SUPREME COURT OF INDIA

Nani Sha

Vs.

State of Arunachal Pradesh

C.A.No.2665 of 2007

(H.K. Sema and V.S. Sirpurkar JJ.)

16.05.2007

JUDGMENT

V.S. SIRPURKAR, J.

1. Leave granted.

2. This appeal is a classic example of the internal fight between the direct employees and the promoted employees in the matter of inter-se seniority.

3. The appeal has been filed by five appellants challenging the judgment of the Division Bench of the Guwahati High Court whereby the judgment of the learned Single Judge of the High Court was confirmed. The learned Single Judge had allowed the writ petition filed by the respondents herein. In the writ petition the respondents herein, who are the directly appointed Assistant Conservator of Forests (hereinafter referred to as the "ACF" for short) had challenged an order passed by the State of Arunachal Pradesh dated 8.6.2004 vide No.FOR 376/E(A)/2001/4901-61 granting retrospective effect promotions to the appellants herein with effect from 2.11.1994.

With that retrospective effect the respondent nos.3 to 7 herein became junior to the appellants since they were all appointed in the year 1996 after direct examination to the post of ACF. The learned Judge found that giving such retrospective effect would be illegal and on the concerned date they were not even borne on the cadre of ACF and were only serving as Range Forest Officer. He also found that in the unamended Rule 5 which provided for method of Recruitment, there was no 50:50 quota for the direct recruits and the promotees which quota came to be introduced only by way of an amendment effected to Arunachal Pradesh Forest Rules vide notification No.FOR.391/E-A/90/32343 dated 24.9.1999 and as such even if the respondents herein were given more than 50% posts in the cadre of ACF, it was permissible and as such the promotions made of the appellants herein for the first time in the year 2001 could not be dated back by giving retrospective effect from the year 1994.

4. In order to understand the controversy some facts would be necessary. All the present appellants herein started their career in the post of Forest Rangers and after their training in the Forest Rangers College, Kurseong, they were appointed as Forest Rangers with effect from 7.7.1984. The post of Forest Rangers is the feeder post for the post of ACF. There are Service Rules for governing the service conditions called Arunchal Pradesh Forest Service Rules.

These Rules provide, inter alia, that a Forest Ranger would have to put in five years of service before being promoted to the post of ACF.

In that way the appellants herein had become entitled for being considered for promotion by 1989. They were, however, not promoted in the year 1989 and were in fact promoted on 10.6.2002.

However, in the meantime the respondents herein were selected after the competitive examination and were appointed in the year 1996.

Naturally, the respondents herein were senior to the appellants in the cadre of ACF. The government on account of the representations made constituted another Departmental Promotion Committee (hereinafter referred to as the "DPC" for short) and the present appellants were awarded the notional promotion with retrospective effect, i.e., from December, 1994. This order was passed on 20th May, 2004. Because of this order all the appellants would become senior to all the directly appointed respondents and for this precise reason the said order came to be challenged before the Guwahati High Court which challenge was accepted by the learned Single Judge and the judgment of the learned Single Judge was confirmed by the Division Bench which has necessitated the present appellants to come before us.

5. Shri C.M. Nayar, Senior Advocate urged before us that the appointments of the respondents herein were in excess of quota and, therefore, amounted to fortuitous appointment without carrying the seniority with such appointments. He painstakingly pointed out that all the appellants who were appointed in 1984 had unblemished service and, therefore, they had earned a right after five years of service to be considered for the promotion to the post of ACF.

Unfortunately, there was no exercise on the part of the State Government to constitute any DPC right from 1989 till 2002 when they were actually promoted. It is pointed out by the learned Senior Counsel that it was for no fault of the appellants that the promotions were not granted to them and had such DPC being constituted in time as was expected under the administrative norms, they would have been senior to the present respondents who were directly appointed only in the year 1996. Carrying his arguments further, the learned counsel urges that at any rate, the direct appointments made of the respondents in the year 1996 were bound to be held as fortuitous appointments as at the time when the appointments were made, there were already more than 50% posts filled up by the direct appointees. Learned counsel takes us to Rule 5 and points out that under that Rule there was a clear quota of 50% in case of direct appointees while remaining 50% was to go to the promotees. We have been shown the position of the vacancies as occurring in 1996 from which the learned counsel buttresses his arguments that direct appointees were occupying more than 50% posts out of the total cadre posts of 54. According to the learned counsel only 27 posts could have gone to the direct appointees, but on 1.1.1996 28 direct appointees were already occupying the posts and as if that was not sufficient, five more persons were brought in by way of direct appointments making the total figure of the direct appointees to 33.

