

G. P. Doval and Others

Vs

Chief Secretary, Government of U. P. and Others

Civil Writ Petitions Nos. 5105-13 of 1983

(A. P. Sen JJ)

18.07.1984

JUDGMENT

DESAI, J. -

1. The petitioners in this group of petitions under Article 32 of the Constitution were inducted as Khandsari Inspectors between March 1960 and 1964. Respondents 4 to 19 were also recruited as Khandsari Inspectors on different dates. Respondents 1 and 2 are the Chief Secretary, Government of U.P. and the Secretary, Industries respectively of the U.P. Government and respondent 3 is the Sugar Commissioner of U.P. The dispute amongst the petitioners and the respondents 4 to 19 is about inter se seniority between them in the cadre of Khandsari Inspectors.

2. It appears that in the year 1958-59, the State Government framed what is styled a 'Khandsari Licensing Scheme' to regulate the supply of sugarcane to sugar factories by G.O. No. 4588 (1)/XVIII-A-680/59 dated November 21, 1959. Posts of Khandsari Inspectors initially designated as Licensing Inspectors were created in the payscales of Rs. 120-250. Petitioners 1, 2 and 3 were appointed as Khandsari Inspectors between March and May 1960. Thereafter some of the respondents were recruited as Khandsari Inspectors and some others who were recruited departmental were approved by the Public Service Commission. On March 22, 1971, the third respondent - the Sugar Commission circulated a provisional seniority list of Khandsari Inspectors. The grievance of the petitioners is that some of the petitioners have been assigned lower place in the seniority list even though they were recruited earlier and have been continuously in service. To illustrate, petitioners pointed out that petitioners 1 to 3 have been placed at Serial Nos. 25, 29 and 27 respectively though all of them were recruits of 1960 while respondent 7 - J. S. Negi, who was recruited on March 23, 1961 was assigned the place at Serial No. 15 and respondent 4 O. N. Chaturvedi, who was recruited on March 23, 1961 was shown at Serial No. 6. Similarly, respondent 9 - P. N. Rai, who was also recruited on March 23, 1961 was shown at Serial No. 17 and respondent 5 was shown at Serial No. 8. The petitioners further pointed out that petitioners 4, 5, 6, 7 and 8, who were recruits of 1961 have been assigned places Nos. 30, 34, 42, 35 and 31 respectively while recruits of 1963 have scored a march over them in the provisional seniority list. The petitioners assert that when the recruitment was made in the year 1960, the post of Khandsari Inspector was not within the purview of the Public Service Commission and that they were regularly recruited to posts which were temporarily sanctioned and indefinitely continued till today and therefore, in reckoning the seniority, they must be given the benefit of the length of continuous officiation. They further contend that when the post of Khandsari Inspector was later brought within the purview of the Public Service Commission, the names of the petitioners who were already recruited in service as also of some of the respondents were forwarded to the Public Service Commission for approval and except petitioner 9 - S. P. Gupta, the names of rest of the petitioners were approved by the Public

Service Commission on September 30, 1963, the relevant date in the case of petitioner 9 is April 14, 1978. The petitioners assert that even assuming that their appointment would be regular after approval of the Public Service Commission, yet once such approval is granted, it would relate back to the date of appointment and the previous length of service cannot be ignored or denied in computing their seniority in the absence of any statutory rule or administrative instruction which has the force of law. The petitioners further aver that in the absence of any other statutory rule or administrative instruction for determining seniority, length of continuous officiation provides a valid principle for determining seniority. Viewed from this angle, petitioners 1 to 3 would be senior to all the respondents and the placement of the remaining petitioners vis-a vis the respondents will have to be recomputed. On the circulation of the provisional seniority list, the petitioners submitted various representations pointing out the error in drawing up the provisional seniority list but till this day no reply was given not any final seniority list circulated nor reasons assigned for rejecting the representations. The petitioners further say that despite their representation, respondents 1, 2 and 3 are operating the tentative seniority list for making further promotions to the post of Khandsari Officer and Assistant Sugar Commissioner and thereby they are being denied equality of opportunity in the matter of promotion. The petitioners accordingly questioned by these writ petitions the validity and legality of the provisional seniority list asserting that as the final seniority list is not being drawn up and as the representations are being ignored and yet the provisional seniority list is being operated to the disadvantage of the petitioners thereby denying them equality of opportunity in the matter of promotion which action of the respondents 1 to 3 is violative of Articles 14 and 16.

