~~and~~ 16 of the Constitution.

In case of H.V. Pardasan and others vs. Union of India & others (1985 2, SCC, 468) it was observed that length of continuous officiation rule will not prevail

where any other rule of seniority is prescribed. The Supreme Court has also laid down that length of service will not prevail in the case of rules provided otherwise. It was also a case of dispute between direct recruits and promotees.

In the case of Delhi Water Supply and Sewerage Disposal Committee vs. R.K. Kashyap (1989 Supplement 1, SCC 194) it was held that rule of length of continuous officiation should normally be followed if there is no statutory rules and not in violation of Article 14 and 16 of the Constitution.

In the case of V.K. Jaisawal vs. State of M.P. (1987(4) SCC 450) it was observed that normal rule of length of service would not be applicable to determine seniority in the case in the absence of statutory rule or executive memorandum or order.

In the case of Direct Recruit Class II Engineers Officers Association vs. State of Maharashtra (1990, II 715) the Constitution Bench of the Supreme Court before which the question of seniority between direct recruits and promotees were in question, it was held that quota rule can be prescribed by executive instructions in the absence of statutory rules in this regard. It was further laid down in the case once incumbent is appointed to a post according to rule, his seniority is to be counted from the date of his appointment and not according to his date of his confirmation. ^{was 2} Collary to the above rule is that where initial appointment is only adhoc and made ¹⁰ officiation as stop gap arrangement/for such post/cannot be taken for considering the seniority.

O.M. of 1949 undoubtedly provides that if those who were appointed on temporary basis are confirmed

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subsequently though their promotion by way of selection was on the basis of merit, the seniority shall follow the order of confirmation and not merit but the O.M. does not speak of promotion which one gets by virtue of his length of service. The confirmation rule will apply only if promotion from various grades separately or jointly is made on the basis merit and thereafter confirmation took place. In the instant case, promotion has been made from time to time on the basis of seniority subject to rejection of unfit on the circle level seniority and not that on the basis of seniority/merit or on the basis of merit and consequently O.M. of 1949 as such will not apply to the instant case and ~~so~~ it will not then be necessary for us to hold it violative of Article 14 and 16 of the Constitution or otherwise.

Promotion when made on the basis of seniority /rejection to unfit the confirmation rule will have no play and the general rule of continuous length of service as held by the Supreme Court repeatedly and by the Constitution Bench prevail, as there is no statutory rule or valid order to the contrary on this behalf. The same will thus apply to the circular of 1978 which obviously will not come in the way of the applicant. Accordingly, the seniority of the applicant and those who were promoted subsequently will be governed by the continuous length of service notwithstanding the ^{l. i. e. g. m. t. o. n s} ~~enquiries~~ uncertainty of confirmation.

Even if confirmation has taken later on seniority will be determined on the basis of continuous officiation which proved to be permanent post on which confirmation was also made.

A question has been raised as to whether in

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determining the seniority as to whether it is zonal seniority or circle seniority is to be taken into account. As has been noticed earlier that even by way of local ~~arrangement~~ arrangements are made and zonal seniority remains in the zone itself. The service is an All India service and ~~several~~ zones are part of a circle and zones in U.P. are included in U.P. Circle. In case seniority is counted zonal wise while many include adhoc or stop gap appointees. The rule of continuous officiation or even of confirmation in such circumstances may be relegated into background. In D.K. Mitra vs. Union of India (1985 SCC (Suppl) 243) it was held that zonal confirmation given to the railway Doctors cannot be valid basis for drawing up their seniority on zonal basis. It was observed that confirmation limited by legal perspective within a particular zone cannot serve legitimate basis into All India Cadre. The same principle will apply in the instant matter too. The seniority is to be seen circle wise and is to be determined on the basis of continuous officiation from the date of the promotion.

In view of what has been said the application deserves to be allowed and the same is allowed. It is directed that the seniority of the applicant will be counted from the date of permanent appointment and the respondents will fix seniority within a period of 3 months from the date of receipt of a copy of this order, after taking into consideration those whose position will be lowered down. No order as to costs.

Shakeel/-

Shakeel
A.M.

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V.C.

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