

Union of India

Vs

G.N. Tiwari and Others The Madhya Pradesh High Court In Miscellaneous

Union of Indian and Others

Vs

K.L. Jain, Respondent. Civil Appeal Nos. 5045 of 1985

Civil Appeals Nos. 5040-44 and 5045 of 1985

(A. N. Sen, D. P. Madon JJ)

19.11.1985

JUDGMENT

A.P. SEN, J. -

1. After hearing learned counsel for the parties, we had by our order dated October 11, 1985 dismissed these appeals. We now proceed to give the reasons therefor.
2. These appeals by special leave directed against the judgments and orders of the Madhya Pradesh High Court dated September 9, 1983 and December 16, 1983 raise a question as to whether a member of the State Civil Service (Executive) on his temporary appointment by the State Government under Rule 9 of the Indian Administrative Service (Cadre) Rules, 1954 for a period exceeding six months, is entitled to have his continuous period of officiation in a senior post, to be taken into account in reckoning the 'year of allotment' under Rule 3(3)(b) of the Indian Administrative Service (Regulation of Seniority) Rules, 1954. That depends on whether prior approval of the Central Government or the Union Public Service Commission to such appointment under sub-rule (2) of Rule 9 of the Cadre Rules for the appointment of a non-cadre officer to a cadre post by the State Government is a condition precedent for a valid appointment under Rule 9 of the Cadre Rules. Further, the question is whether the existence of a vacancy in the cadre strength of promotees, i.e. over-utilization of the State Deputation Reserve Quota is a relevant factor to be taken into consideration in determining the period of continuous officiation in a senior post on the cadre till the Central Government accords its approval to such appointment under Rule 9 of the Cadre Rules in assigning the year of allotment under Rule 3(3)(b) of the Seniority Rules.
3. Facts in these cases are more or less similar. It will suffice for our purposes first to state the facts in K.L. Jain's case. The respondent was a substantive member of the State Civil Service (Executive) in the State of Madhya Pradesh. He was on November 7, 1975 temporarily appointed by the State Government to the post of a Collector which is a senior post on the cadre under Rule 9 of the Indian Administrative Service (Cadre) Rules, 1954 and had been continuously officiating on such post w.e.f. November 10, 1975 till the Central Government accorded its approval on October 1, 1976, for his appointment in the Indian Administrative Service. The promotion quota of non-cadre officers to cadre posts was 50 prior to October 1, 1976 but was on that date increased to 56. The respondent

was formally appointed to the Indian Administrative Service by the Central Government on December 7, 1976. The State Government of Madhya Pradesh by letter dated February 3, 1979 informed the respondent that he was assigned 1972 as the year of allotment by the Central Government. Feeling aggrieved, the respondents filed a petition before the High Court under Article 226 of the Constitution for an appropriate writ, direction or order, directing that he should instead be assigned 1971 as his year of allotment under Rule 3(3)(b) of the Seniority Rules and his seniority should be fixed on that basis, and that on re-fixation of his seniority, he be allowed the consequential reliefs to which he may be entitled.

4. The appellant contested the respondent's claim on three grounds, namely : (i) he was not entitled to count his continuous officiation in the senior post of Collector from November 10, 1975 as his appointment to such post in the cadre was not approved by the Central Government till October 1, 1976 i.e., for any period prior to October 1, 1976; (ii) there was no vacancy in the cadre strength of promotees for any period prior to October 1, 1976 and therefore the appointment of the respondent to the post of Collector for the period from November 10, 1975 to September 30, 1976 had to be ignored; and (iii) there was over-utilization of the State Deputation Reserve Quota and for this reason also his continuous officiation on the senior post of a Collector could not be taken into account.

