

SUPREME COURT OF INDIA

S.N.Dhingra

Vs.

Union of India

Writ Petition (civil) 388 of 1994

(G.B.Pattanaik and B.N.Agarwal JJ.)

31.01.2001

JUDGMENT

G.B.Pattanaik, J.

1. This petition under Article 32 by the Direct Recruits to Delhi Higher Judicial Service, assails the inclusion of the respondents 5 to 8 in the Gradation List drawn up by the High Court of Delhi by order dated 22.8.2000 pursuant to the directions given by this Court in Writ Petition No. 490/87. These respondents have been continuously working in Delhi Higher Judicial Service w.e.f. 18th of January, 1986 but had been posted as Chief Metropolitan Magistrates on account of the Government decision of up-gradation of the said post of Chief Metropolitan Magistrates. The petitioners on the other hand are directly recruited officers to Delhi Higher Judicial Service in the year 1988 pursuant to the selection made in accordance with the Recruitment Rules. The bone of contention of the petitioners is that the respondents, who were continuing as Chief Metropolitan Magistrates, must be held to be juniors to the petitioners inasmuch as their decision was subject to challenge in appeal before the petitioners, who were appointed as Additional District and Sessions Judge, and the High Court committed error in including the names of these respondents in the gradation list pursuant to the directions given by this Court in the Constitution Bench by not properly understanding the directions in question.

2. This Court in *O.P.Singlas case*¹ took into consideration the relevant provisions of the Recruitment Rules and came to hold that the quota principle contemplated in the Recruitment Rules has totally broken down and as such seniority of the officers in the Delhi Higher Judicial Service cannot be determined by taking recourse to the quota and rota provided in Rule 8(2). The Court on the other hand indicated that the seniority has to be determined on the basis of continuous length of service provided the promotees have been promoted after due consultation with the High Court and they did possess the requisite qualification for promotion in accordance with Rule 7 of the Recruitment Rules. The Court had further indicated in Singlas that the ad hoc, fortuitous and stop-gap appointees will not be entitled to the benefit of the aforesaid principle namely the continuous length of service as the basis of their seniority in the cadre. As the High Court failed to implement the aforesaid judgment of this Court in its proper perspective and drew up seniority list contrary to the letter and spirit

of the judgment, writ petitions were filed in this Court which stood disposed of by a Constitution Bench in the case of *Rudra Kumar Sain and Ors. Vs. Union of India and Ors., reported in²*. The Constitution Bench came to the conclusion that the provisional and final gradation list had not been drawn up in accordance with the principles enunciated in Singlas case and accordingly the said gradation lists were quashed. The Constitution Bench also further directed that the appointees to the Delhi Higher Judicial Service prior to the amendment of the Recruitment Rules in the year 1987, whether by direct recruitment or by promotion, are entitled to get their seniority re-determined on the basis of continuous length of service in the cadre, as indicated in Singlas case and the High Court, therefore should draw up the same within a specified period. The Constitution Bench further elaborated the meaning of the expression ad hoc, fortuitous and stop gap and having said so, it was further observed:

3. It is not possible to lay down any strait-jacket formula nor give an exhaustive list of circumstances and situation in which such an appointment (ad hoc, fortuitous or stop gap) can be made. As such, this discussion is not intended to enumerate the circumstances or situations in which appointments of officers can be said to come within the scope of any of these terms. It is only to indicate how the matter should be approached while dealing with the question of inter se seniority of officers in the cadre.

4. Thus both in Singlas case as well the Constitution Bench decision in Rudra Kumars case, this Court has indicated the principle on which the inter se seniority of the officers of Delhi Higher Judicial Service has to be drawn up, particularly when the statutory mode contained in Rule 8(2) of quota and rota principle was found to be broken down and at the same time it was also indicated that for finding out the period of continuous service in the cadre of Higher Judicial Service, the ad hoc, fortuitous and stop-gap appointments would not be taken into account. Since respondents 5 to 8 were the promoted officers in Delhi Higher Judicial Service prior to the amendment of the Recruitment Rules in 1987, their seniority has been determined on the basis of their continuous length of service in the cadre pursuant to the observations and directions given by this Court in the Constitution Bench decision of Rudra Kumars case.

