B. L. Goel

Vs

State of Uttar Pradesh and Others

Civil Appeal No. 911 of 1978

(CJI Y. V. Chandrachud, A. P. Sen, P. N. Untwalia, O Chinnappa Reddy, R. S. Sarkaria JJ)

17.10.1978

JUDGMENT

SARKARIA, J. –

1. This appeal by special leave is directed against a judgment dated December 12, 1977 of the High Court of Allahabad.

2. The appellant herein, Shri B. L. Goel, is a district and Sessions Judge and as such a Member of U.P. Higher Judicial Service. The sanctioned permanent strength of the Higher Judicial Service was 82. It comprised (i) 37 posts of District and Sessions Judges and (ii) 45 Civil and Sessions Judges, including five posts of leave reserves. The service includes substantive posts as well as temporary posts. The appointments to the posts of Civil and Sessions Judges are made from two sources.

> (a) By promotion from the members of the U.P. Civil Service (Judicial Branch); and
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> (b) By direct recruitment after consultation with the Court (vide Rule 5).

Under Rules 13 and 17 of the U.P. Higher Judicial Service Rules, 1953 (hereinafter referred to as the 1953 Rules) waiting lists were to be prepared of the persons found fit for promotion or appointment to the higher service. Rule 19 provided that the Governor shall, on receipt from the Court of the waiting lists prepared under Rules 13 and 17, make appointment to the service on the occurrence of substantive vacancies. Para 2 of Rule 19 provided that the Governor could make appointments in temporary or officiating vacancies of the persons who were eligible for appointment by promotion and whose names were borne on the waiting list in force prepared under Rule 13. Rule 21 fixed the period of probation for direct recruits at two years. Rule 22 provided that the probation could be extended for a specific period. On satisfactory completion of his period of probation, a direct recruit was entitled to be confirmed. No period of probation was fixed in the case of promotees. Rule 20, which is being impugned, originally, ran as follows :

20. Seniority. - Subject to the provisions of Rule 31 seniority in each of the two classes of posts in the Services shall be determined by the date of confirmation in that class of post :

> Provided that if in any class of the post, two or more persons are confirmed on the same date, their seniority will be determined according to the order in which their confirmation has been notified;
>
> Provided further that in the case of direct recruits, their inter se seniority will be fixed

> in the same order in which their names appear in the list prepared by the Section Committee under Rule 17.

Rule 23 dealt with confirmation. It provided :

> 23. Confirmation. - (1) A probationer shall be confirmed in his appointment at the end of his period of probation or at the end of the extended period of probation, if the Governor, after consultation with the Court, is satisfied that he is fit for confirmation.
>
> (2) All confirmations under this rule shall be notified in the Official Gazette.

3. The appellant was appointed to the U.P. Civil Service (Judicial Branch) on September 13, 1948 on the basis of a competitive examination held by the U.P. Public Service Commission. He was posted as Civil Judge in the same service in January 1955. He was appointed by promotion as an officiating Civil and Sessions Judge in U.P. Higher Judicial Service in July 1960. Respondents 3, 4 and 5 are direct recruits. They were appointed on probation as Civil and Sessions Judges and joined the service on May 31, 1966, May 27, 1966 and June 1, 1966 respectively.

4. The constitutional validity of the 1953 Rules providing for appointment to U.P. Higher Judicial Service first came up for consideration before this Court in 1966, in Chandra Mohan v. State of U. P. ((1967) 1 SCR 77 : AIR 1966 SC 1987 : (1967) 1 LLJ 412) wherein it was held that the 1953 Rules providing for recruitment of District Judges, particularly Rules 5, 8, 13, 17 and 19 of the U.P. Higher Judicial Service Rules 1953, were invalid as they contravened the mandate of Article 233 (1), and that consequently, the appointments of persons appointed under those Rules including the appellant and respondents 3, 4 and 5 to the U.P. Higher Judicial Service were unconstitutional and invalid. The appointments of persons appointed under the 1953 Rules, including the appellant and respondents 3, 4 and 5 were, however, validated by the Constitution (Twentieth Amendment) Act, 1964, which inserted Article 233A in the Constitution.

