

P. K. Dixit and Others

Vs

State of U. P. and Others

Writ Petitions (Civil) Nos. 11788-96 of 1984

(CJI R. S. Pathak, G. L. Oza JJ)

08.10.1987

JUDGMENT

OZA, J. -

1. These writ petitions filed by the petitioners challenge the inter se seniority of the officers in the higher judicial service coming from two sources : (i) promoted from the judicial service and (ii) others who are directly recruited from the Bar.
2. The petitioners are officers of the State Judicial Service who have been promoted on various dates to the higher judicial service and posted as Additional District Judges or some of them were posted as Civil and Sessions Judges before 1974 as in 1974 the post of Civil and Sessions Judge had been abolished and the higher judicial service for the State of Uttar Pradesh was constituted.
3. According to the petitioners they were promoted to officiate as Additional District and Sessions Judges on various dates and they continue to officiate as such, they were confirmed and on their confirmation they have been given the seniority not from the date of their continuous officiation but from some other date chosen by the High Court arbitrarily. And because of which, they have been put in the seniority list much below those officers appointed by direct recruitment and who were appointed much after the petitioners. According to the petitioners, they were promoted on various dates shown against their names and they have also shown the dates on which they were confirmed :

#-----SI Pet. Name Date of Date
of pro Date of Date ofNo. joining motion & confir- vacancy PCS (J) continuous
mation in which Nyayik officiation confirmed Sewa in HJS on Addl. Distt. &
Sessions Judge-----1. P. K. Dixit
1-3-61 9-9-73 24-1-81 1-10-782. A. N. Gupta 1-3-61 22-9-73 24-1-81 1-10-783. B.
K. Srivastava 1-3-61 29-3-74 24-1-81 30-4-794. L. S. Mathur 1-4-62 24-5-74 24-1-81
31-7-795. Taj Shanker 1-4-62 16-8-76 24-1-81 1-1-806. R. N. Sarkar 17-4-61 16-8-
76 29-10-83 1-1-807. S. P. Agarawal 2-3-63 3-1-77 29-10-83 1-1-808. A. K.
Srivastava 1-3-62 3-1-77 9-10-83 1-1-80-----
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4. In this list they have also shown the date of the vacancy on which they were proposed to be confirmed.
5. It is also contended on behalf of the petitioners that in 1975 the present rules for recruitment of the judicial officers in the higher judicial service came into force. Before these rules were brought

into force, the earlier rules were declared to be bad and in substance therefore, before these rules were brought into force, there was no provision for direct recruitment to the higher judicial service. It is contended that all the vacancies existing on the date on which these rules (1975 Rules) came into force have to be filled in by promotion. And while confirming and giving the dates for the purposes of seniority, the High Court ought to have prepared a list of vacancies existing on the date on which these rules (1975 Rules) came into force and confirm all those who were officiating as Additional District and Sessions Judges or Civil and Sessions Judges on this date in all those vacancies. And if this was done, these petitioners who were appointed before 1975 could have been confirmed on those vacancies and in that event they could not have been confirmed in the vacancies occurring in 1978, 1979 and 1980.

6. It is not disputed that out of these petitioners first four were promoted in 1973 and 1974 and on the date on which these rules came into force, they were already functioning as Civil and Sessions Judges as the designation of Additional District Judges was not there.

7. In the written affidavit filed by the High Court, it is not disputed that before these rules were brought into force, all the posts which were available on the date on which these rules came into force have to be filled in by promotion as till that date there was no rule requiring direct recruitment. But unfortunately, the High Court in their return have not mentioned the exact number of vacancies existing on that date as also the number of officers who were officiating on that as Civil and Sessions Judges or Additional District and Sessions Judges who were entitled to be included in that cadre of higher judicial service under these rules.

8. The High Court, it was contended has prepared a seniority list which has been notified and objections have been invited. It was therefore directed that list must be produced in this Court and consequently, the lists have been produced. The seniority list or the list which have been produced along with the affidavit filed by Mr. Chatterjee claiming to be in charge of the litigations of the High Court, unfortunately do not clearly give the picture. The list must show the initial date on which officers were promoted and were posted in the post of Civil and Sessions Judge or Additional District and Sessions Judge. It also does not clearly show the date on which the order of confirmation was issued. And it should have been made clear that before this date of confirmation, on what date a post was available for confirmation of the person concerned so that he should get the seniority if not from the date on which he was promoted for the first time from the date on which the post was available for him. It was expected that these facts clearly should have been stated in the return filed on behalf of the High Court.

