

SUPRTEME COURT OF INDIA

Radha Mohan Malakar

Vs.

Usha Ranjan Bhattacharjee

C.A.No.4157 of 2009

(R. V. Raveendran and Markandey Katju JJ.)

07.07.2009

JUDGMENT

Markandey Katju, J.

1. Leave granted.
2. This appeal by special leave has been filed against the final judgment and order dated 5.4.2006 passed by the High Court of Gauhati in Writ Appeal No. 166 of 2004.
3. Heard learned counsel for the parties and perused the record.
4. The dispute in this case is about relative seniority between the direct recruits of 1990 and promotees of 1991 to the Grade -II of the Tripura Civil Service which has been constituted under the Tripura Civil Service Rules 1967. The appellants in this case are direct recruits and the respondents are promotees.
5. The promotees filed a writ petition before the learned Single Judge of the Gauhati High Court which was dismissed on 23.4.2004, but against that judgment a writ appeal was filed by the promotees which was allowed by the impugned judgment dated 5.4.2006 of the Division Bench of the High Court. Hence this appeal by the direct recruits.
6. The fixation of the inter se seniority of the members of the Tripura Civil Service (in short, 'the TCS') is governed by Rule 28 of the *Tripura Civil Service Rule, 1967* (in short, 'the TCS Rules'). Sub-rule (iii) of Rules 28, which had been the subject of repeated controversy, read as under:

"The relative seniority of direct recruits and of promotees shall be determined according to 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 rules 5"

7. The Government of Tripura had earlier issued a notification, dated 25.5.1981 enunciating the principles governing the inter se seniority between the direct recruits and promotees purportedly consistent with Rule 28(iii). The notification dated 25.5.1981, aforementioned, is reproduced herein below:-

"Government have observed that certain difficulties have arisen in the implementation of the general principles of determining seniority of various categories of persons employed under the Tripura Government, as incorporated in Tripura Administration's order No. F1.(16)-GA/59 dated 12.7.1960.

2. It is clarified that the rotation and the fixation of relative seniority of direct recruits and regular promotees shall be done taking into account only such officers as are appointed from either source to the same grade and the same cadre within any single calendar year.

3. Any final seniority list already notified by the Government shall not be liable to revision merely because of the issue of the present order.

By order & in the name of the Governor

Sd/- S.R. Sankaran
Chief Secretary to the
Government of Tripura".

8. The notification dated 25.5.1981, aforementioned, came to be challenged in Civil Rule No. 204/81 by the promotees of Grade-II of the TCS, who had formed an association under the name and style of the Association of Civil Service Officers, Tripura, Agartala. By judgment and order dated 29.7.1992, a Division Bench of the High Court allowed the Civil Rule and quashed the impugned notification dated 25.5.1981, aforementioned.

9. While quashing the said notification dated 25.5.1981, the Division Bench observed and held inter alia, as follows:

"It is well settled in a catena of decisions by the Hon'ble Supreme Court that when there are two sources of recruitments to a service with a fixed quota, the quota rule has to be followed and there should not be any deviation in following the quota rules. It has also been well settled by the catena of decisions by the Hon'ble Supreme Court that if the promotees happen to occupy the vacancies which are within the quota of direct recruits, when direct recruitment takes place, the direct recruits will occupy the vacancies within their quota and the promotees who are occupying the vacancies within the quota of direct recruits will either be reverted or be absorbed in the vacancies within their quota. So also when direct recruits appointed in the vacancies which are within the quota of promotees after the recruitment by promotion taken place the promotees will occupy the vacant post within their quota.

It is apparent that by the impugned notification, rotation and fixation of relative seniority of direct recruits and promotees has been confined to the recruits of a calendar year, even if in a calendar year recruitment is made from only one source or from a source in excess of the fixed quota. Thus, the impugned notification confining the fixation of relative seniority between the direct recruits and promotees to the recruits of a calendar year purports to frustrate and override the very tenet of quota rules and the well settled principles of fixation of relative seniority between the direct recruits and promotees when the recruitment to the service is made against the quota vacancies reserved for the direct recruitment and promotion.

