

IN THE CENTRAL ADMINISTRATIVE TRIBUNAL HYDERABAD BENCH AT HYDERABAD
O.A.NO. 381/92.

Between:

Date of decision: 28-7-93

Ch.V.Subba Rao.

... Applicant.

and

1. Union of India, rep. by its Secretary, Ministry of Personnel, Public Grievances and Pensions, Dept. of Personnel & Training, New Delhi.
2. The Secretary, Central Board of Direct Taxes, New Delhi.
3. Chief Commissioner of Income tax, A.P. Ayakar Bhavan, Basheer bagh, Hyderabad.

... Respondents.

Appearance:

For the applicant: Sri V.V.R.S.Vara Prasad, Advocate

For the Respondents: Sri N.R.Devraj, ~~Adv.~~ Sr.CGSC.

CORAM:

THE HON'BLE SHRI JUSTICE V.NEELADRI RAO : VICE CHAIRMAN

THE HON'BLE SHRI P.T.TIRUVENGADAM : MEMBER (ADMN).

JUDGMENT

(Of the Bench delivered by Hon'ble Shri Justice V.Neeladri Rao,
Vice Chairman).

The applicant herein was selected as Income tax Inspector in the direct recruitment quota and was appointed as such in Andhra Pradesh charge. He joined as Inspector of Income-tax on 27-3-1982. He was declared to have completed probation period as per proceedings dated 20-5-84 of Commissioner of Income tax, Andhra Pradesh-I, Hyderabad. He passed the departmental examination for the Income-tax Officers in 1989. He was confirmed in the grade of Income-tax Inspector with effect from 25-7-1990 by proceedings of even date.

5. Para 6 of the Annexure to OM dated 22-12-1959 refers to the fixation of inter-se seniority between direct recruits and promotees. The said para was modified vide OM No.35014/2/80-Estt(D) dt.7-2-1986 of the Ministry of Personnel, Pub.Griev.& Pensions, Dept.of Personnel and Training. As the determination of relative seniority between the direct recruits and the promotees does not arise for consideration for disposal of this O.A., necessary details need not be referred. By OMNo.18011/1/86-Estt(D) dated 28-3-88 of the Ministry of Personnel, P.G. & Pensions, it was ordered that the confirmation should be only at the initial stage. In cases where probation is prescribed for promotees in the higher category, it is also stated therein that all the employees who satisfactorily completed the probation and who are otherwise eligible for confirmation have to be considered for confirmation, whether substantive vacancies are available or not.

6. The posts of Incometax Inspector have to be filled up by direct recruits and also promotees. The direct recruits have to undergo two-year probation. It is stated for the applicant that probation is not prescribed for the promotees to the post of Income-tax Inspector. The same is not controverted for the respondents. In view of the OM dated 28-3-88 the promotee should be deemed to have been confirmed in the post of Income-tax Inspector on the very date of promotion itself while the direct recruit to the post of Income-tax Inspector is eligible for consideration for confirmation on satisfactory completion of the period of probation and on passing the requisite departmental test. Of course, it is stated for the respondents that in fixing the inter-se seniority of the direct recruits and the promotees, the slots reserved for the promotees are being filled up by promotees only in the order of their seniority in the lower grade while the confirmed direct recruits are placed above the unconfirmed direct recruits in the slots reserved for direct recruits.

7. But in such a case, the possibility of junior direct recruit becoming senior to the promotee cannot be ruled out. Assume a case where A, B, C, and D are direct recruits while E, F, G and H are promotees. Assume that the cadre is comprised of the direct recruits and promotees in the ratio of 1 : 1 and then the seniority

4. Direct recruits:

Notwithstanding the provisions of para 3 above, 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 recommendation of the UPSC or other selecting authority, persons appointed as a result of subsequent selection:

Provided that where persons recruited initially on a 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."

The service of an employee of Government, even in direct recruitment quota is held as temporary till he is made permanent on the basis of confirmation, though the appointment is on the basis of selection in accordance with the recruitment rules. The main provision of para 4 of the Annexure reads that the seniority of the 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 the selecting authority. But the proviso is to the effect that if the confirmation is in an order different from the order of merit indicated at the time of appointment, the seniority shall follow the order of confirmation and not the original order of merit. The rules in regard to various services of the Central Government stipulate that D.P.C. has to consider as to whether the employee is unfit for confirmation and if anyone of them is found unfit he is not confirmed. Further the rules in regard to some of the services lay down that one has to pass the departmental test for being eligible for consideration for confirmation. Hence those who have not passed the departmental test by the date the substantive vacancies were available were not considered for confirmation, and when the question of juniors being considered for confirmation arises. Similarly if any employee is held as unfit for confirmation due to adverse remarks in CRs, he is not being confirmed and his juniors who were held as fit are being confirmed.

of substantive vacancies.". As already pointed out, a senior direct recruit may become junior of his junior promotee and vice versa prior to 28-3-88 for no fault of that direct recruit or promotee as the case may be.