3. Kailash Narain Pandey, Additional Sugar Commissioner filed affidavit-in-opposition. It was admitted that by the Government Order dated November 21, 1959 temporary posts of Licensing Inspectors later redesignated as Khandsari Inspectors in the pay scales of Rs. 120-250 were created but according to him as the maximum of the scale was over Rs. 200 right from its inception, the post was within the purview of the Public Service Commission in view of Regulation 5(a) of Appointment Department Misc. No. 99/II-B-151-60 dated January 29, 1954 issued under the Uttar Pradesh Public Service Commission (Limitation of Functions) Regulations, 1954. It was then stated that on the framing of the Khandsari Licensing Scheme, it became necessary to urgently appoint Inspectors to implement the scheme and therefore, the third respondent - Sugar Commissioner as Appointing Authority pending regular selection through open competition by the Public Service Commission proceeded to make appointment and the appointments of the petitioners were of a stopgap or ad hoc nature and that it created no right to the post. It was admitted that petitioners 1 and 2 were recruited after holding departmental competitive test on March 4, 1960. Petitioners 3, who was then working as a Clerk in Cane Union Federation Ltd., Lucknow was selected on May 24, 1960 by applying a weeding out test. Petitioners 4 to 8 were recruited after holding qualifying test and interview on March 23, 1961 and petitioners 9 was appointed as and by way of stopgap arrangement. It was contended that the petitioners were appointed on an ad hoc and temporary basis as a measure of stopgap arrangement. It was contended that all the petitioners except petitioner 9 were approved by the Public Service Commission for regular appointment in the year 1963, to be specific of on September 30, 1963 and they have continued uninterruptedly in the posts of Khandsari Inspectors. It was further averred that within a period of one year and seven months from the date of appointment of the petitioners, the State Public Service Commission selected candidates to request the already working unapproved Licensing Inspectors on the request of the Department and sent a list of approved candidates on September 14, 1961, but only 5 out of 44 such selected candidates joined and hence the Department had to permit the petitioners to continue though according to third respondent notices of termination of service were served on some of the

petitioners. It was further pointed out that when the State Public Service Commission proceeded to recommend candidates for the post of Khandsari Inspectors, some of the petitioners applied for such posts, but their applications were rejected at the stage of scrutiny. But on a request from the Department the State Public Service Commission entertained the applications, called the petitioners for interview and approved them. It was admitted that except petitioner 9 all the rest of the petitioners were approved by the Public Service Commission on September 30, 1963. Justifying the drawing up of the tentative seniority list as being based on recommendations of Public Service Commission, it was said that the service which can be taken into consideration for determining the length of continuous officiation must commence from the date of substantive appointment and accordingly the provisional seniority list has been drawn up keeping in view the date of approval by the Public Service Commission in respect of each candidate. It was averred that if this principle is valid for the purpose of Article 16, there is no error in drawing up the seniority. It was specifically stated that it was open to the Government to ignore officiating service rendered on appointment in an ad hoc or stopgap arrangement. It was broadly stated that before a man can claim to have his seniority determined in the cadre, he must belong to the cadre and he can only enter the cadre on substantive appointment.

4. The rival contentions would bring into focus the controversy between the parties. The impugned provisional seniority list dated March 22, 1971 is drawn up on the length of continuous officiation determined by the date of selection/approval of each person by the State Public Service Commission. In the process service prior to the approval by the Public Service Commission is wholly ignored while reckoning seniority with the result that the recruits of 1961 have scored a march over those who were recruited earlier in the cadre and have been uninterruptedly officiating in the post and who at a later date were approved by the Public Service Commission for appointment at Khandsari Inspectors. The question is : where on account of exigencies of service, recruitment to a post within the purview of the Public Service Commission is made by the appointing authority, but at a later date the Public Service Commission puts its seal of approval on such an appointee, whether the continuous and uninterrupted service rendered by such appointee prior to the approval by the Public Service Commission can and should be taken into computation while determining seniority based on the principle of length of continuous officiation ?