On a bare reading of the provision of rules 28 of the Tripura Civil Service Rules, 1967, and the impugned instruction, it becomes apparent that the impugned order dated 28.5.1981 is inconsistent with and violative of the provision of rule 28 of the TCS Rules. It is well settled that provisions of statutory rules cannot be overridden or violated by administrative instruction and that administrative instruction which is inconsistent with and violative of the Rules, is illegal and void. For the reason stated above, we have no hesitation to hold that the impugned order dated 28.5.1991 being ex-facie inconsistent with and/or violative of the provisions of Rules 18 of the *Tripura Civil Service Rules, 1967* is illegal and void. The petition is, therefore, allowed and impugned notification dated 28.5.1981 is quashed. We make no order as to costs". (emphasis supplied)

10. The said decision rendered by the Division Bench in Civil Rule No. 204/1981 dated 29.7.1992 remained unchallenged and accordingly attained finality. The Government of Tripura prepared and published Office Memorandum dated 25.7.1997 which was a draft seniority list purportedly in terms of the decision in Civil Rule No. 204/1981, by placing the promotees, irrespective of their individual date of recruitment, to their respective slots in the gradation list on the basis of Quota Rota Rule. Subsequent thereto, however, a Government order dated 25.5.2000 was issued clarifying the general principles for determination of seniority between the direct recruits and the promotees with reference to the decision in Civil Rule No.204/1981.

11. Acting upon the said order dated 25.5.2000, the State Government published afresh, vide order dated 9.6.2000 a seniority list of the officers of the Tripura Civil Service Grade-II whereby the direct recruits of 1990 were placed en-bloc over the promotees of 1991. The Government order dated 25.5.2000 aforementioned as well as the seniority list dated 9.6.2000, aforementioned came to be challenged by some promotees of 1991, in two writ petitions, namely, Writ Petition Nos. 293/2000 and 294/2000.

12. While dismissing the two writ petitions on 23.4.2004, the learned Single Judge concluded that since the direct recruits had been recruited to Grade-II of the TCS prior to the promotion of the writ petitioners thereto and that the direct recruitment had remained confined within the quota meant for being filled up by direct recruitment, the writ petitioners, on being subsequently promoted to the Grade-II of the TCS, cannot be granted seniority over the direct recruits, for the promotees were not even born in the cadre of the TCS on the dates

when the private respondents were directly recruited to Grade-II of the TCS. It was the correctness of this conclusion, which was challenged in writ appeal before the Division Bench of the High Court.

13. The Division Bench by the impugned judgment has set aside the judgment of the learned Single Judge and allowed the appeal and set aside the judgment of learned Single Judge dated 23.4.2004 as well as clarificatory order dated 25.5.2000 and the impugned gradation list dated 9.6.2000. The Division Bench directed the authority to prepare a fresh gradation list in respect of the Grade II of the Tripura Civil Services in terms of the principles embodied in the unamended Rule 28 (iii) of the Tripura Civil Services 1967 and in the light of its observations. The order was restricted to the appellants and private respondents before the Division Bench.

14. The Division Bench held that the impugned clarificatory order dated 25.5.2000 and the impugned seniority list published by order dated 9.6.2000 were contrary to the provisions of Rule 28 (iii) of the Rules. The Division Bench also held that the impugned order dated 25.5.2000 sought to achieve the same object which the notification dated 25.5.1981 sought to realize, and since the said notification dated 25.5.1981 has already been quashed, the question of bringing in another notification having the same effect cannot arise and cannot be legally permitted.