5. G.P. Singh, C.J., speaking for himself and Faizanuddin, J. in *K.L. Jain v. Union of India* (1984 MPLJ 284) held that though there was no specific approval of the Central Government to the appointment of the respondent, such prior approval was not a condition precedent for a valid appointment to a cadre under Rule 9 of the Cadre Rules and therefore the continuous officiation by the respondent as the Collector for the period from November 10, 1975 to September 30, 1976 could not be ignored on the ground that the appointment was not specifically approved by the Central Government. Further, it was held that the existence of a vacancy in the promotion quota for cadre officers was not a condition prerequisite for making an appointment of a non-cadre officer to a cadre post under Rule 9 of the Cadre Rules and therefore, merely because there was over-utilization of the State Deputation Reserve Quota had no bearing on the question of the validity of the appointment of the respondent on a cadre post. It also held that the condition of approval by the Central Government required by the proviso to clause (1) of Section III of Schedule II of the Indian Administrative Service (Pay) Rules, 1954 was only for pay fixation and it had nothing to do with the validity of the officiation of a non-cadre officer in a cadre post under Rule 9 of the Cadre Rules. It, accordingly, allowed the writ petition filed by the respondent and held that his continuous officiation in a senior post of Collector from November 10, 1975 was in accordance with Rule 9 of the Cadre Rules and the same must enure for his benefit to give him seniority under Rule 3(3)(b) of the Seniority Rules.

6. In the connected case, *G.N. Tiwari and 19 other members of the Madhya Pradesh cadre of the Indian Administrative Service* who had similarly been deprived of the benefit of their continuous officiation on their temporary appointment to the cadre post of a Collector by the State Government under Rule 9 of the Cadre Rules and had been assigned the year 1967 instead of 1966, the year 1968 instead of 1967, or the year 1972 instead of 1971 as the year of allotment under Rule 3(3)(b) of the Seniority Rules also moved the High Court by a petition under Article 226 of the Constitution based on the same grounds, and prayed for the grant of similar relief. A Division Bench consisting of J.S. Verma and C.P. Sen, JJ. following the decision in *K.L. Jain case* (1984 MPLJ 284) allowed the writ petition filed by the aforesaid respondents and directed that they be assigned the years 1966, 1967 and 1971 as their years of allotment respectively under Rule 3(3)(b) of the Seniority Rules, as claimed by them, and their placement in the seniority list be accordingly revised. It expressed the

hope that the State Government and the Central Government would give them all the consequential reliefs to which they may be entitled on re-fixation of their seniority. Against the two judgments, the Union of India has preferred these appeals by special leave.

7. In support of the appeal, learned counsel for the appellant advanced two contentions, namely : (1) The respondents were not entitled to have their entire period of continuous officiation in a senior post under Rule 9 of the Cadre Rules taken into account in assigning the years of allotment under Rule 3(3)(b) of the Seniority Rules as their temporary appointment to such senior post in the cadre was subject to the prior approval of the Central Government under sub-rule (2) of Rule 9 of the Cadre Rules, and (2) they as non-cadre officers were not entitled to appointment to the cadre post of a Collector because there was no actual vacancy in the cadre strength of promotees. It is urged that the power of the Central Government under sub-rule (3) of Rule 9 of the Cadre Rules to direct termination of appointment of a person other than a cadre officer appointed for a period exceeding three months is a larger power and necessarily carries within its ambit, the lesser power to direct curtailment of the period of officiation. It is further urged that the respondents were not entitled to the benefit of continuous officiation in a senior post to be taken into account in reckoning their year of allotment because there was no vacancy in the cadre strength of promotees. In fact, there was over-utilization of State Deputation Reserve Quota. We are afraid, we cannot accept this line of reasoning.

8. The assignment of the year of allotment is governed by Rule 3 of the Indian Administrative Service (Regulation of Seniority) Rules, 1954. The relevant clause applicable to the respondents is that contained in Rule 3(3)(b) which reads as follows :

3(3) The year of allotment of an officer appointed to the Service after the commencement of these Rules, shall be -

##(a) \* \* \*##

(b) where the officer is appointed to the Service by promotion in accordance with sub-rule (1) of Rule 8 of the Recruitment Rules, the year of allotment of the juniormost among the officers recruited to the Service in accordance with Rule 7 of those Rules who officiated continuously in a senior post from a date earlier than the date of commencement of such officiation by the former :

Provided that the year of allotment of an officer appointed to the Service in accordance with sub-rule (1) of Rule 8 of the Recruitment Rules who started officiating continuously in a senior post from a date earlier than the date on which any of the officers recruited to the Service in accordance with Rule 7 of those Rules so started officiating, shall be determined ad hoc by the Central Government in consultation with the State Government concerned.