5. Mr. Shanti Bhushan, the learned senior counsel, appearing for the present petitioners, who are the direct recruits to the Delhi Higher Judicial Service in the year 1988, however contends that the inclusion of these respondents in the gradation list already drawn up is erroneous inasmuch as their recruitment itself unequivocally indicates that the same is purely fortuitous and as a stop-gap arrangement, as it would be apparent from the Notification dated 16.1.1986. Mr. Shanti Bhushan further contends that the appointment of these respondents by letter dated 16.1.86 was fortuitous and as a stop-gap arrangement is re-enforced by the fact that a fresh appointment to the service on temporary basis was made in their favour under Rule 16(2) of the Recruitment Rules by the Administrator by Notification of 24th of February, 1989 and as such the services of these respondents from 16.1.86 till 24.2.89 being purely a fortuitous and stop-gap arrangement, the said period could not have been reckoned as continuous service for determination of their seniority in the cadre of Delhi Higher Judicial Service and the High Court, therefore was not justified in including their names in

the gradation list drawn up on 22nd August, 2000, pursuant to the directions given by this Court in the Constitution Bench decision of Rudra Kumars case. Mr. Shanti Bhushan further contends that by mere up-gradation of the post of Chief Metropolitan Magistrate, those posts did not form a part of cadre until amendment in question and inclusion of the post in the schedule, and adjudged from that angle also, the appointees to those posts could not have been held to be regular appointees in Delhi Higher Judicial Service. The schedule having been amended only in 1991 and these respondents having been continued as Chief Metropolitan Magistrates till February, 1989, could not have been made senior to the direct recruits-petitioners who were recruited to the Delhi Higher Judicial Service in the year 1988. Mr. Shanti Bhushan, the learned senior counsel, relying upon the provisions of the Criminal Procedure Code also strenuously contended that against the orders of the Chief Metropolitan Magistrates, appeal being maintainable to the District and Sessions Judge and the respondents having continued as Chief Metropolitan Magistrates till 1989 and against their orders, appeal being maintainable to the District and Sessions Judge, which post was held by the petitioners since in the year 1988, those respondents could not have been made senior to the petitioners in any view of the matter. According to Mr. Shanti Bhushan, both in Singlas case as well as in *Patwardhans case*³ on which reliance was placed in Singlas case, the Court while evolving the principle of continuous length of service as the criterion for determination of the inter se seniority in the cadre, has hastened to add that the post in question must belong to the same cadre and the incumbents discharge similar functions and bear the same responsibility, but applying the aforesaid principle to the case in hand, it cannot be said that the Chief Metropolitan Magistrates discharge the similar function and bear the same responsibility as the Additional District and Sessions Judge and, therefore, the respondents could not have been given their seniority on the basis of continuous length of service for the period they are continued as Chief Metropolitan Magistrates. Mr. Shanti Bhushan further contends that an examination of the scheme of the Criminal Procedure Code, more particularly, Sections 17, 19, 28 and 29 unequivocally indicate that a Chief Metropolitan Magistrate is subordinate to the Sessions Judge and, therefore notwithstanding the up-gradation of the post of Chief Metropolitan Magistrate, the statutory subordination under the Criminal Procedure Code remains and consequently, the respondents who continued as Chief Metropolitan Magistrates till February, 1989, cannot be held to be senior to the petitioners, who are recruited as Additional District and Sessions Judge in the year 1988 and in this view of the matter, the inclusion of the name of the respondents in the gradation list drawn up is erroneous.