5. By a notification dated March 31, 1969 the Governor confirmed respondents 3, 4 and 5 as Civil and Sessions Judges with effect from May 31, 1966, May 27, 1966 and June 1, 1966, respectively. Again, by a notification dated May 31, 1969 they were confirmed with effect from the same dates. These notifications were superseded by notification dated July 19, 1974. The dates of confirmation of the respondents, however, remained unchanged. This notification was cancelled by Government notification dated August 26, 1974.

6. The Government by its Order (G.O. No. 870/7-AI-503) dated June 19, 1971, created by conversion of the existing temporary posts, 22 permanent posts of Civil & Sessions Judges with effect from June 1, 1969, for absorbing the promoted officers, who had been continuously officiating as Civil & Sessions Judges for more than three years.

7. Subsequently, by its G.O. No. 2693/VII-A-Niaya/503/70, the Government in partial modification of its G.O. dated June 19, 1971, directed that the creation of 22 permanent posts of Civil & Sessions Judges shall have effect from April 1, 1966. This notification shows that all these posts/courts continuously existed on temporary basis from different dates ranging between July 22, 1949 to August 8, 1962.

8. Consequent upon the creation of 22 permanent posts with effect from April 1, 1966, the Governor on March 19, 1975, issued a notification in supersession of the earlier ones.

9. Although all the 22 permanent posts created with effect from April 1, 1966 according to the Government notification were meant for absorption of promotees only, three of those posts were given to the three direct recruits, respondents 3, 4 and 5 (S/Shri R. C. Bajpai, Rikheshwari Prasad and Behari Ji Das) who were shown as confirmed with effect from May 31, 1968, May 27, 1968 and June 1, 1968, respectively, the dates on which they completed their two years' probation. Against 12 of those posts, 12 promotees were confirmed as District and Sessions Judges with effect from April 1, 1966. The appellant was not one of those 12 promotees who were so confirmed although he had been continuously officiating as Civil and Sessions Judge since July 1960 and the direct recruits/respondents, 3, 4 and 5 were appointed to that cadre six years later. The appellant was, however, shown, along with others, as confirmed with effect from January 1, 1969.

10. The appellant was appointed as officiating District and Sessions Judge under government notification dated January 9, 1974 with the rider that the seniority would be determined later on. This notification was cancelled by notification dated July 17, 1974 whereby the appellant was confirmed on the post of District and Sessions Judge with effect from February 8, 1973.

11. Respondents 3, 4 and 5 were appointed as District and Sessions Judges and confirmed as such by a government notification dated January 9, 1974. These notifications were cancelled and replaced by fresh notifications from time to time. The last notification issued by the State Government confirming the appellant and respondents 3, 4 and 5 as District and Sessions Judges is of March 19, 1975. Under this notification, the appellant was confirmed with effect from February 8, 1973, while respondents 3, 4 and 5 were confirmed with effect from July 16, 1972, August 8, 1972 and August 25, 1975, respectively.

12. On July, 22, 1977, the High Court in exercise of its powers under Article 235 of the Constitution, issued a notification confirming certain officers as District and Sessions Judges in order of seniority from the dates and in the vacancies shown against their names. The appellant was shown at Serial No. 38 and respondents 3, 4, and 5 at Serial Nos. 30, 31 and 32, respectively. While the appellant's date of confirmation was mentioned as May 18, 1973, respondents 3, 4 and 5 were shown as confirmed with effect from August 25, 1972.

13. The appellant challenged the validity of all the notification issued by the State Government relating to his confirmation as also of respondents 3, 4 and 5 on the post of Civil and Sessions Judge as well as on the post of District and Session Judge by a writ petition under Article 226 on these grounds : (1) That these orders were discriminatory and therefore (sic); and (2) that the Governor had no power to confirm Civil and Sessions Judges and District Judges, as the same power being a power being a part of 'control' vested exclusively in the High Court under Article 235. (3) The appellant, also, (by amending his writ petition) impugned the validity of notification 670 dated July 22, 1977 issued by the High Court during the pendency of the writ petition. (4) It was also contended on the authority of this Court in S. B. Patwardhan v. State of Maharashtra ((1977) 3 SCC 399 : 1977 SCC (L&S) 391 : (1977) 3 SCR 775 : AIR 1977 SC 2051) that the rule requiring determination of the seniority to be governed by the date of confirmation is unconstitutional as it made seniority dependent upon the fortuitous circumstances of confirmation, and where a cadre consists of both permanent and temporary employees, the date of confirmation cannot be an intelligible criterion for determining seniority as between direct recruits and promotees.