Explanation 1. - In respect of an officer appointed to the Service by promotion in accordance with sub-rule (1) of Rule 8 of the Recruitment Rules, the period of his continuous officiation in a senior post shall, for the purposes of determination of his seniority, count only from the date of the inclusion of his name in the Select List, or from the date of his officiating appointment to such senior post, whichever is later :

Explanation 2. - An officer shall be deemed to have officiated continuously in a

senior post from a certain date if during the period from that date to the date of his confirmation in the senior grade he continues to hold without any break or reversion a senior post otherwise than as a purely temporary or local arrangement.

9. It is common ground that the post of Collector is a senior post. It is not disputed that the respondents were continuously officiating in a senior post for long periods prior to the date of their appointment to the Indian Administrative Service. It is also not in dispute that if the entire period of continuous officiation by the respondents in the senior posts of Collectors were taken into account, they would be entitled to the year 1966 instead of 1967, the year 1967 instead 1968 and the year 1971 instead of 1972 as the 'year of allotment' to them in accordance with Rule 3(3)(b) of the Seniority Rules.

10. The appointment of the respondents to the senior post of Collector was made in accordance with Rule 9 of the Indian Administrative Service (Cadre) Rules, 1954. It is in those terms :

9. Temporary appointment of non-cadre officers to cadre posts. - (1) A cadre post in a State may be filled by a person who is not a cadre officer if the State Government is satisfied -

(a) that the vacancy is not likely to last for more than three months, or

(b) that there is no suitable cadre officer available for filling the vacancy.

(2) Where in any State a person other than a cadre officer is appointed to a cadre post for a period exceeding three months, the State Government shall forthwith report the fact to the Central Government together with the reasons for making the appointment.

(3) On receipt of a report under sub-rule (2) or otherwise, the Central Government may direct that the State Government shall terminate the appointment of such person and appoint thereto a cadre officer, and where any direction is so issued, the State Government shall accordingly give effect thereto.

(4) Where a cadre post is likely to be filled by a person who is not a cadre officer for a period exceeding six months, the Central Government shall report the full facts to the Union Public Service Commission with the reasons for holding that no suitable officer is available for filling the post and may in the light of the advice given by the Union Public Service Commission give suitable directions to the State Government concerned.

11. It is plain upon a construction of Rule 9 that under sub-rule (1) the State Government can direct that a cadre post may be filled by a person who is not a cadre officer if it is satisfied that the vacancy is not likely to last for more than three months or that there is no suitable cadre officer available for filling the vacancy. In these cases, admittedly, the appointments of each of the respondents who was a person other than a cadre officer to the senior post of Collector in the cadre lasted for nearly a year or more and therefore exceeded the period of three months contemplated by sub-rule (1). Such an appointment could be made by the State Government on being satisfied that there was no suitable officer for filling the vacancy. It is not averred in the returns filed by the State Government or the Central Government in the High Court that this condition was not satisfied when the respondents were so appointed. Under sub-rule (2), where in any State a person other than a

cadre officer is appointed to a cadre post for a period exceeding three months, the State Government is required to forthwith report the fact to the Central Government together with the reasons for making the appointment. From the documents filed by the State Government in the High Court, it appears that such a report was made by the State Government to the Central Government on June 26, 1976. The Central Government by letter dated February 19, 1977 asked for a consolidated proposal for approval of officiation of non-cadre officers on cadre posts for the half year ending September 30, 1976. In compliance therewith, the State Government sent the required proposal on March 29, 1977. Under sub-rule (3), on receipt of a report under sub-rule (2) or otherwise, the Central Government may direct that the State Government shall terminate the appointment of such person and appoint thereto a cadre officer, and where any direction is so issued, the State Government shall accordingly give effect thereto. Under sub-rule (4), where a cadre post is likely to be filled by a person who is not a cadre officer for a period exceeding six months, the Central Government is required to report the full facts to the Union Public Service Commission with the reasons for holding that no suitable officer is available for filling the post and may, in the light of the advice given by the Union Public Service Commission, give suitable direction to the State Government concerned in that behalf.