6. Mr. P.P. Rao, the learned senior counsel, appearing for the High Court of Delhi, on the other hand contended that the order of the Administrator in upgrading five posts of Chief Metropolitan Magistrates and including them in Delhi Higher Judicial Service tantamounts to creation of temporary posts in the service under sub-rule (2) of Rule 16 of the Rules. According to the learned counsel the definition of cadre post in Rule 2(b) of the Rules, clearly conceives any other temporary post declared as cadre post by the Administrator and, therefore, when the Administrator upgraded the post of Chief Metropolitan Magistrate and included those posts in Delhi Higher Judicial Service, then the holder of those posts cannot be denied the benefit of such continuation of service. The learned counsel further contended that under Rule 4(2) of the Recruitment Rules, the Administrator is empowered to create

from time to time as many cadre posts as may be necessary and in the absence of any embargo on the aforesaid power of the Administrator, the so-called upgradation of the post of Chief Metropolitan Magistrate and inclusion of those upgraded posts in the Delhi Higher Judicial Service, undoubtedly entitles the incumbents of those posts to claim seniority on the basis of their continuous service, as has been held in Singlas case and upheld by the Constitution Bench in Rudra Kumars case. The learned counsel further contends that notwithstanding the amendment of the schedule in the year 1991, the position being that five posts of Chief Metropolitan Magistrates were upgraded and were included in the Delhi Higher Judicial Service and private respondents having been continuing against those posts, the High Court was justified in taking the entire length of continuous service in the Higher Judicial Service for the purpose of determination of their seniority in the cadre and no error can be found therein in the matter of preparation of gradation list on 22nd August, 2000, pursuant to the Constitution Bench judgment of this Court. In support of this contention, he placed reliance on a decision of this Court in the case of *S.L.Kaul and Ors. Vs. Secretary to Govt. of India, Ministry of Information and Broadcasting, New Delhi & Ors.*⁴. Mr. Rao also contended that the very appointment of the respondents on 16th of January, 1986 was to Delhi Higher Judicial Service and not against any particular post. On being so appointed, the High Court which is the authority to make posting, posted them as Chief Metropolitan Magistrates or Additional Chief Metropolitan Magistrates against the five upgraded posts of the Chief Metropolitan Magistrates. This being the position, the fact that against their order while they were continuing as Chief Metropolitan Magistrates, an appeal lay to the District and Sessions Judge under the provisions of Criminal Procedure Code, will not take away the benefits of their continuous service in the cadre, as contended by Mr. Shanti Bhushan, and, therefore, the impugned gradation list has rightly been drawn up. According to Mr. Rao, it is no doubt true that in the appointment order dated 16.1.86, it has been indicated that the appointments are fortuitous and stop-gap, but this labelling is of no consequence and would not deny the respondents of their valuable rights of continuing in the Delhi Higher Judicial Service and would not deprive them of their seniority being determined according to the principles evolved in Singlas case and affirmed in the Constitution Bench judgment of this Court in Rudra Kumars case, particularly, when the Court has tried to resolve the impasse created by directing that continuous length of service should be the principle for determining the seniority.

7. Mr. G.L. Sanghi, the learned senior counsel, appearing for some of the promotee-respondents, in the context of the facts of the present case, contended that appointment to service and thereafter posting to a particular post are two different concepts. Once the respondents were appointed to Delhi Higher Judicial Service by order dated 16th of January, 1986 and continued to hold the post in the said service, the continuous period of officiation is the only guiding factor for determining their seniority in the cadre. This principle having been evolved by this Court in Singlas case and upheld in Rudra Kumars case, cannot be given a go-bye, merely because the initial letter of appointment indicated that the appointment is fortuitous or stop-gap. Mr. Sanghi contended that the use of the expression fortuitous and stop-gap by the High Court is because of the fact indicated in the Registrars letter dated 4th of January, 1986, namely the sanctioned strength of Delhi Higher Judicial Service, as it stood then and the fact that the advertisement had been issued separately for the

direct recruits as per Rule 7(b) of the Recruitment Rules. This letter was considered in Rudra Kumars case by the Constitution Bench and the Court had observed as to how the High Court was obsessed for use of the word fortuitous and stop-gap. This being the position, and in the light of the directions and observations in Rudra Kumar' case, the High Court rightly included the names of these respondents in the gradation list drawn up, and there is no infirmity in the same. Mr. Sanghi contends that in concluding paragraph of the judgment of the Constitution Bench in Rudra Kumars case, the High Court was called upon to draw up the seniority of all the officers, direct recruits and promotees, appointed to Delhi Higher Judicial Service prior to the amendment of the Recruitment Rules of 1987 and in view of the aforesaid directions and the respondents having been appointed to the Delhi Higher Judicial Service with effect from 16.1.1986 and having continued in the said service without interruption, it was only logical for the High Court to include them in the gradation list drawn up and the petitioners who came to be recruited in the year 1988, cannot make any complaint of the same. According to Mr. Sanghi, though the order of appointment dated 16.1.86 indicate the appointment to be fortuitous or stop-gap, but the substance being looked at and the principles enunciated in Rudra Kumars case being applied for, such appointment cannot be held to be fortuitous or stop-gap, so as to deprive the benefit of the continuous length of service for the purpose of seniority of the appointees, and consequently, the gradation list drawn up does not require any interference.