5. When a seniority list is challenged as being violative of the guarantee of equality enshrined in Articles 14 and 16 and prima facie it appears that those who came into the cadre later on scored a march over those who were already in the cadre, it would be for the authority justifying the seniority list to plead and point out the rule for determining seniority on the basis of which the list is drawn up. If any such rule is pleaded, it would be for those impugning the seniority list to aver and establish that the alleged seniority rule is violative of the fundamental rights guaranteed by Articles 14 and 16.

6. In the affidavit-in-opposition filed by the Additional Sugar Commissioner on behalf of respondents 1 to 3, it was asserted that the impugned seniority list of the Khandsari Inspectors was drawn up on the principle of the length of continuous officiation reckoned from the date of selection/approval by the Public Service Commission in respect of each employee belonging to the cadre. It is necessary to refer to this aspect because the averment is vague and of a general nature and later on at the hearing of the petitions reliance was placed on Memo No. O-66/II-233-1938 dated January 30, 1940 ('1940 Order' for short) for sustaining the seniority list, the affidavit being conspicuously silent with regard to this order. There is not a whisper of the 1940 Order in the whole of the affidavit-in-opposition. However, if the respondents would be in a position to justify the seniority list on any existing statutory rule or administrative instruction which has been invariably

followed, it would not be proper to attach too much importance to the vagueness in drawing up pleadings, shifting the stand in the course of the proceedings. It must, however, be made clear that Mr Gopal Subramaniam, learned counsel who appeared for respondents 1 to 3 attempted to reconcile the averments in the affidavit and the oral submissions made at the hearing of the petitions by urging that when it is said in the affidavit that the seniority in respect of each member of the cadre was reckoned on the principle of length of continuous officiation commencing from the date of selection/approval of each member by the State Public Service Commission, respondents 1 to 3 had the 1940 Order in mind.

7. It is therefore, necessary first to examine the nature and character of the 1940 Order and whether it lays down either by way of a statutory rule or administrative instruction a binding rule or seniority for determining the seniority in the cadre of Khandsari Inspectors. If it does, it will have to be further ascertained whether upon its true construction, the relevant rule excludes any service rendered by a members of the service prior to his approval/selection by the State Public Service Commission.

8. The 1940 Order styled as a memorandum was not annexed to the affidavit-in-opposition. A copy of it was submitted at the time of hearing of the petitions. In its preamble it proceeds to recite that in view of the "Appointment Department Memorandum No. 233(1)/II-38 dated July 27, 1939 the Department of Secretariat are informed that under Section 241(1)(b) and (2)(b) of the Government of India Act, 1935, rules have to be framed for appointment to the civil services and posts and conditions of service of persons serving". It further proceeds to state that "the existing rules for the various provincial, specialist and subordinate services under the Government should be revised so as to bring them into conformity with provisions of the Government of Indian Act, 1935 and new rules should also be drawn up for services and posts which existed prior to April 1, 1937 but for which no rules were framed, or which have been created after the date". The 1940 Order further recites that enquiries are being received as to the lines on which either the old existing rules have to be revised or new rules have to be framed. It then states that" the general principles which have been accepted by Government are stated below". para 2 of the Order clearly brings out the nature and character of the 1940 Order, the relevant portion of which reads as under :

2. Among other things the rules should provide for the following matters.

At Item No. 11. seniority is mentioned. Elaborating how the rules about seniority should be drawn up, the memorandum proceeds to prescribe guidelines as under :

Seniority in service shall generally be determined from the date of substantive appointment to a service, or from the date of the order of first appointment, if such appointment is followed by confirmation. In special cases seniority may be determined in accordance with the conditions which may suit a particular service.

9. After extensively referring to the 1940 Order, it was urged on behalf of the respondents that the impugned seniority list is drawn up keeping in view the date of appointment, the date of selection/approval by the Public Service Commission, which is the relevant date for the purpose of computing seniority under G.O. of 1940 and the date of confirmation by the department and date of promotion.