14. The High Court, has however, taken the view that Patwardhan case (supra) is not attracted to the facts of the instant case because in the case of U.P. Higher Judicial Service, the matter stands concluded by the decision of this Court in Chandra Mohan case (Chandra Mohan v. State of U. P.,

(1976) 3 SCC 560 : 1976 SCC (L&S) 459 : AIR 1976 SC 1482), wherein it was held that it is open to the competent authority to determine the seniority in accordance with Rule 20 sans the second proviso, supplemented by any other valid principles or rules. After an elaborate discussion, the High Court concluded :

The notification dated July 17, 1974 and notification dated March 19, 1975 issued by the Governor confirming the petitioner and the opposite parties 3, 4 and 5, are invalid and ultra vires inasmuch as the power to confirm on the post of District Judge vests in the High Court and not in the Governor. The notification of the High Court, dated July 22, 1977, however, meets the situation and fills up the lacuna to a certain extent. This notification has been issued by the High Court in exercise of its powers under Article 235 of the Constitution ...... The said notification of the High Court also mentions the respective dates from which they stood confirmed. These dates are not founded on proper criteria and it appears that they were not properly fixed. Hence, that part of the said notification of the High Court cannot be sustained. Their dates of confirmation shall have to be redetermined by the High Court.

15. In the result, the High Court partly allowed the writ petition and quashed the aforesaid notifications dated July 17, 1974 and 22, 1977, so far as they relate to the dates of confirmation of the petitioner and the opposite parties 3, 4 and 5. A direction was given to the High Court in its administrative side, to redetermine the dates of their confirmation as District and Sessions Judges and their inter se seniority "in accordance with Rule 20 sans the second proviso of the U.P. Higher Judicial Service Rules, 1953 supplemented by any other valid principles or rules".

16. The main contentions raised by Shri R. K. Garg, appearing on behalf of the appellant, are :

> 16A. (1) Rules 20 and 23 of the 1953 Rules, which make determination of seniority wholly dependent upon the fortuitous circumstance of confirmation offend Articles 14 and 15 of Constitution. (It is submitted that earlier in Chandra Mohan v. State of U. P. (supra) he was obliged to give up the plea because fundamental rights were then under suspension and the broader protection of Article 14 was not available to him). Reliance has been placed on Patwardan case (ibid).

17. (2)(a) In the impugned notifications, dates of confirmations have been fixed arbitrarily in a manner which unduly favours the direct recruits (respondents 3, 4 and 5) and singles out the appellant-promotee for unfavourable treatment, notwithstanding the fact that he was promoted as Civil and Sessions Judge about 6 years prior to the recruitment of respondents 3, 4 and 5 to the same cadre, and had also been promoted to the senior grade of the Service as District and Sessions Judge, one year prior to the promotion of these respondents to that grade.

18. The High Court has not properly construed the observation in this Court's decision in Chandra Mohan's case, to the effect, that the seniority was to be determined "in accordance with Rule 20 sans the second proviso of the U.P. Higher Judicial Service Rules, 1953, supplemented by any other valid principles or rules". In that observation the indication was clear that the confirmations were not to be arbitrarily made but in accordance with valid and fair criteria which would ensure that its consequences did not offend Articles 14 and 16. One of these criteria would be the length of continuous service in the cadre of the Higher Judicial Service. Indeed, new Rules of 1975 adopt this as the governing criteria for fixation of inter se seniority in the service. According to Mr. Garg, this criterion based as it was on a principle of fair play, could be validly imported into the truncated Rule 20 of 1953 Rules, in accordance with the broad observation of this Court in its decision in Chandra

Mohan.