15. In the year 1989, 25 promotees were recruited in TCS. 32 direct recruits by way of competitive examination were recruited in TCS in the year 1990 against the substantive vacancies in the cadre of 1987/1988 for which the advertisement was issued in year 1988. The appellants herein are some of the direct recruits belonging to 1990 batch. 52 promotees were again recruited in TCS in year 1991. Private respondents no.1 to 12 are all promotees who belong to the 1991 batch. However, only these 12 respondents herein filed the Writ Appeal No. 166/2004 whose judgment is impugned herein. By the impugned judgment herein the seniority between a handful of parties in this petition has been disturbed by the High Court.

16. It is contended by the appellants that the High Court ought to have considered the seniority between the 1989 promotees, 1991 promotees on the one hand and 1990 direct recruits on the other hand. Many of the promotees belonging to the 1989 and 1991 batch have retired from service. However, it is alleged by the appellants that in view of the impugned judgment now the seniority is wrongly sought to be fixed qua the 1990 (direct recruits) and 1991 (promotees) confined to the parties in the present petition, which is erroneous.

17. The Association of Civil Service Officers in TCS challenged the aforesaid notification dated 25.5.1981 in Civil Rule No. 204 of 1981 before the Gauhati High Court Agartala Bench. The Division Bench of Gauhati High Court Agartala Bench vide final judgment and order dated 29.7.1992 quashed the notification dated 25.5.1981.

18. It was held by the High Court in the impugned judgment that the administrative order dated 25.5.2000 of rotation and fixation of relative seniority of direct recruits and promotees has been confined to the recruits of a calendar year, even if in a calendar year recruitment is made from only one source or from a source in excess of the fixed quota. Hence it was held that the administrative order dated 25.5.2000 purports to frustrate and override the very tenet of quota rules when the recruitment to the service is made against excess of quota of vacancies reserved for direct recruitment and promotion.

19. The provisional draft seniority list was published by the Government of Tripura vide memorandum dated 25.7.1997 comprising of the seniority list for batches of 1989 (promotees), 1990 (direct recruits) and 1991 (promotees). True copy of the draft seniority list published by Government of Tripura dated 25.7.1997 is produced as Annexure P-3 to the appeal.

20. The appellants filed a Writ Petition No.110 of 2000 before the High Court, Gauhati challenging the aforesaid seniority list dated 25.7.1997. It was subsequently withdrawn in view of the administrative order dated 25.5.2000 and the seniority list dated 9.6.2000.

21. The Government of Tripura issued the administrative order dated 25.5.2000 governing the general principles of relative seniority between direct recruits and promotees in TCS. It was specifically clarified therein that the persons recruited in excess of the quota from any source shall not get rotational seniority in the same calendar year but shall be reverted to the year where they can be accommodated in the respective quota of that year, which was not clarified in the earlier notification dated 25.5.1981.

22. The administrative order dated 25.5.2000 issued by the Government of Tripura reads as follows:-

"No. F.23 (9)-GA (P&T)/2000
Government of Tripura
Central Administration (P&T) Department
25th May, 2000

ORDER

Subject :- General Principles for determination seniority The State Govt. observed that certain difficulties had arisen in the implementation of the general principles of determining seniority of various categories of persons employed under the State Govt. as incorporate in Tripura Administration's order no. F.1 (16)-GA /59 dated 12.7.1960.

2. To overcome the difficulties a clarification was issued vide order No. F.1 (11)-GA /59 dated 28.5.1981. According to that clarification rotation and fixation of relative seniority of direct recruits and promotees was to be done taking into account only such officers as were appointed from either source to the same grade and the same cadre within any single calendar year.

3. The Hon'ble Gauhati High Court in CR 204 of 1981 quashed the aforesaid order on the ground that it confined rotation and fixation of relative seniority, even if in a calendar year recruitment from one source is made in excess of the quota. Accordingly, a formal order was issued vide No. F. 23 (47)-GA /81 dated 8.7.1993 for not giving effect to the former order.