This, according to the appellants, was not permissible and, therefore, the appointments of the respondents made on 1.7.1996 were bound to be held fortuitous appointments not carrying any seniority with the appointment. It is then pointed out that this position of over-crowding by the direct appointees continued right till 2000 and even on the date when the appellants were promoted there were 31 direct appointees as against 27 posts which could come to their share. From this the learned counsel urges that it was only to allay the grievance of the promotees that the State Government had taken a decision to remove this disparity causing injustice to the promotees and,

therefore, their promotions were made retrospective with effect from 1992. Learned counsel assailed both the judgments and argued that this position was not properly viewed by both, the learned Single Judge and the learned Division Bench and, therefore, both the judgments were rendered erroneous and were liable to be set aside.

6. As against this Shri L. Nageshwara Rao, Senior Advocate pointed out that under the Rules as they existed at the time of direct appointment of the respondents, there was no 50:50 quota between the direct appointees and the promotees. For this purpose he heavily relies on the language of Rule 5 which is the relevant rule. He further points out that the said Rule 5 later one underwent a change whereby a proviso was added thereto more particularly by notification No.391/E-A/90/32343 dated 24.9.1999. Learned counsel points out that it is for the first time that 50:50 quota was introduced in between the direct appointees and the promotees. According to the learned counsel atleast till the 50:50 quota was introduced, it was perfectly possible for the government to fill up more than 50% vacancies from any group direct appointees or promotees. Learned counsel further went on to say that in the year 1994, the year from which the appellants have been given the seniority, they were not even borne in the cadre and, therefore, they could not have claimed seniority over and above the direct appointees who had already occupied the post in the year 1996 itself. Learned counsel very fairly agreed that had there been a 50:50 quota, then there was no question of the direct appointees overshooting the quota and in that event the direct appointees would have had no case because they had clearly exceeded to 27 posts which would have been available to them under the Rules.

7. It will, therefore, have to be found as to whether there was a quota of 50:50 for the promotees and direct appointees and whether the direct appointees had exceeded their quota on the day of their appointment.

8. For this purpose it would be worthwhile to see the language of Rule 5 before its amendment. Rule 5 before it was amended was as under:

"5. Method of Recruitment: Save as provided in Rule 17, appointment to the service shall be made by the following methods, namely:

(a) 50% of the substantive vacancies which occur from time to time in the authorized permanent strength of the service shall be filled by direct recruitment in the manner specified in part IV of these rules, and (b) The remaining such substantive vacancies shall be filled by selection in the manner specified in Part V of the Rules from amongst:

i) Officers who substantively hold the posts of Forest Rangers and possess the minimum qualification of High School or equivalent under the Government of Arunachal Pradesh.

ii) Officers who may be considered for appointment to the service at its initial constitution, though not actually appointed under Rule 7 and who substantively hold any of the specified posts in the schedule or such other posts connected with forestry as may be approved by the Government of Arunachal Pradesh for the purpose of these rules.

Provided that nothing in this rules shall preclude the Governor from holding a vacancy in abeyance or filling up on officiating basis in accordance with the provisions of these Rules."

It is this Rule that the learned counsel for the appellants uses for in support of his contention that there is 50% quota in the cadre. Shri Nageshwara Rao points out that the Rule of 50%

does not apply to the whole cadre of the ACF but applies only to "substantive vacancies which occur from time to time" in the authorized permanent strength of the service. Shri Nageshwara Rao points out that from the language of Clause (a) it is very clear that there is no mention of 50% of the cadre strength, it is only the vacancies which occur from time to time, contemplated in the Rules. Learned counsel further suggests that even in respect of the promotees the words "such substantive vacancies" in Sub-Rule (b) would indicate only the substantive vacancies which have occurred from time to time in the authorized permanent strength of service and remained after the vacancies are filled up by direct appointees. Learned counsel then points out that in the whole of the Rules as they existed before the amendment, there is no mention of a fixed 50% quota for the direct appointees and the promotees. To substantiate this argument our attention is invited to the amended Rule 5. We find that all that is added by the amendment is the proviso which is to the following effect:

"Provided that the posts actually filled by direct recruitment and promotion in the Grade II, at any time should not exceed 50:50 ration in the authorized permanent strength of Grade-II posts, further that, nothing in these rules shall preclude the Government from holding a vacancy in the service in abeyance of filling it on officiating basis in accordance with the provisions of Part VIII of these Rules."