19. (b) In any case, the Government had while creating 22 permanent posts with effect from April, 1966, (by conversion of the existing temporary posts held by promotees into permanent ones) as per notifications (G.O. No. 870/7-A1-503 and G.O. No. 2093/VII-A-Niaya/503 of 1970) declared it as a matter of policy that all these posts are being created for permanent absorption of promotees who have been continuously working against temporary posts in an officiating capacity for more than three years. Respondents 3, 4 and 5 had not even been appointed (on probation) to the service on April 1, 1966. They entered the service on May 31, 1966, May 21, 1966 and June 1, 1966; while on April 1, 1966, or even on the date of respondents entry into service, the appellant had put in about six years' continuous service as officiating Civil and Sessions Judge. Thus, both as a matter of declared policy and fair principle, the appellant could not be denied confirmation with effect from April 1, 1966, against one of those 22 posts, and none of the respondents could be confirmed against any of those 22 posts which had been made permanent for the purpose of absorbing promotees who had put in officiating service for a period of more than three years. Stress has been laid on the fact that apart from greater length of service, the appellant has an excellent, unblemished record of service. In the circumstances, therefore, the confirmation of the appellant with effect from a date later than those assigned to respondents 3, 4 and 5 is unfair, arbitrary, and discriminatory.

20. As against this, Shri Andley, learned Counsel for respondents 3, 4 and 5 submits that the respondents should be deemed to have been appointed to the service in 1964, when they were selected for appointment to the Service by the Select Committee of the High Court and were recommended for appointment to the Government. The respondents, it is submitted, would have been appointed to the Service and jointed it in 1964, but for the fact that Chandra Mohan, etc. in the writ proceedings obtained an interim order from the Court, restraining the Government from giving effect to their appointments, and it was only on the vacation of that "stay" order in 1966, the respondents could join duty, which they did in May and June, 1966. The delay in joining the service being not due to any fault on the part of the respondents for the purpose of confirmation and determination of seniority, it would be but fair to take the date of their appointment as the date on which they were selected by the Selection Committee in 1964 for recruitment to the Service. If no stay order issued by the Court had intervened, the respondents would have been entitled to be confirmed on completion of their two years' probation in 1966, long before a substantive vacancy could become available to the appellant. It is pointed out while these direct recruits were, as usual appointed against substantive vacancies, on probation, the appellant and other promotees like him were appointed against temporary posts on officiating basis only, and they (promotees) could claim confirmation only when substantive vacancies/posts became available to them. It is further argued that the intendment of Rule 8 of the 1853 Rules was that 25 per cent of the vacancies in U.P. Higher Judicial Service should be filled by direct recruitment, and this, according to the learned Counsel implies that confirmations of direct recruits and promotees at any given time should also be made in the ratio of 1 : 3 by rotation. It is urged that when the matter is considered from this angle, the en bloc confirmation of 12 promotees with effect from April 1, 1966 followed by the confirmation of the three direct recruits (respondents 3, 4 and 5) with effect from May 30, 1968, May 27, 1968 and June 1968, was neither improper, nor arbitrary. Learned Counsel further maintains that equities are wholly on the side of respondents 3, 4 and 5 who are not younger than the appellant, and this should also be taken into account as a factor in their favour.

21. The last but lukewarm contention of Shri Andley is that it is not clearly borne out by the record that the 22 temporary posts, converted into permanent ones with effect from April 1, 1966, were created for the purpose of absorbing the promotees only.

22. We do not think it necessary to decide the question with regard to the constitutional validity of Rules 20 and 23, because this appeal can be disposed of on the second ground urged by Shri Garg. Before dealing with that contention, it is necessary to have a clear picture of its factual premises. There is no dispute that the appellant was promoted as officiating Civil and Sessions Judge in July 1960, while respondents 3, 4 and 5 joined the service as Civil and Sessions Judges on probation, about six years later in May/June, 1966. We are unable to accept to Shri Andley's argument that the date of the respondents' entry into service should be assumed as the date in 1964, when the Selection Committee selected them for appointment. There is no warrant for importing such a fiction. The stark fact remains that respondents 3, 4 and 5 joined the service in May/June, 1964.