12. Interpreting the provisions of sub-rules (2), (3) and (4), the High Court in K.L. Jain case (1984 MPLJ 284) rightly observed :

In the instant case, the Central Government never directed the State Government to terminate the petitioner's appointment. It is also not the case that the UPSC tendered any advice to the Central Government that the appointment be terminated. It is true that there is no specific approval of the Central Government to the appointment of the petitioner but that is not a condition precedent for a valid appointment under Rule 9 and the petitioner's officiation in a senior cadre post from November 10, 1975 to September 30, 1976 cannot be ignored on the ground that the appointment was not specifically approved by the Central Government. The petitioner's said officiation cannot also be ignored on the ground that there was no vacancy during this period in the promotion quota of the cadre officers.

The High Court held that prior approval of the Central Government was not a condition precedent to the appointment of a non-cadre officer to a cadre post under Rule 9 of the Cadre Rules. It further held that the existence of a vacancy in the promotion quota was not a prerequisite for making such an appointment. The appointment of the respondent K.L. Jain to the Indian Administrative Service made by the Central Government on December 7, 1976 was on a post when there was admittedly a vacancy in the promotion quota of non-cadre officers, but his temporary appointment by the State Government to the post of Collector which is a senior post in the cadre under Rule 9 on November 7, 1975 was at a time when there was no such vacancy in the promotion quota. It appears that the promotion quota of non-cadre officers to cadre posts was 50 prior to October 1, 1976 and was on that date increased to 56. Since the existence of a vacancy was not a condition precedent for making an appointment under Rule 9 of a non-cadre officer to a cadre post, the High Court held that the respondent's officiation from November 10, 1975 to September 30, 1976, could not be held to be invalid or ignored. On the same reasoning, it held that the fact that the State Government had over-utilized the Deputation Reserve Quota during the aforesaid period, could have no bearing on the question of validity of his appointment on the cadre post. It then added :

It may be that if the Central Government thought that the State Government was wrong in over-utilizing the Deputation Reserve Quota which gave rise to a vacancy

of a cadre post, it could have directed the State Government to terminate the petitioner's appointment but such a course was never adopted. As the Central Government did not issue any direction to the State Government to terminate the petitioner's appointment, the appointment has to be held to be valid and given effect to.

13. In that view, the High Court held that the respondent's continuous officiation in a senior post from November 10, 1975 was in accordance with Rule 9 of the Cadre Rules and the same must enure for his benefit for reckoning his seniority under Rule 3(3)(b) of the Seniority Rules. Further, it held that the requirement of approval of the Central Government as contained in the proviso to clause I of Section III of Schedule II of the Indian Administrative Service (Pay) Rules, 1954 cannot be imported into Rule 9 of the Cadre Rules or Rule 3(3)(b) of the Seniority Rules. The view expressed by the High Court in K.L. Jain case (1984 MPLJ 284) was followed with approval in the later case of G.N. Tiwari v. Union of India (Misc. Petition 297, 142, 830, 891 and 1520 of 1982 in M.P. High Court, decided on December 16, 1983).

14. Where a person other than a cadre officer is appointed to the Service by promotion in accordance with sub-rule (1) of Rule 8 of the Recruitment Rules, the year of allotment of the juniormost amongst the officers recruited to the Service in accordance with Rule 7 of the Rules who officiated continuously in a senior post from a date earlier than the commencement of such officiation by the former, is the determinative factor in allocation of the 'year of allotment' under Rule 3(3)(b) of the Seniority Rules. Proviso thereto enjoins that the year of allotment of an officer appointed to the Service in accordance with sub-rule (1) of Rule 8 of the Recruitment Rules who started officiating continuously in a senior post from a date earlier than the date on which any of the officers recruited to the Service in accordance with Rule 7 so started officiating, shall be determined ad hoc by the Central Government in consultation with the State Government concerned.