Learned counsel Shri Nair, however, tries to suggest that the aforementioned addition of proviso is only by way of a clarification and, therefore, this Rule should be viewed with retrospective effect and it should be viewed as if quota was always there even earlier.

9. Considering the plain language of the unamended Rule there can be no dispute that earlier what was contemplated by Rule 5 was only "substantive vacancies which occur from time to time in the authorized permanent strength of service". The Rule does not contemplate that there shall be a separate quota for the two categories from out of the cadre strength. The condition of the two categories having 50:50 strength came only by way of amendment.

When we see the plain language of the proviso that position becomes all the more clear. Atleast from the plain language of unamended Rule 5 we are unable to see any quota being there for the two categories much less in the ratio of 50:50. On this backdrop when we see the chart of vacancy position, it is apparent that on 1.1.1996, out of 54 sanctioned posts 28 were already filled in by direct recruits and 15 posts were occupied by the promotees. Thus there were in all 43 posts which were occupied and 11 posts were vacant. It seems that these 11 posts were to be filled and, therefore, 50% posts, namely, 5 posts as per the unamended Rule 5 went to the direct recruits and were filled in on 1.7.1996. For some reasons which are beyond our imagination, the posts of promotees were never filled and remained pending right from 1996 upto 2002. On 24.9.1999 when the amendments came, the position was that out of 54 posts 32 posts were occupied by the direct appointees while only 12 posts were filled in by the promotees. It seems that ultimately in 2002 as many as 12 posts were filled in by promotions and right upto 1.1.2004 the posts of the direct appointees remained at 31 without adding even a single post obviously to honour the quota introduced in 1999. The posts of the promotees which had dwindled upto 9 then became 21 with effect from 3.4.2002. This was obvious because of the promotion. There can be no dispute that the government took unnecessarily long period to effect the promotions. Apparently, there is no reason for this with the government. However, the fact remains that till 2002, the promotees were never promoted and direct appointees were already working in the cadre on the available posts right from 1996. Under such circumstances, if the seniority of the direct appointees was honoured in comparison to the promotees, we do not think there was any error committed by the learned Single

Judge or the Division Bench. This takes us to the question of retrospective effect of the Rule.

10. It was tried to be impressed upon by the learned counsel for the appellant that Rule 5(a) would operate retrospectively as its nature was clarificatory. It was tried to be further impressed that even the government has treated, right from the beginning that there was a quota and it was only to redress the injustice done to the promotees that the government passed the impugned Resolution dated 20th May, 2004. Firstly, we must clarify that there was no evidence put before us by the Government that it was all through treating, even before 1999, that there was a 50:50 quota in between the promotees and direct appointees. Such an evidence was bound to be put before the High Court in the first instance which was not so put. The exercise done on 20th May, 2004 appears to be not a suo motu exercise on the part of the government but on the basis of the representations made by the present appellants. We can understand if the government had made this exercise of 20th May, 2004 on its own, that would have given credence to the arguments that the government had always been treating that there was a 50:50 quota in between the direct appointees and the promotees but that did not happen and the government was "persuaded" to hold another DPC on the basis of the representations and of course the advise tendered by P&AR Department in U.O. No.409 dated 21.10.2003. That document is not before us and we have no way to find out as to whether it was put before the High Court to support an argument that the government was always under the impression that there existed a quota. On the other hand the DPC viewed that there were some posts which were bound to be reserved for the Scheduled Tribes candidates and they were bound to be treated as backlog vacancies to be filled up as per 100 points roster and it is for this reason that the posts were to be filled up by the appellants. So far so good, but we completely fail to understand that even when there were backlog vacancies how was the government justified in giving a retrospective effect from 2.11.1994 in four cases and from 31.12.1994 in favour of Shri T. Tapi. There is no justification whatsoever of giving the retrospective effect. We, therefore, endorse the view expressed by the High Court that there was no necessity of giving the retrospective effect.

