

S.L. Chopra and others

Vs

State of Haryana and others

Civil Appeal No.1643 of 1991

(K. N. SINGH, K. Ramaswamy JJ)

05.04.1991

JUDGEMENT

K. RAMASWAMY, J.:-

1. The special leave to appeal is granted.

2. These appeals and the writ petition were heard elaborately along with Civil Appell No.4094 of 1984 on merits. Since same controversy, as involved in Civil Appeal No. 2316 of 1986, we are disposing of both the appeals and writ petition by a common order.

3. The appellants are Class II engineers in the Haryana Service of Engineers (Public Health Branch). They were promoted to officiate as Executive Engineers under the Punjab Service of Engineers, Class I, P.W.D. (Public Health Branch) Rules, 1961 made by the Governor in exercise of the powers under the proviso to Art. 309 of the Constitution. After the formation of State of Haryana, the service was known as the Haryana Public Service of Engineers, Class I, P.W.D. (Public Health Branch) with effect from November 1, 1966. The rules are called for short 'the rules'. The service under the rules consists of Asstt. Executive Engineer, Executive Engineer, Superintending Engineer and Chief Engineer. The State Government exercised its power under Rule 22 and relaxed the qualification of 5 years' length of service and promoted the appellants and S. L. Chopra as Executive Engineers on February 21, 1972, B. R. Batra on July 29, 1971 and O. P. Juneja on February 16, 1972. The respondent B. D. Sardana was recruited as Asstt. Executive Engineer by direct recruitment to Class I Service of Junior scale and was appointed with effect from December 7, 1977. The State Government relaxed part of his probationary period and promoted him also as Executive Engineer Mr. B. R. Batra filed a writ petition under Art. 32 challenging the promotion of Sardana as Executive Engineer and also the State Govt.'s power to grant relaxation and fixing his seniority as Executive Engineer. He further challenged the promotion of Sardana as Superintending Engineer by order dated July 29, 1982 on the plea that it violated his fundamental rights under Arts. 14 and 16. The appellants, namely, Sardar Pratap Singh, K. C. Sehgal and Sardar Bhupinder Singh in Civil Appeal No. 2316 of 1986 are Class II officers promoted on officiating basis as Executive Engineers in Senior scale with effect from 1962, 1964 and 1964 respectively and they were confirmed on that post with effect from June 1, 1977, May 1, 1979 and November 1, 1979 respectively. F. L. Kansal, the respondent a direct recruit was appointed on May 18, 1965 as Asstt. Executive Engineer in the Class I, Junior scale. The High Court allowed the writ petition of Kansal and quashed the confirmation of the appellants.

4. This Court in J. C. Yadav v. State of Haryana (1990) 2 SCC 189 and K. K. Khosla v. State of Haryana (1990) 2 SCC 199, upheld the relaxations granted by the Government under R. 22 to the

appellants and Sardana. The same contention raised in the High Court there by received quietus. The High Court held that the appellants are not the members of the service till they are appointed substantively to the cadre posts under the rules. Therefore, they had no locus standi to question the promotion of B. D. Sardana as Executive Engineer and Superintending Engineer. However, the High Court held that the promotions and confirmations of the appellants (in C.A. No. 2316 of 1986) were in excess of their 50% quota and on that basis the High Court quashed them and directed the State Government to refix the seniority afresh.

5. The only question that arises in the appeals and the writ petition is whether what is the date from which the appellants and B. D. Sardana and F. L. Kansal became members of the service and what should be their seniority in the senior posts of Executive Engineers. We have discussed the rules at length in Civil Appeal No. 4094 of 1984 which have been disposed of today. The reasoning contained in that judgment apply to the instant cases also.

6. Under Rule 5(1), recruitment to the service is made from three sources; (a) direct recruitment; (b) by transfer of officers already in the service of the State or of the Union and (c) by promotion from Class II service. Direct recruitment as defined under R. 2(7) means an appointment by open competition but does not include 'an appointment made by promotion or transfer'. Under Rule 2(1) appointment to the service includes an appointment made according to the terms and provisions of the rules to an officiating vacancy or an ex-cadre post provided that an officer so appointed shall not be deemed to have become a 'member of the service' as defined in Cl. (12) of Rule 2. Class II service as defined under R. 2(5) means Punjab Service of Engineers, Class II in Public Health Branch Asstt. Executive Engineer as defined under Rule 2(2) means a member of the service in a junior scale of pay. Rule 2(3) defines 'cadre post' which means a permanent post in the service. 'Ex-cadre post' as defined by Rule 2(10) means a temporary post of the same rank as of a cadre post. Rule 2(12) is the main rule in controversy which needs interpretation reads thus :

"member of the service", means an officer appointed substantively to a cadre post, and includes-

(a) in the case of a "direct appointment" an officer "on probation", or such an officer who, having successfully completed his probation, awaits appointment to a cadre post;

(b) is not necessary hence omitted.