Explanation 1 to Rule 3(3)(b) interdicts that in respect of an officer appointed to the Service by promotion in accordance with sub-rule (1) of Rule 8 of the Recruitment Rules, the period of his continuous officiation in a senior post shall, for purposes of determination of his seniority, count only from the date of inclusion of his name in the Select List, or from the date of his officiating appointment to such senior post, whichever is later. Explanation provides that an officer shall be deemed to have officiated continuously in a senior post from a certain date if during the period from the date of his confirmation in the senior post he continued to hold without any break or reversion the senior post otherwise than as a purely temporary or local arrangement. In these cases, the respondents who were appointed to the Service by promotion in accordance with sub-rule (1) of Rule 8 of the Recruitment Rules were entitled under Explanation I to have the entire period of continuous officiation in a senior post, for the purpose of determination of their seniority, counted from the date of inclusion of their names in the Select List or from the date of his officiating appointment to such senior post, whether was later. They were also entitled by reason of the legal fiction contained in Explanation 2 to have the entire period of their continuous officiation without a break in a senior post from the date of their officiating appointment to such senior post till the date of their appointment into the Service, counted for purposes of determining their year of allotment under Rule 3(3)(b) of the Seniority Rules. It cannot be said that their officiation in a senior post on the cadre for the periods in question was merely fortuitous or stop-gap.

15. We are not impressed with the submission that the power of the Central Government under sub-rule (2) to direct termination of appointment of a person other than a cadre officer to a cadre post for a period exceeding three months or more was a large power and carried with it the power to direct curtailment of the period of officiation of such person. Obviously, the power to direct

termination of the appointment of a non-cadre officer in a senior post is distinct from the power to direct curtailment of his period of officiation. There is no such provision made in the Cadre Rules empowering the Central Government to direct the curtailment of the period of officiation of a non-cadre officer on a cadre post for purposes of reckoning his year of allotment under Rule 3(3)(b) of the Seniority Rules. Such a power cannot be spelt out from sub-rule (2) of Rule 9 of the Cadre Rules which confers power on the Central Government to direct termination of appointment of a non-cadre officer to a cadre post. In the absence of such a provision, the impugned order passed by the Central Government appointing October 1, 1976 as the date from which the period of officiation is to be reckoned for determining the year of allotment under Rule 3(3)(b) of the Seniority Rules was wholly arbitrary and capricious and therefore rightly struck down by the High Court. The failure of the Central Government to give a direction under sub-rule (3) of Rule 9 to terminate the appointment of the respondents implies that their continuous officiation on a cadre post had the tacit approval of the Central Government, particularly in view of the fact that the Central Government by letter dated February 19, 1977 required the State Government to submit a consolidated proposal for approval of officiation of non-cadre officers on cadre posts for the half year ending September 30, 1976. This was followed by a report of the State Government dated March 29, 1977. The Central Government by order dated October 1, 1976 accorded its approval to their appointment in the Indian Administrative Service. Furthermore, the respondents as non-cadre officers could not be denied the benefit of continuous officiation in a senior post merely because the State Deputation Reserve Quota was over-utilised; *Harjeet Singh v. Union of India* ((1980) 3 SCR 459 : (1980) 3 SCC 205 : 1980 SCC (L&S) 351 : AIR 1980 SC 1275) and *Amrik Singh v. Union of India* ((1980) 3 SCR 485 : (1980) 3 SCC 393 : 1980 SCC (L&S) 415).

16. The result therefore is that the appeals must fail and are dismissed. There shall be no order as to costs.

17. We are constrained to observe that although the judgment of the High Court in *K.L. Jain* case (1984 MPLJ 284) was rendered as far back as September 9, 1983 and that in the case of *G.N. Tiwari* (Misc. Petition 297, 142, 830, 891 and 1520 of 1982 in M.P. High Court, decided on December 16, 1983) on December 16, 1983, the directions issued by the High Court have not been implemented so far. We hope and trust that the Central Government will take steps to comply with the directions issued by the High Court forthwith.

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