10. The first question is : does the 1940 Order lay down a binding rule of seniority in respect of Khandsari Inspectors ? It may at once be made clear that the cadre of Khandsari Inspectors was first

formed under 'Khandsari Licensing Scheme' which was framed somewhere in November 1959. It is difficult to believe that two decades earlier, a seniority rule for a future cadre was prescribed. It is of course open to the Government to lay down general conditions of service governing all service in the State either by rules framed under Section 241 of the Government of India Act, 1935, or on the advent of the Constitution under the proviso to Article 309 of the Constitution. It must be conceded that in the absence of statutory rules, conditions of service in a particular cadre may be governed by executive instructions issued by the Government in exercise of its executive power. At any rate, 1940 Order does not purport to lay a statutory rule framed under Section 241 of the Government of India Act, 1935 because the memorandum recites that in view of the provisions contained in Section 241, rules have to be framed for appointment to civil service and posts and conditions of service of persons serving. It further recites that rules will have to be framed in respect of service which may be created for the first time after the advent of the Government of India Act, 1935. The memorandum further provides that whenever there is an occasion for framing statutory rules or issuing executive instructions governing conditions of service, there must be some uniformity in this behalf and accordingly the memorandum proceeded to point out what should generally be the contents of the rules and on what model they should be framed. Therefore, unquestionably the memorandum prescribes guidelines for framing rules governing conditions of service. The memorandum is something akin to model standing orders. At any rate it does not purport to prescribe statutory rules or executive instructions governing conditions of service. This further becomes clear from the penultimate paragraph of the memorandum in which it is stated that the principles set out in the memorandum will be generally suitable for service or posts recruitment to which is conducted through the Public Service Commission and whenever the departure is made the same should be justified. Directions are given by the memorandum that the departments of the Secretariat should proceed with the revision of the existing service rules or frame rules for new service and posts under their control in accordance with the principles set out in the memorandum. The departments were directed to draw up the draft rules and when ready they were required to be submitted for the scrutiny of the appointment department and should be accompanied by a self-contained note in which the important points and deviation from the above principles should be explained and justified. It is thus abundantly clear that the memorandum of 1940 merely prescribed guidelines for the departments of the Secretariat either to frame statutory rules or executive instructions governing conditions of service in respect of existing service, if there are no rules or they may be modified or amended so as to bring them generally in conformity with the 1940 Order and whenever a new post or a new cadre in a service is set up to frame rules in conformity with guidelines prescribed in 1940 Order. The 1940 Order does not purport to lay down conditions of service governing any cadre either specifically or generally. It provides a model and unless the model is adopted, it is commonsense to say that it is not binding. Therefore, the contention that 1940 Order prescribed binding conditions of service and which have been followed in drawing up the seniority list does not commend to us and must be rejected.

11. Assuming that in the absence of any specific rule to the contrary having not been shown to have been adopted, the Department accepts the model as the binding one, the next question is : whether upon its true construction it permits previous service to be wholly ignored in reckoning seniority.

12. The model set out at Item No. 11 governing seniority merely enacts the well-known rule of seniority in Government service, namely, seniority being determined in accordance with length of continuous officiation. In the absence of any other rule valid for determining seniority under Article 16 this rule of seniority being determined by the length of continuous officiation has been accepted as valid by the courts. In a very recent opinion of this Court in *P. S. Mahal v. Union of India* (WPs Nos. 157-162 of 1976, decided on May 23, 1984 : See *infra* in this volume) Bhagwati, J. after

referring to *Bishan Sarup Gupta v. Union of India* ((1975) 1 SCR 104 : (1975 3 SCC 116 : 1974 SCC (L&S) 506 : 1974 Lab IC 1090 : (1974) 2 SLR 136) observed as under : (SCC para 13)

There was no specific seniority rule to determine inter se seniority between the direct recruits and the promotees appointed regularly within their respective quota from and after January 16, 1959 and though, in the absence of any specific seniority rule, the Court could have applied the residuary rules based on length of continuous officiation, the Court did not do so because it felt that since the old seniority rules had ceased to operate by reason of the infringement of the quota rules, it would be for the Government to devise "a just and fair seniority rule as between the direct recruits and the promotees for being given effect to from January 16, 1959".