9. It is not disputed that on the date on which these rules (1975 Rules) were brought into force, all the posts available were to go to the promoted officers and the only thing that the High Court is expected to do is to find out how many posts were available on that date and how many persons were officiating in the higher judicial service or equivalent posts on that date and their seniority ought to be fixed on the basis of their promotion to the posts except where an officer was not found fit or where officer concerned was reverted back to the judicial posts. The documents do not disclose that any one of these judicial officers who were promotees have been reverted. The documents also do not disclose that at any time the High Court considered the question of their confirmation and any one of them was not found fit for confirmation, or that it was decided to postpone the date of confirmation because the work of the officer was not up to the mark. The record produced by the High Court only shows the date from which these petitioners were promoted and started officiating as Additional District Judges and the date on which they were ultimately confirmed. During this period (sic that) their case was considered at any time does not appear from

the record produced in this case nor was (sic that) the contention of the learned counsel appearing for the High Court. It, therefore, is not disputed that these petitioners who were promoted before these rules (1975 Rules) were brought into force were never found unfit for confirmation and in this view of the matter, therefore, it is clear that all posts available on the date on which these new rules were brought into force will have to be filled in by these promoted officers who were working in the officiating capacity in the post of higher judicial service on the date on which these rules were brought into force. So far as the situation before these rules were brought into force is concerned even during the course of argument not much controversy appears to exist as it is clear that the question of direct recruitment and the quota of the direct recruits vis-a-vis promoters was not in existence.

10. It was contended on behalf of the High Court that when these judicial officers were promoted as it became necessary to fill in the temporary posts the formality of examining their record and consideration by a committee or the full court was not done but were only promoted on the basis of seniority and therefore from the date from which these officers started officiating as Additional District and Sessions Judges, they could not be treated as appointed on probation. But it is not the case of the High Court that after such ad hoc promotion whenever the High Court (full court or a committee) examined their causes any one of them who may have been found not fit for promotion normally would be reverted back to his original post and if at any time these officers were not reverted then imaginary date for probation could not be given on arbitrary basis as throughout their officiation as Additional District and Sessions Judges they have been found fit and they were continuing on these posts. It is also not stated when after an officer was promoted to fill in the temporary post, his case was considered for promotion to a substantive post. At best while confirming and giving seniority the only thing that could be considered was the availability of a permanent post and from the date a permanent post was available these officers had to be confirmed giving them seniority from that date.

11. It appears that the stand of the High Court is that as and when a temporary vacancy was available an officer who was the seniormost was promoted as Civil and Sessions Judge or Additional District and Sessions Judge but it is not the case of the High Court that afterwards the case of such promoted officers was considered by a committee or by the full court after examining the records and this was done at any time before their cases came up for consideration for confirmation. It only appears that their cases were considered for confirmation and at that time some date has been given from which they were treated to be on probation and on that basis the seniority has been counted but as stated earlier in absence of any one of these officers not having been found fit (sic unfit) for promotion this stand taken by the High Court cannot be justified. The period of officiation has to be considered as period of probation and the confirmation has to be from the date on which earliest a vacancy was available and the seniority has to be counted on that basis. Unfortunately neither the affidavit filed on behalf of the High Court nor the list clearly shows the position of these judicial officers who were promoted long before these new rules were brought into force in 1975 and what has been stated above will have to be done afresh so far as the officers who were promoted before the new rules were brought into force in 1975.

12. This also appears to be the intention of the rules when they were framed in 1975 as is clear from the proviso to Rule 8. It reads :

Provided further that the permanent vacancies existing on May 10, 1974 plus 31 temporary posts existing on that date, if and when they are concerted into permanent posts, shall be filled by promotion from amongst the members of the Nyayik Sewa;

and only the remaining vacancies shall be shared between the three sources under these rules :

It therefore is clear that even these rules provided that all the posts (permanent) available in the Higher Judicial Service existing on May 10, 1974 plus 31 temporary posts existing on that date which may become permanent later shall be filled by promotion from amongst the members of the Nyayik Sewa. It is therefore clear that all the posts in the Higher Judicial Service, lying vacant on May 10, 1974 plus 31 will have to be filled in from the officers of the Nyayik Sewa. May be that some of these posts may be occupied by promote officers who were given promotions on ad hoc basis and working on those posts or that the posts may be lying a vacant. Whatever may be the situation on the basis of what has been discussed above and also as has been clearly provided in these rules the matter will have to be gone into by the High Court afresh and fill in all the posts in the Higher Judicial Service available on May 10, 1974 plus 31 posts from the officers of the Nyayik Sewa.