11. Reverting back to the effect of the proviso, we do not find anywhere any such intention to apply the proviso with retrospective effect. In order to make a provision applicable with retrospective effect, it has to be specifically expressed in the provision. We do not find such an expression in the said proviso. Nothing had stopped the government before amending the Rule to word it specifically, making it retrospective. That was not done and we are not prepared to hold that the Rule is retrospective. Secondly, we cannot countenance the argument that the Rule has a clarificatory nature. The Rule, for the first time, creates a quota and thus crystallizes the rights of the direct appointees and the promotees which was not there earlier. It, therefore, cannot be viewed as a clarificatory amendment. Again whether the amendment is clarificatory or not would depend upon the language of the provision as also the other Rules. We have examined the Rules which did not suggest that there was any quota existing as such. On the other hand we see Rule 25 which is a Rule regarding seniority and more particularly Rule 25(c). It is apparent from the language of the Rule that the government thought otherwise.

Rule 25(c) is as under:

"The relative seniority of direct recruits and of promotees shall be determined according the rotation of vacancies between direct recruits and promotees which shall be based on the quotas of vacancies reserved for direct recruitment and promotion under Rule 5".

This language suggests that the only quota that was contemplated was as per Rule 5 which we have already explained in the earlier part of the judgment which suggests the 50% quota only in

the "substantive vacancies which occurred from time to time" and not the whole vacancies in the cadre. We are, therefore, unable to accept the argument of the learned counsel for the appellants.

12. Therefore, one thing is certain that the appellants did not have right to claim a retrospective seniority particularly over and above the respondents who had been working in the post of ACF right from July, 1996.

13. This Court in a reported judgment in State of Uttranchal &

that the seniority is to be reckoned not from the day when the vacancy arose but from the date on which the appointment is made to the post. There this Court was interpreting Rules 17 and 21 of the U.P. Agriculture Group B Service Rules, 1995 and Rule 8 of the U.P.

Government Servants Seniority Rules, 1991. This Court disapproved the stance taken by the High Court that the directions should have been given not from the date of appointment but with retrospective effect when the vacancy arose. The following observations in para 34 are speaking and would close the issue:

"Another issue that deserves consideration is whether the year in which the vacancy accrues can have any relevance for the purpose of determining the seniority irrespective of the fact when the persons are recruited.

Here the respondent's contention is that since the vacancy arose in 1995096 he should be given promotion and seniority from that year and not from 1999, when his actual appointment letter was issued by the appellant.

This cannot be allowed as no retrospective effect can be given to the order of appointment order under the Rules nor is such contention reasonable to normal parlance. This was the view taken by this Court in Jagdish Ch. Patnaik vs. State of Orissa [(1998) 4 SCC 456]". (Emphasis Supplied)

14. Lastly, the High Court has specifically rejected the claim of the appellants on another ground, namely, that the appellants were not borne in the cadre of the ACF on the date from which they have been given the seniority. We are in complete agreement with the High Court, particularly in view of the decision of this Court reported in State of Bihar & Others vs. Akhouri Sachindra Nath [(1991) Supp.

1 SCC 334] which decision was reiterated in the case of State of want to burden this judgment with further reported decisions.

However, the same view has been taken in another reported decision of this Court in Uttranchal Forest Rangers' Asson. (Direct Recruit) paragraph 18 this Court has taken a view that no retrospective promotion or seniority can be granted from a date when an employee has not even been borne in the cadre so as to be adversely affecting those who were appointed validly in the meantime.

15. There is still one another reason for our concurring with the High Court's judgments. There cannot be any dispute that all through right from 1996 when the respondents were appointed till 2002, the appellants were working under them in capacity of the Range Forest Officers, the appellants came in those posts and started exercising the powers and duties of the post of ACF only from 2002. It would be, therefore, very unfair to allow the appellants to steal a march over the direct

appointees under whom they worked practically for eight years. On this ground we concur with the High Court that at this point of time there would be no justification in upsetting the whole balance.

16. We, therefore, find no force in the appeal and dismiss the same but without any orders as to costs.