4. However, the difficulties as aforesaid, persist and to over come the same it is clarified again, in modified form in the light of the decision of the Hon'ble High Court, that the rotation and fixation of relative seniority of direct recruits and the promotees shall be done taking into account only such officers as are appointed from either source to the same grade and the same cadre within any single calendar year if the recruitment are made within the respective quota. Persons recruited in excess of the quota from any source shall not get rotational seniority in the same calendar year but shall be reverted to the year where they can be accommodated in the respective quota of that year.

5. Any final seniority list already notified by the Govt. shall not be liable to revision merely because of the issue of the present order.

By order of the Governor

(S.K. Roy)
Secretary to the Govt. of
Tripura

23. The seniority list of existing officers in Grade II batches of 1989 (promotees), 1990 (direct recruits), and 1991 (promotees) in the Tripura Civil Services was published by the Government vide office memorandum dated 9.6.2000.

24. It was submitted by the respondents-promotees before us that in the seniority list as per Notification dated 9.6.2000, all the 1989 batch promotees (25 in number) were placed en-bloc senior over 1990 direct recruits. The 1990 direct recruits were placed en-bloc senior over 1991 promotees batch. It was submitted that this was in violation of the judgment of the Division Bench of the High Court dated 29.7.1992. True copies of the office memorandum and final seniority list dated 9.6.2000 is produced as Annexure P-5 to the appeal.

25. The learned Single Judge before whom the writ petition was filed held that the principle of determination of the seniority contained in the memorandum dated 25.5.2000 does not contravene Rule 28 (iii) of the Rules. However, the Division Bench of the High Court has reversed the said judgment and hence this appeal.

26. In our opinion this appeal deserves to be allowed.

27. In this connection reference may be made to the three Judge Bench of this Court in *N. K. Chauhan and Ors. vs. State of Gujarat and ors.*¹. In paragraphs 32 and 33 of the aforementioned decision this Court has observed:-

"32. We therefore reach the following conclusions:

1. The promotions of mamlatdars made by Government between 1960 and 1962 are saved by the 'as far as practicable' proviso and therefore valid. Here it falls to be noticed that in 1966 regular rules have been framed for promotees and direct recruits flowing into the pool of Deputy Collectors on the same quota basis but with a basic difference. The saving provision 'as far as practicable' has been deleted in the 1966 rules. The consequence bears upon seniority even if the year is treated as the unit for quota adjustment.

2. If any promotions have been made in excess of the quota set apart for the mamlatdars after rules in 1966 were made, the direct recruits have a legitimate right to claim that the appointees in excess of the allocable ratio from among mamlatdars will have to be pushed down to later years when their promotions can be regularised by being absorbed in their lawful quota for those years. To simplify, by illustration, if 10 deputy collectors' substantive vacancies exist in 1967 but 8 promotees were appointed and two direct recruits alone were secured, there is a clear transgression of the 50 : 50 rule. The redundancy of 3 hands from among promotees cannot claim to be regularly appointed on a permanent basis. For the time being they occupy the posts and the only official grade that can be extended to them is to absorb them in the subsequent vacancies allocable to promotees. This will have to be worked out down the line wherever there has been excessive representation of promotees in the annual intake. Shri Parekh, counsel for the appellants has fairly conceded this position.

3. The quota rule does not, inevitably, invoke the application of the rota rule. The impact of this position is that if sufficient number of direct recruits have not been forthcoming in the years since 1960 to fill in the ratio due to them and those deficient vacancies have been filled up by promotees, later direct recruits cannot claim 'deemed' dates of appointment for seniority in service with effect from the time, according to the rota or turn, the direct recruits' vacancy arose. Seniority will depend on the length of continuous officiating service and cannot be upset by later arrivals from the open market save to the extent to which any excess promotees may have to be pushed down as indicated earlier."