Therefore, in the absence of any specific rule of seniority governing a cadre or a service, it is well-settled that length of continuous officiation will proved a more objective and fair rule of seniority. And that is exactly what the model in the memorandum prescribes. It says that seniority in service shall generally be determined from the date of substantive appointment to a service. If the rule were to stop here, the question would arise : what constitutes substantive appointment to a post within the purview of the Public Service Commission ? But the rule does to stop by merely saying that the seniority shall generally be determined from the date of substantive appointment to a service. It further provides that it may be determined commencing from the date of the order of the first appointment, but proceeds to qualify the last clause by providing : "if such appointment is followed by confirmation". In other words, a rule for determining seniority may provide length of continuous officiation from substantive appointment or from the date of the order of the first appointment if such appointment is followed by confirmation. In the latter case, once confirmation is made and the service till then is uninterrupted and continuous it relates back to the date of the order of the first appointment. Now model Rule 11 suggests as guidelines two independent principles for determining seniority, namely, (1) seniority be reckoned from the date of substantive appointment and (2) from the date of the order of first appointment, if such appointment is followed by confirmation. Two different starting points for reckoning seniority are set out in the model and it is difficult to assume that a department adopted one and rejected the other without making a specific rule in that behalf.

13. The question that can then be posed is : what constitutes substantive appointment in a cadre which is within the purview of the Public Service Commission. Now the cadre of Khandsari Inspectors was formed in 1959. There is no material to show that at that time it was within the purview of the Public Service Commission. A vague statement was made that under Uttar Pradesh Public Service Commission (Limitation of Functions) Regulations, 1954, any post with a sanctioned scale, the maximum of which exceeds Rs. 200 would be within the purview of the Public Service Commission. It was therefore, said that the post of Khandsari Inspector was within the purview of the Public Service Commission. It was then urged that as the 'Khandsari Licensing Scheme' was to be urgency implemented, the appointing authority filled-in the posts pending recruitment by the Public Service Commission. This statement is not borne out by the record. On May 4, 1960, 9 persons including petitioners 1 and 2 were temporarily appointed as Licensing inspectors. The appointment order does not show that the appointment was pending selection of regular candidates by the Public Service Commission. In fact, some confusion in this behalf crept in because a statement was made at the hearing of these petitions that the post of Khandsari Inspectors came within the purview of the Public Service Commission in 1961. Undoubtedly the post of Licensing Inspector was created in the first instance upto March 31, 1960. But it may be mentioned that it has continued uninterruptedly till today and has become a permanent cadre. Identical appointment order was issued in favour of petitioner 3. Some of the petitioners including petitioners 4, 5, 6, 7 and 8 and some of the respondent including respondents 4, 5, 6, 7 and several other came to be appointed

by the Order dated March 23, 1961. (Annexure 'B' to the petition.) In this appointment order it was clearly stated that "on the result of the qualifying test and interview held for the posts of Khandsari Inspectors in the months of February and March, 1961, the candidates as noted in the enclosed list are temporarily appointed as officiating Khandsari Inspectors in the scale of Rs. 120-6-210-EB-10-250 plus usual dearness allowance per month subject to final selection by Public Service Commission at any later date". The recitals in the order do not spell out that the appointees were to hold stopgap arrangement till a candidate selected by the Public Service Commission is made available. On the contrary, the recitals clearly indicate that those appointees will have to face the approval test by the Public Service Commission. Now if petitioners 1 and 2 came to be appointed in 1960 and respondents, 4, 5 and 6 came to be appointed in 1961 and the appointment of each of them had to be approved by the Public Service Commission, once the approval is granted, the same will relate back to the date of first appointment. That is the meaning of the expression in model No. 11; "or from the date of the order of the first appointment, if such appointment is followed by confirmation". It is not disputed that all the petitioners except petitioner 4 were approved by the Public Service Commission on September 30, 1963 and yet respondent 7 - J. S. Negi is shown at S. No. 17 while petitioner 1 who joined service on March 4, 1960 and whose appointment was approved on the same day has been assigned S. No. 27 in the seniority list. If the first appointment is made by not following the prescribed procedure but later on the appointee is approved making his appointment regular, it is obvious commonsense that in the absence of a contrary rule, the approval which means confirmation by the authority which had the authority, power and jurisdiction to make appointment or recommend for appointment, will relate back to the date on which first appointment is made and the entire service will have to be computed in reckoning the seniority according to the length of continuous officiation. That has not been done in this case. Therefore, assuming that the model principle set out in the 1940 Order has a binding effect, the impugned seniority list does not conform to the prescribed guidelines and would certainly be invalid.