8. Mr. D.N.Goburdhan, the learned counsel appearing for some other respondents, while supporting the contentions raised by Mr. Sanghi, further urged that the notification, appointing the petitioners to Delhi Higher Judicial Service on probation, itself unequivocally indicates that the same is subject to the final result in pending writ petitions and that the seniority vis-a-vis the promotees in Delhi Higher Judicial Service would be determined and fixed in accordance with the judgment of the Supreme Court in O.P.Singlas case as well as the other writ petitions pending in the Supreme Court and in view of such appointment letters and in view of the Constitution Bench decision in Rudra Kumars case, the High Court rightly determined the seniority and the same should not be interfered with.

9. Mr. Raju Ramachandran, the learned senior counsel, appearing for respondent No. 6, emphasised that the expression discharging similar functions in O.P.Singlas case, must be understood to mean capable of discharging similar functions inasmuch as an appointee discharges the functions of the post to which he is appointed by the employer. In this view of the matter once respondents are appointed to Delhi Higher Judicial Service, their mere posting as Chief Metropolitan Magistrate as against the upgraded post in the said cadre of Delhi Higher Judicial Service will not deprive them of their right to have their continuous length of service as the basis for seniority in the cadre and, therefore, the impugned gradation list does not suffer from any infirmity.

10. In view of the submissions made at the Bar and in view of the two earlier decisions of this Court, O.P.Singla and Rudra Kumar, the first question that arises for our consideration is whether it was open for the Administrator to upgrade the post of Chief Metropolitan Magistrate and include those upgraded posts in Delhi Higher Judicial Service, so as to form a part of the cadre post. The definition of cadre post in Rule 2(b) of the Recruitment Rules,

stipulates that any other temporary post declared as cadre post by the Administrator would be a cadre post apart from those which have been specified in the schedule. The definition of service in Rule 2(e) means the Delhi Higher Judicial Service and the expression promoted officer in Rule 2(h) of the Rules means a person who is appointed to the service by promotion from Delhi Judicial Service. Rule 4(2) speaks of the power of the Administrator to create cadre post from time to time as may be necessary. Rule 16 authorises the Administrator to create temporary post in the service and to fill up such posts in consultation with the High Court from amongst the members of the Delhi Judicial Service. In view of the aforesaid provisions of the Rules and in view of the earlier decisions of this Court in Singla and Rudra Kumar, the conclusion is irresistible that the Administrator by upgrading five posts of Chief Metropolitan Magistrates to the rank of Delhi Higher Judicial Service and by including them in the service has merely exercised his power under Rule 16, and therefore, the appointees like the respondents to those posts in the service from Delhi Judicial Service must be held to be born in the service from the date of their appointment by virtue of order dated 16th of January, 1986. This conclusion of ours is further strengthened from the fact that even the schedule has been amended later, by indicating the authorised strength of the service to include the five posts of Chief Metropolitan Magistrates/Additional Chief Metropolitan Magistrates. In the aforesaid premises and in the light of the two earlier judgments of this Court in Singla and Rudra Kumar, we have no hesitation to come to the conclusion that the upgraded posts of Chief Metropolitan Magistrates were born in the cadre of Delhi Higher Judicial Service and, necessarily, therefore, the incumbents appointed against those posts would not ordinarily be deprived of their benefit accruing from such appointment unless in their true nature and spirit the appointments can at all be termed to be fortuitous or stop gap.