33. These formulations based on the commonsense understanding of the resolution of 1959 have to be tested in the light of decided cases. After all, we live in a judicial system where earlier curial wisdom, unless competently overruled, binds the Court. The decisions cited before us start with the leading case in *Mervyn Coutindo vs. Collector of Customs*² and closes with the last pronouncement in *V.B. Badami vs. State of Mysore*³. This timespan has seen dicta go zigzag but we see no difficulty in tracing a common thread of reasoning. However, there are divergencies in the ratiocination between *Mervyn Coutindo and Govind Dattatray*

*Kelkar vs. Chief Controller of Imports and Exports*⁴ on the one hand and *S.G. Jaisinghani vs. Union of India*⁵, *Bishan Sarup Gupta vs. Union of India*⁶, *Union of India vs. Bishan Sarup Gupta*⁷ and *A.K. Subraman vs. Union of India*⁸ on the other, especially on the rota system and the year being regarded as a unit, that this Court may one day have to harmonize the discordance unless Government wakes up to the need for properly drafting its service rules so as to eliminate litigative waste of its servants' energies."

(emphasis supplied)

28. The aforesaid decision has considered the earlier decisions of this Court including the Constitution Bench decision in *Mervyn Coutindo vs. Collector of Customs*⁹, *S.G. Jaisinghani vs. Union of India*¹⁰, *V. B. Badami vs. State of Mysore*¹¹ etc.

29. In our opinion the principle of the decision in N. K. Chauhan's case (supra) can be illustrated by taking a hypothetical example. Suppose in a particular service 50% of the vacancies are to be filled in by promotion and 50% by direct recruitment, and suppose there is a rule that the inter se seniority of direct recruits and promotees is to be fixed according to the rotation of vacancies between direct recruits and promotees in the manner that the first post will go to a promotee, the second to a direct recruit, the third to a promotee, the fourth to a direct recruit, and so on. Even here the ordinary rule that seniority will depend on the length of the continuous officiating service has to be followed unless the quota of direct recruits or of the promotees has been exceeded. It is only if the said quota is exceeded that the appointees have to be pushed down in the seniority, otherwise seniority has to be taken from the date of continuous officiating service. In the present case it is admitted that the quota of direct recruits has not been exceeded. Hence, in our opinion, the seniority of direct recruits (appellant) has to be taken from the date of their initial appointment and they cannot be pushed down in seniority. The promotees (respondents herein) were appointed to the Grade II of TCS after the appointments of the direct recruits (appellants). Hence the former have to be treated as junior to the latter. The earlier Division Bench decision of the High Court dated 29.7.1992 has to be understood in the light of the decision of this Court in N.K. Chauhan's case (supra).

30. The result of the impugned judgment of the Division Bench will be that the 1990 direct recruits who were recruited against vacancies created before 1988 will be pushed below the 1991 promotees in seniority. In our opinion such a view is clearly erroneous in law.

31. In our opinion the Government's order dated 25.5.2000 and office memorandum dated 9.6.2000 are valid and are in accordance with the Tripura Civil Service Rules, and the view of the Division Bench is not correct.

32. In *B.S. Mathur and another vs. Union of India and Others*¹² it was observed that ordinarily inter se seniority is to be determined on the basis of continuous length of service. The Court in the aforementioned decision has referred to the earlier decision in *O.P. Singla and Another vs. Union of India and Others*¹³ and *Rudra Kumar Sain and Others. Vs Union of India and Others*¹⁴.

33. Since the quota of direct recruits has not been exceeded hence in our opinion the seniority has to be calculated from the date of the initial appointment and the said seniority cannot be pushed down.

34. For the reasons given above this appeal is allowed, the impugned judgment of the Division Bench is set aside and judgment of the learned Single Judge is upheld. No orders as to costs.

¹1977 (1) SCC 308

²AIR 1967 SC 52

³1976(2) SCC 901

⁴AIR 1967 SC 839

⁵AIR 1967 SC 1427

⁶1973(3) SCC 1

⁷1975(3) SCC 116

⁸1975(1) SCC 319

⁹AIR 1967 SC 52

¹⁰AIR 1967 SC 1427

¹¹1967 (2) SCC 901

¹²2008 (10) SCC 271

¹³1984 (4) SCC 450

¹⁴2008 (8) SCC 25