13. It appears that the date May 10 has been mentioned in this proviso to Rule 8 because by notification of May 1974 the Higher Judicial Service was constituted and the posts of Civil and Sessions Judges were abolished. Paragraph 3 of these Rules notified on May 8, 1974 about the abolition of Civil and Sessions Judges is also significant. Para 3 reads thus :

Creation of posts and confirmation - (1) Upon the abolition of the cadre of Civil and Sessions Judges, permanent and temporary posts of Additional District and Sessions Judges equal in number of the permanent and temporary posts, respectively, of a Civil and Sessions Judges existing immediately before the date of commencement of these rules, shall stand created with effect from the said date, and the officers holding the posts of Civil and Sessions Judges immediately before the said date shall become Additional District and Sessions Judges and be designated accordingly.

This clearly indicates that those holding the posts either temporarily or permanently as Civil and Sessions Judges immediately before this date i.e. May 8, 1974 shall become Additional District and Sessions Judges and were designated accordingly. It is therefore clear that the Officer who was officiating as Civil and Sessions Judge on May 8, 1974 automatically became Additional District and Sessions Judge and therefore it could not be contended that proper procedure for promotion was not followed but as and when occasion arose an office in the Judicial Service was posted as Civil and Sessions Judge to perform the functions of that office on the basis of seniority. It was also contended that when initially an officer in the Judicial Service (Nyayik Sewa) was posted to perform the functions of Civil and Sessions Judge, his promotion was not done in accordance with the Rules and what was suggested was that no committee considered their record but on the basis of seniority it was decided to promote them. This argument appears to have been based on the Rules of 1975 where for promotion of the members of the Nyayik Sewa it has been provided that Selection Committee will examine the record of the eligible judicial officers and then shall prepare a list of those who have been selected for promotion and as when a vacancy occurs an officer from this list will be promoted. Admittedly this is what has been contemplated in Rule 20 could not be applied retrospectively for promotions before 1975 when the Rules were brought into force and it is also not suggested or brought on record that there was any such system or practice in the High Court. In fact, nothing has been brought on record to indicate as to how an officer was appointed to the post of Civil and Sessions Judge from the Nyayik Sewa. In this view of the matter also and in view of the notification abolishing the posts of Civil and Sessions Judges dated May 8, 1974 it is apparent that there is no scope for going back and those who were working as Civil and Sessions Judges either

against temporary or permanent vacancies either appointed temporarily or permanently became Additional District and Sessions Judges temporary or permanent as the case may be and therefore there is no scope for examining their cases now to find out as to whether they were promoted in accordance with the procedure prescribed in Rule 20 which was the rule enacted in 1975. It has therefore to be accepted that all those who were working as Civil and Sessions Judges on May 8, 1974 automatically became Additional District and Sessions Judges and what has left was only a consideration of their cases of confirmation and in so doing in view of the conclusions arrived at by us and also as has been provided in the proviso to Rule 8 quoted above all the posts available on May 10, 1974 plus 31 posts (temporary) on that date will have to be filled in from the cadre of Nyayik Sewa by promotion. In this view of the matter therefore while confirming these judicial officers who were working as Civil and Sessions Judges and who became Additional District and Sessions Judges on abolition of the cadre of Civil and Sessions Judges automatically the only thing that could be kept in view is the date on which a vacancy (permanent) was available for their confirmation and the seniority of these officers will have to be reckoned in accordance with the date of confirmation which will be not the actual date of confirmation but a date when a post was available and in so doing it will not also be reasonable to fix any date as has been done by the High Court arbitrarily on the basis of the assumption that initially when they were promoted they were not promoted after following the procedure. The only thing that can be considered will be that if at the time of confirmation an officer was not found fit naturally he must have been reverted, and the question of his seniority in the Higher Judicial Service therefore will not arise. Much reliance was placed on the decision of this Court in *O. P. Singla v. Union of India* ((1985) 1 SCR 351: (1984) 4 SCC 450 : 1984 SCC (L&S) 657 : 1984 Lab IC 1659). So far as the officers promoted before the Rules were brought in to force, this decision also does not carry the matter further and as regards the interpretation of rules, although an attempt was made to contend that the Delhi Rules and the U. P. Rules are similar but it could not be said that they are identical and therefore also this decision is not of much help to the case of the petitioners.