8. But it is urged that when seniority is linked with confirmation and the confirmation is based on the pass in the test then it has to be held that confirmation depends upon efficiency and hence the seniority can be linked with confirmation. But the said contention does not hold good if the position prior to 28-3-88 is taken into consideration. Assume that A to D are direct recruits and A, C and D passed the departmental test which is requisite for confirmation, while B failed in it. Assume that only two vacancies were available after the results of the said test were announced. Then A and C will be confirmed. But even though D also passed the test he could not be confirmed for want of availability of substantive vacancy. Then assume that B passed the test in second attempt and only thereafter, one substantive vacancy had become available. Then B being senior to D and as he passed the test by the time the vacancy was available, he has to be confirmed and D could not be confirmed. Then can it be stated that the confirmation is based on the basis of efficiency alone. Hence the above contention for the respondents cannot be accepted.

9. Of course, till 1985 the employees who have not passed the departmental test were being discharged. Later that provision was deleted. Thus even the employees who failed in the departmental test are permitted to discharge the duties and hold responsibilities just as those who passed the test. But a pass in the test may be prescribed as a requisite condition for consideration for promotion for in such a case it is necessary for the employee to discharge more arduous duties and or to hold higher responsibilities. Hence it will be arbitrary if seniority is linked with confirmation if the latter is based on pass in a test.

10. Thus we feel that in view of the judgment of the Supreme Court in AIR 1990 (2) SC 1607 wherein the ratio desidenti in AIR 1977 SC 205 that the period of continuous officiation by government servant after his appointment following the rules

will be A, E, B, F, C, G, D & H, if the turn of the direct recruits come first. Assume a case where probation is prescribed for direct recruits and it is not prescribed for promotees. Subsequent to 28-3-88, all the employees who are eligible have to be considered for confirmation irrespective of the fact whether substantive vacancies are available or not. In such a case the direct recruits cannot be confirmed unless their probation is over and the departmental test is passed in case it is prescribed. Assume that the promotees passed such a test even before their promotion. Then the promotees will be confirmed on the very date of their promotion and their seniority will be in accordance with the seniority in the lower cadre from which they are promoted. Assume that 'B' failed in the test and hence he is not confirmed. Then as per the plea of the respondents, C and D have to be placed above F and G respectively if C and D passed the test and there are no adverse remarks against them. Then B will go below G or H. Thus, it is a case where C the junior of F will become senior to F, and D, the junior of G will become senior to G for no fault of F and G. It will, thus, be a case of arbitrariness when seniority is linked with confirmation. Similar is the situation when direct recruit is not confirmed subsequent to 28-3-88 on the ground that there are adverse remarks against the direct recruit. In such case also the promotee will become a senior of his own junior direct recruit. Prior to 28-3-88 there was possibility of a direct recruit becoming a junior of his own junior promotee if a senior promotee is not confirmed due to adverse remarks. Similarly prior to 28-3-88 even a promotee may become junior of his junior direct recruit if a senior direct recruit was not confirmed on the ground that there are adverse remarks. Thus, it will be arbitrary if seniority is linked with confirmation even prior to 28-3-88. In 1990 (2) SC 1607, the Supreme Court reiterated the principle 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 confirmation is one of the inglorious uncertainties of the government service depending neither on efficiency of the incumbent nor availability

applicable for substantive appointments had to be taken into account for determining his seniority, and seniority cannot be determined on the sole test of confirmation, was reiterated. the proviso to para 4 of the Annexure to the O.M dated 22-12-59 has to be held as violative of Articles 14 and 16 of the Constitution. Similarly the proviso to para 5(i) of the Annexure to the O.M dated 22-12-59 which is in regard to promotees has to be held as violative of Articles 14 and 16 of the Constitution. Hence these two provisos are hereby struck down.

11. It has to be mentioned that the above provisos were in force till 4-11-92, as by OM of even date, the seniority was delinked with confirmation. Hence the question of altering the seniority list prepared prior to 4-11-92, in view of the striking down of the provisos referred to, arises. In this case the O.A. is filed in time. The appointment of the applicant is in accordance with the rules. Hence the revised seniority list of Income-tax Inspectors in the Andhra Pradesh Charge has to be prepared in accordance with the provisions contained in the Annexure to the O.M.No.9/11/55-APS dated 22-12-59 of the Ministry of Home Affairs by ignoring the provisos to paras 4 and 5 (i) of the said annexure.

12. The O.A. is ordered accordingly. No costs.

CERTIFIED TO BE TRUE COPY

Date: *R.S. 15/5/93*
Court Officer
Central Administrative Tribunal
Hyderabad Bench
Hyderabad.

To

1. The Secretary, Ministry of Personnel, Public Grievances and Pensions, Department of Personnel & Training, UDI, New Delhi.
2. The Secretary, Central Board of Direct Taxes, New Delhi.
3. The Chief Commissioner of Income tax, A.P. Ayakar Bhavan, Basheerbagh, Hyderabad.
4. One copy to Mr. G.V.R.S. Vara Prasad, Advocate, 113/3RT, Vijayanagar colony, Hyd.
5. One copy to Mr. N.R. Devraj, Sr. CGSC.CAT.Hyd.
6. One copy to Deputy Registrar (J) CAT.Hyd.
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