7. Rule 5(2) postulates that 'recruitment to the service' shall be so regulated 'that the number of posts filled by promotion from Class II service' shall not exceed 50% of the number of posts in the service 'excluding the posts of Asstt. Executive Engineers' provided that till such time as an adequate number of Asstt. Executive Engineers who are eligible and considered fit for promotion are available, the actual percentage of officers promoted from Class II, service may be larger than 50%. Rule 6 prescribes qualifications for appointment to the service by direct recruitment and appointment by promotion from Class II service and prescribes the length of service. Rule 15 provides for passing the prescribed departmental test as a condition for promotion to the post of Executive Engineers and above. Rule 7 provides for appointment of direct recruits and R. 8 prescribes procedure for promotion. Rule 11 prescribes the period of probation of an officer appointed to the service and the procedure for declaration. The Rule provides that direct recruits shall be on probation for a period of two years and the promotees and transferees shall be on probation for a period of one year and the officiating period shall be considered towards probation.

Rule 11(4) postulates that 'on the satisfactory completion of the period of probation, Government shall confirm such officer in a cadre post, if one is available for him'. Rule 12 prescribes the procedure for determination of the seniority. By operation of sub-rule (3) read with sub-rule (5) of R. 12, the seniority of the Asstt. Executive Engineer (direct recruit) on promotion as Executive Engineer (senior scale) shall be the calendar year in which the order of appointment as Asstt. Executive Engineer may have been issued by the Government. Sub-rules (6) and (7) prescribe the procedure to determine the inter se seniority of the Class II officers promoted as Executive Engineers notwithstanding they are officiating or confirmed. They take their rank next below the junior most Executive Engineer of the preceding year of allotment of such an officer whether officiating or confirmed. Rule 3(2) read with Appendix 'A' provides procedure to determine cadre post's in the light of the guidelines laid down therein.

8. Shri P. P. Rao, learned counsel for the appellants urged that the moment the appellants were promoted, though officiating in the regular vacancies as Executive Engineers, they should be deemed to be the members of the service from the date of their initial officiating promotion, their seniority should be determined retrospectively with effect from their due dates. Their continuous length of service should be counted towards their seniority. He urged that since the appellants were promoted in the year 1971-72, they are senior to B. D. Sardana as he is a direct recruit of the year 1977. He sought reliance on the 'inclusive definition' under R. 2(12)(a) and the proviso to Rule 5(2) of the rules. He further contended that while the appellants were on probation and their probation was declared to be completed with a view to make them regular from the date of their initial officiating promotion. The fixation of cadre posts and appointment of the appellants substantively to a cadre post are inglorious uncertainties which take unduly long period. The officiating service cannot be cut down or the contesting respondent B. D. Sardana be promoted over them or other senior promotees awaiting promotion either as Executive Engineers or Superintending Engineers. He further contended that in the counter-affidavit filed in the High Court the State Government had admitted that the case of the appellants would be considered in the light of J. C. Yadav's case which went in their favour. So the only thing that the State Govt. shall have to do is to determine inter se seniority between the appellants and the contesting respondent from the respective dates of promotion as Executive Engineers and appointment by promotion as Superintending Engineer shall be made on that basis. We have elaborately considered all the contentions in Sehgal's appeal and we have recorded our findings on the basis of interpretation of the rules.

9. In our opinion under Rule 2(12)(a) only direct recruit appointed to the cadre post though on probation is a member of the service from the date of appointment by operation of the main part of Rule 2(12)(a) read with Rule 2(1) to a cadre post within the meaning of Rule 2(3). The inclusive definition in Rule 2(12)(a) is applicable only to a 'direct appointee' i.e., Asstt. Executive Engineer under R. 2(7) and put on probation, officiating in an ex-cadre post as contemplated in para 11 of Appendix 'A' but having successfully completed his probation and awaits appointment to a cadre post. The promotee Class II officers admittedly are not direct recruits as per R. 2(7) but are officiating as Executive Engineers, they would not become members of the service as declared by R. 2(7) but become a member of the service only after they are appointed substantively to a cadre post. Sub-rule (2) of R. 5 prescribes quota to the promotees at 50% and 50% to the direct recruits and by appointment by promotion to the cadre posts of Executive Engineers and above. The proviso is a built in relaxation which empowers the State Govt. to promote Class II officers as Executive Engineers in excess of their 50% quota. The promotion of Class II officers in excess of 50% quota would be illegal or irregular in the teeth of the mandatory language of R. 5(2). With a view to have smooth functioning of the administration this power of relaxation was given as a breathing facility. The moment a direct recruit is available, the promotee shall give place to him. If a promotee is