23. It is further an uncontroverted fact that the appellant was promoted to the senior grade as officiating District and Sessions Judge about one year prior to the respondents' promotion to that grade. It is further clear from the record (vide paragragh 6(g) of the affidavit of Shri Radhika Raman, Under Secretary to the Government of Uttar Pradesh; Annexure IV A to the Rejoinder Affidavit of respondents 3 and 5 filed in the High Court as also the copies of the notifications filed by the appellant in this Court) that the State Government created (by conversion of the existing temporary posts/courts) 22 permanent posts/courts of Civil and Sessions Judges, under G.O. No. 870/7-1-503, dated June 19, 1971 with effect from January 1, 1969. Later on, by another Government Order No. 2693/VII/A-Niaya/503 of 1970 dated March 3, 1973, in modification of the earlier notification, the creation of the aforesaid 22 permanent posts was given effect from April 1, 1966. By the impugned government notification of March 19, 1975, against 12 of those 22 posts, twelve promoted officers shown at Serial Nos. 24 to 35 were confirmed with effect from April 1, 1966. Against the next 3 of those 22 posts, respondents 3, 4 and 5 were confirmed with effect from May 31, 1968, May 27, 1968 and June 1, 1968. Against the remaining seven, promoted officers, including the appellant, were confirmed with effect from January 1, 1969. The first proviso to Rule 8 of 1953 Rules which provided for a quota of 25 per cent for direct recruitment and 75 per cent for promotion, was specifically declared void by this Court in Chandra Mohan case decided in 1966. That void rule, being non-existent, was not available for the purpose of confirmation etc.

24. After considering the entire material on record and hearing the Counsel for the parties, including Shri Dikshit appearing for the State, we are unable to appreciate why the appellant like 12 other promoted officers, was not confirmed with effect from April 1, 1966, when he was continuously working as officiating Civil Sessions Judge from July, 1960.

25. In the case of promoted officers, the main criteria to be considered for their confirmation are :

(i) Availability of a substantive vacancy/post.

(ii) Suitability for the post.

26. Here, in the case of the appellant, a substantive post was available to him with effect from April 1, 1966, when respondents 3, 4 and 5 had not even been appointed, on probation or otherwise, to the service. By that date, April 1, 1966 he had put in service as officiating Civil and Sessions Judge for a period of 5 years and 9 months, approximately. There is nothing on record to suggest that by or on April 1, 1966, he was not found suitable for confirmation. Why was he, then, not accorded the same treatment in the matter of fixing the date of his confirmation as had been meted out to twelve promoted officers who were confirmed with effect from April 1, 1966 ? Shri Dikshit has not been able to satisfy us that in not allocating April 1, 1966 to the appellant as the date of his confirmation, the Government were acting according to any intelligible differentia or reasonable principle. Nor is

any principle justifying a differential treatment to the appellant, in the matter of fixing the date of his confirmation, discernible from the impugned notification dated March 19, 1975, itself.

27. We are therefore, of opinion that this government notification dated March 19, 1975 cannot, as it stands, be sustained and needs reconsideration.

28. The same comments apply mutatis mutandis to the impugned notification, dated July 22, 1977, issued by the High Court. Moreover, once it is found that the notification dated March 19, 1975 cannot be sustained, the foundation for fixing dates of confirmation and determining relative seniority of District and Sessions Judges will also crumble.

29. Accordingly, we allow this appeal, set aside the impugned notifications dated March 19, 1975 and July 22, 1977 insofar as they fix the dates of confirmation of the appellant vis a vis respondents 3, 4 and 5, both in the junior and senior grade of the U.P. Higher Judicial Service. The High Court shall consider the matter afresh and refix and readjust, in the exercise of its powers under Article 235 of the Constitution, the dates of the confirmation of the appellant and the said respondents, at first, in the grade of Civil and Sessions Judges, and then in the grade of District and Sessions Judges, in accordance with law. There will be no order as to costs in this Court.

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