11. The next question that arises for consideration, therefore, is whether such appointments though nomenclatured as stop- gap and fortuitous can at all be held to be such in the light of the enunciation of those terminology in Rudra Kumars case. There is no dispute that the Constitution Bench in Rudra Kumars case has clearly indicated that whether a particular appointment is really fortuitous or stop-gap has to be decided in the facts and circumstances of the case and any universal principle cannot be made for the purpose. In the case in hand, the Administrator had upgraded those posts of Chief Metropolitan Magistrates to be in Delhi Higher Judicial Service, the posts have been filled up by these respondents belonging to Delhi Judicial Service in consultation with the High Court. These respondents did possess the requisite qualification and experience for being appointed to Delhi Higher Judicial Service and they have been continuing in the said Higher Judicial Service from January, 1986. In this premises, it would be a travesty of justice if their continuous appointment in the service is not taken into account for the purpose of their seniority, merely because of the use of the expression stop-gap and fortuitous in the order dated 16th of January, 1986. It may be stated that the order had emanated from the High Court and in Rudra Kumars case, the Constitution Bench has already dealt with the obsession of the High Court for use of such expression and how for inaction on the part of the High Court, the promotees have suffered in the matter of their seniority and how in Singlas case the Court resolved the impasse by directing continuous length of service to be the guiding principle for determination of the seniority in the cadre. Having examined the entire facts and circumstances of the case in hand,

particularly, the upgradation of the post of Chief Metropolitan Magistrate to the post in Delhi Higher Judicial Service and filling up of those posts in consultation with the High Court by the Administrator, we find it difficult to hold that such appointment of the respondents from 16.1.86 till 1989 were in fact really fortuitous or stop-gap. To hold such appointments to be fortuitous or stop-gap, would be against the spirit of the judgment of this Court in Singla and re-affirmed in Rudra Kumars case. We, therefore, are not persuaded to agree with the submissions of Mr. Shanti Bhushan that the appointment of respondents from 16.1.1986 till 1989 must be held to be fortuitous or stop-gap and on that score ought not to be counted for the purpose of their seniority in the cadre.

12. The next question that arises for consideration is whether the fact that the respondents though were appointed to Delhi Higher Judicial Service, but having been posted as Chief Metropolitan Magistrates against whose orders, appeal lay to the Court of District and Sessions Judge would make any difference? In this connection we find sufficient force in the argument of Mr. Sanghi that appointment to a service and posting thereafter are of two different concepts. Once the appointment is made to the Higher Judicial Service, as in the case in hand, then the subsequent posting against some posts born in the Higher Judicial Service will not deprive the appointees from the benefits of continuous appointment against the post merely because at a given point of time against their order an appeal lay to the District and Sessions Judge, which might have been occupied by the petitioners on being directly recruited in the year 1988. It is in this context, the very recruitment of the petitioners and the terms and conditions mentioned therein is of great significance as pointed out by Mr. Goburdhan, appearing for some of the respondents. It has been unequivocally stated that the question of their seniority would be subject to and in accordance with the decision of the Supreme Court in the pending cases. In view of the Constitution Bench Judgment in Rudra Kumar and in view of the earlier directions contained in OP Singla and in view of our conclusion already arrived at, the ultimate conclusion is inescapable that the continuous length of service of these respondents right from their appointment to the Higher Judicial Service in January, 1986 should be the basis on which their seniority has to be determined and the High Court therefore, was fully justified in including the names of these respondents in the gradation list that had been drawn up on 22nd of August, 2000.

13. The submission of Mr. Shanti Bhushan, on the basis of the provisions of the Criminal Procedure Code and the subordination of the Chief Metropolitan Magistrates, as provided in Section 19 of the Criminal Procedure Code is of little consequence for the determination of the seniority in the service, once it is held that the upgraded post of Chief Metropolitan Magistrate stood included in the Delhi Higher Judicial Service.

14. In the aforesaid premises, we do not find any merit in the writ petition, which accordingly fails and is dismissed. But in the circumstances there would be no order as to costs.

¹1984(4) SCC 450

²2000 (8) SCC 25

³1977 (3) SCR 775

⁴1989 Supp.(1) SCC 147