14. It could not be disputed that after that these Rules which are Uttar Pradesh Higher Judicial Service Rules, 1975 came into force a ratio has been fixed for the direct recruits and promotes. The petitioners also did not challenge the ratio nor did they challenge the rules except on the ground that while computing seniority they should be given the advantage of the continuous officiation. As discussed above so far as the posts available on a particular date i.e. May 10, 1974 is concerned the High Court will have to look into the matter afresh and decide the seniority in the light of what we have discussed but after the Rules came into force it could not be disputed that the Rules will have to be given effect to. These Rules have provided the mode of promotion and selection and have also provided the manner in which the seniority will be computed.

15. It was contended that the phrase "appointment to the service" which has been used in Rule 22 should not be restricted to the substantive vacancies i.e. permanent vacancies only. As it was contended that the term "the service" in Rule 3 has been defined to mean Uttar Pradesh Higher Judicial Service and it does not mean only permanent posts. Rule 22 provides for the manner of appointments from the direct recruits as well as from the promotees which reads as under :

Appointment - (1) Subject to the provisions of sub-rules (2) and (3), the Governor shall on receipt from the court of the lists mentioned in Rules 18, 20 and 21 make appointments to the service on the occurrence of substantive vacancies by taking candidates from the lists in the order in which they stand in the respective lists.

(2) Appointments to the service shall be made on the rotational system, the first

vacancy shall be filled from the list of officers of the Nyayik Sewa, the second Vacancy shall be filled from the list of direct recruits (and so on), the remaining vacancies shall thereafter be filled by promotion from the list of the officers of the Nyayik Sewa;

Provided that for so long as suitable officers are available from the cadre of the Judicial Magistrate appointments to the service shall be made in such a way that the second, fifth and eighth (and so on), vacancy shall be filled from the list of Judicial Magistrates.

(3) Appointment for temporary vacancies or in officiating capacity shall be made by the Governor in consultation with the court from amongst the members of the Nyayik Sewa :

Provided that for so long as suitable officers are available from the cadre of the Judicial Magistrates, appointments on temporary vacancies or in officiating capacity shall be made in consultation with the court from amongst the Judicial Magistrates according to the quota fixed for that source under these rules :

Provided further that for so long as such members of the Judicial Service as are considered suitable for appointments on temporary vacancies or in officiating capacity, are not available in sufficient number, the Governor in consultation with the court may fill in not more than 50 per cent of such vacancies from amongst the officers of the cadre of Judicial Magistrates.

(4) The appointments shall be made on rotational system - the first vacancy shall be filled from the list of officers of the Nyayik Sewa, the second vacancy shall be filled from the list of Judicial Magistrates (and so on).

In Rule 22 the phrase used is "to make appointment to the Service on the occurrence of substantive vacancies" and it was contended on the one side that substantive vacancies does not mean permanent vacancies whereas on the other hand it was contended that it only means permanent vacancies. The substantive vacancy has not been defined in the Rules but proviso to Rule 8 which has been quoted above speaks of permanent vacancies and temporary posts. In fact the scheme of the Rules clearly indicates that there are permanent posts and temporary also which are created to meet contingency and it may in due course be made permanent. It therefore could not be doubted that when appointment under Rule 22 is contemplated in the service of substantive vacancies, it may be both temporary or permanent but the vacancy must be in the cadre. It could not be doubted that a person could only be confirmed when a permanent post is available for him.

16. Different procedure is provided for appointment to a temporary vacancy and to a permanent vacancy. It was contended that if an officer is promoted to fill in a temporary post it is done without following the procedure i.e. selection but there is nothing to indicate as to how and when such appointments were considered and appointed on probation in a substantive post. Unfortunately the record produced by the High Court does not indicate this. What has been done it appears is that for purpose of seniority a date has been given and this has been done arbitrarily as there is no reason as to why the seniority should be counted from the date alone. What appears from the scheme of the Rules as provided in clause (3) of Rule 22 is, that appointment to temporary vacancies shall be made only from the Nyayik Sewa and as and when a substantive vacancy arises and the procedure for selection is to be followed, the officers who were appointed to fill in the temporary posts should be

considered first and appointed on probation if found fit, but it appears that it has not been made clear as to how and when this was done nor it is clearly stated as to what was the number of temporary posts created and when those became permanent and in our opinion the High Court will have to examine the matter in the light of the scheme of the Rules as discussed above. Probation has been provided in Rule 23 which reads :

(1) All persons shall on appointment to the service in substantive vacancies be placed on probation. The period of probation shall, in each case, be two years, provided that the period for which an officer has been continuously officiating immediately prior to his appointment may be taken into account for the purpose of computing the period of probation.