14. Once it is shown that the 1950 Order did not prescribe any binding rule of seniority, but it was model prescribed for adoption and the adoption having not been shown, it cannot prescribe a binding rule of seniority. Assuming that it is deemed to have been adopted the seniority it does not conform to the model as interpreted by us.

15. Now if there was no binding rule of seniority it is well-settled that length of continuous officiation prescribed a valid principle of seniority. The question is : from what date the service is to be reckoned ? It was urged that any appointment of a stoppage nature or pending the selection by Public Service Commission cannot be taken into account for reckoning seniority. In other words, it was urged that to be in the cadre and to enjoy place in the seniority list, the service rendered in a substantive capacity can alone be taken into consideration. We find it difficult to accept this bald and wide submission. Each case will depend upon its facts and circumstances. If a stoppage appointment is made and the appointee appears before the Public Service Commission when the latter proceeds to select the candidates and is selected, we see no justification for ignoring his past service. At any rate, there is no justification for two persons selected in the same manner being differently treated. That becomes crystal clear from the place assigned in the seniority list to petitioner 1 in relation to respondents 7. In fact if once a person appointed in a stoppage arrangement is confirmed in his post by proper selection, his past service has to be given credit and he has to be assigned seniority accordingly unless a rule to the contrary is made. That has not been done in the case of all the petitioners. The error is apparent in the case of petitioner 1 and respondent 7. These errors can be multiplied but we consider it unnecessary to do so. In fact a fair rule of seniority should ordinarily take into account the past service if the stoppage arrangement is followed by confirmation. This view which we are taking is borne out by the decision of this Court in Baleshwar

Dass v. State of U.P. ((1981) 1 SCR 449 : (1980) 4 SCC 226 : 1980 SCC (L&S) 531 : 1981 UPSC 15 : (1981) 1 LLJ 140), wherein this Court observed that the principle which has received the sanction of this Court's pronouncement is that "officiating service in a post for all practical purposes of seniority is as good as service on a regular basis. It may be permissible, within limits for Government to ignore officiating service and count only regular service when claims of seniority come before it, provided the rules in that regard are clear and categorical and do not admit of any ambiguity and cruelly arbitrary cut-off of long years of service does not take place or there is functionally and qualitatively, substantial difference in the service rendered in the two types of posts". It was said that service rules will have to be reasonable, fair and not grossly unjust if they are to survive the test of Articles 14 and 16. It is thus well-settled that where officiating appointment is followed by confirmation unless a contrary rule is shown, the service rendered as officiating appointment cannot be ignored for reckoning length of continuous officiation for determining the place in the seniority list. Admittedly, that has not been done and the seniority list is drawn up from the date on which the approval/selection was made by the Public Service Commission in respect of each member of the service, which is clearly violative of Article 16, and any seniority list drawn up on this invalid basis must be quashed.

16. A grievance was made that the petitioners have moved this Court after a long unexplained delay and the Court should not grant any relief to them. It was pointed out that the provision seniority list was drawn up on March 22, 1971 and the petitions have been filed in the years 1983. The respondents therefore submitted that the Court should throw out the petitions on the ground of delay, laches and acquiescence. It was said that promotions granted on the basis of impugned seniority list were not questioned by the petitioners and they have acquiesced into it. We are not disposed to accede to this request because respondent 1 to 3 have not finalised the seniority list for a period of more than 12 years and are operating the same for further promotion to the utter disadvantage of the petitioners. Petitioners went on making representations after representations which did not yield any response, reply or relief. Coupled with this is the fact that the petitioners belong to the lower echelons of service and it is not difficult to visualise that they may find it extremely difficult to rush to the court. Therefore, the contention must be rejected.

17. In view of the discussion, these petitions succeed and are allowed and a writ in the nature of certiorari is issued quashing the impugned seniority list dated March 22, 1971 in respect of Khandsari Inspectors. The respondents 1 to 3 are directed to draw up a fresh seniority list based on the principle of length of continuous, officiation reckoned from the date of first appointment if the appointment is followed by confirmation i.e. selection/approval by the State Public Service Commission. We order accordingly, but in the circumstance of the case, there will be no order as to costs.

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