officiating in a cadre post or appointed to an ex-cadre temporary post when a substantive vacancy arises, the State Government is empowered to consider the eligibility of Class II officers for promotion as Executive Engineer as per the procedure prescribed in R. 8 and an appointment by promotion shall be made but it would be on officiating basis until he is appointed substantively to a cadre post by operation of R. 8(11) read with R. 11 (4). Appointment by promotion made to an ex-cadre post or to any cadre post in an officiating capacity from the list prepared under R. 8 would remain temporary. On satisfactory completion of the period of probation, the Government shall confirm the promotee officer in a cadre post under R. 11(4) if one is available for him. On a conjoint reading of all the relevant rules, a promotee holding a cadre post on an officiating basis as an Executive Engineer or above, within the quota, would be eligible to be considered for appointment in a substantive capacity to a cadre post. His seniority shall be determined with effect from the date of his initial promotion to a cadre post unless he is reverted or there is break in service or from the date of continuous officiation either in the ex-cadre or cadre post.

10. Under Rule 3(2) read with Appendix 'A', the State Government is enjoined to determine the cadre post from time to time and during the first 5 years on 1st day of every year and later from time to time and divide the posts as per the ratio of the available cadre posts to the promotees and the direct recruits and shall make appointment in a substantive capacity. Inter se seniority between direct recruits and promotees is regulated by Rule 12(6) and (7). Since B. D. Sardana is a direct recruit his seniority as Executive Engineer shall be with effect from the date of his initial appointment as Asstt. Executive Engineer, namely, December 7, 1977 as contemplated by Rule 12(3) and (5). Similarly Kansal's seniority would be determined with effect from 1-1-1966, their seniority is unalterable and they are eligible for promotion within 50% quota of cadre post as Executive Engineer, Superintending Engineer and Chief Engineer respectively counting the seniority with effect from year of allotment, namely December 7, 1977, May 18, 1965 (1-1-1966) respectively.

11. As regards the appellants are concerned, they shall be considered for appointment to a substantive vacancy against a cadre post within their 50% quota of the promotees and their seniority would be counted next below the immediate senior promotee of the same year or junior most promotee of the preceding year of allotment either officiating or confirmed, in accordance with sub-rules (6) and (7) of Rule 12 and Rules 8(11) and 11(4). The year of allotment is accordingly alterable. If a promotee Class II officer holds the cadre post within the quota of direct recruit, his period of service from the date of initial promotion till the date of availability of a cadre post is rendered fortuitous. A direct recruit though promoted later steals a march over the promotee and gets right to consideration and if found fit gets promotion within his 50% quota and thereby becomes senior to the officiating promotee.

12. In the affidavit filed by O. P. Juneja one of the appellants it is stated that the State Government has now determined the cadre strength but we decline to go into that question, leaving it open to the Government to determine the seniority after giving opportunity to all parties in the light of this judgment. It is true that that the State Government made admissions in the counter-affidavit that the seniority would be determined in accordance with J. C. Yadav's case ((1900) 2 SCC 189) which went in favour of the appellants, but it does not conclude the matter. It is unfortunate that the State Govt. took sifting stand from time to time. Rule 2(12) is neither arbitrary nor creates invidious discrimination offending Arts. 14 and 16. Direct recruits get seniority from the date of appointment as Asstt. Executive Engineer, it is unalterable. But promotee's seniority is variable by operation of Rules 8 (11), 2 (12)(a) and 5(2) of the Rules. Therefore, the State Government is directed to determine the cadre strength in the Haryana Service of Engineers, Class I, P.W.D. (Public Health

Branch) under the Rules, Executive Engineers, Superintending Engineers and Chief Engineers, consider the cases of the appellants and the contesting respondents B. D. Sardana, F. L. Kansal for promotion to the senior posts of Executive Engineers, Superintending Engineers and Chief Engineers respectively with the respective quota of 50% and make appointment if found eligible and fit for promotion. This exercise shall be done within four months from the date of the receipt of the order. The impugned promotions or any appointment made pending the writ petitions in the High Court or appeals in this Court are subject to the above directions. The status quo as of today will continue till the Government carries out the directions. The appeal and the writ petition are accordingly disposed of and Civil Appeal No. 2316 of 1986 is dismissed but in the circumstances parties are directed to bear their own costs.

Order accordingly.

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