(2)(a) The court may, in special cases, extend the period of probation up to a specified date :

Provided that the total period of probation shall not ordinarily exceed three years.

(b) An order sanctioning such extension of probation shall specify whether or not such extension shall count for increment in the time scale.

(3) If it appears to the court at any time during or at the end of the period of probation, or extended period of probation, as the case may be, that a probationer has not made sufficient use of his opportunities or has otherwise failed to give satisfaction, it may make recommendation to the appointing authority whereupon the appointing authority may revert the probationer to his substantive post, if any, or if he does not hold a lien on any post, his services may be dispensed with.

(4) A person whose services are dispensed with or who is reverted under sub-rule (3) shall not be entitled to any compensation.

This clearly shows that normally the period of probation shall be two years and in computing this period of probation an officer who has been continuously officiating immediately prior to his appointment on probation will also be taken into account for the purpose of computing the period of probation and it has been further provided that period of probation in any event shall not exceed three years.

17. Much controversy was raised about Rule 26 which provides for fixing the seniority wherein in the proviso it has been provided :

Provided that in the case of a promotee the maximum period of continuous officiation in the service shall not, for the purpose of determining seniority exceed three years immediately preceding the date of confirmation.

It was contended that in the case of promotees even if he has been continuously officiating for more than 3 years still for purpose of computing seniority only 3 years will be counted according to this proviso. But this appears to be consistent with Rule 23 where it has been provided that total period of probation shall not ordinarily exceed 3 years. In fact the contention raised on behalf of the petitioners was that they were officiating in the posts before these Rules were brought in to force but still for computing their seniority only 3 years have been counted but in view of what we have held earlier in respect of posts available before the Rules of 1975 came into force, this question will not

be of any consequence. In fact these principles of seniority will only apply to the promotions made after these Rules came into force i.e. in 1975 and the scheme of the Rules appears to be that if a person is appointed to officiate in the Higher Judicial Service, his case for confirmation normally will be considered within 3 years and either he will be reverted and the scheme of these Rules therefore except that an officer who has been promoted his case must be examined by the High Court within three years and decide whether the officer deserves to be confirmed or deserves to be reverted and it is in this view of the matter it appears that in Rule 23 it has been provided that period of probation shall not ordinarily exceed 3 years. Similarly in Rule 26 while providing the principles of counting seniority it has been specifically provided that in case of promotee officers' continuous officiation even if it is for more than 3 years, only 3 years will be counted for purpose of seniority. This itself contemplates that such an occasion shall not arise when a person may be officiating for more than 3 years and still his case has not been considered for confirmation. In fact not much controversy has been placed before us about appointments after the rules came into force. As it is ordinarily expected that if these Rules were brought into force the appointments to the Higher Judicial Service either on the basis of direct recruitment or on the basis of promotion must have been in accordance with these Rules and it is expected that the probation, confirmation and seniority must have been looked into by the High Court strictly in accordance with those Rules. It appears that some amount of controversy has been raised as even after these Rules were brought into force some officers continued to be officiating and it appears that while fixing seniority in the provisional list which has been notified by the High Court, the proviso to Rule 8 which we have quoted above and the principle that all posts before these Rules were brought into force, will have to be filled in by the promotees, was not kept in view. Having gone through these Rules it appears that the contention advanced by the petitioners in respect of proviso to Rule 26 about seniority does not appear to be justified. We therefore feel that from the date these Rules have been brought into force, the High Court must have given effect to these Rules. But in view of what we have discussed earlier about the appointments on the posts available before these Rules were brought into force and to fill in temporary posts, we feel that the matter will have to be examined afresh by the High Court. So far as posts available on May 10, 1974 plus 31 posts are concurred they will have to be filled in only by promotees as we have discussed earlier and also in view of proviso to Rule 8 and after doing it examine the cases of promotion and direct recruitment after the coming into force of these Rules and the vacancies available and after considering the cases in accordance with these Rules the High Court will prepare afresh the seniority list which may be notified so that if any objections are there, they may be placed for determination in accordance with the Rules and in the light of the discussions above. We therefore allow the petitions partly and dispose it of as stated above. In the circumstances of the case, we direct that parties shall bear their own costs.

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