

T.N. Saxena & Others vs State Of U.P. & Others on 7 May, 1982

Equivalent citations: 1982 AIR 1244, 1982 SCR (3) 719, AIR 1982 SUPREME COURT 1244, 1982 ALL. L. J. 1080, (1982) 3 SCR 719 (SC), (1982) 44 FACLR 380, 1982 UPLBEC 359, 1982 UJ (SC) 374, 1982 SCC (L&S) 241, (1982) 2 LABLJ 161, (1982) 2 LAB LN 14, 1982 (2) SCC 319, (1982) 2 SERVLR 31, (1982) UPLBEC 359, (1982) 2 SCWR 73, (1982) 2 SERVLJ 37, (1982) 8 ALL LR 366

Author: Syed Murtaza Fazalali

Bench: Syed Murtaza Fazalali, A. Varadarajan

PETITIONER:

T.N. SAXENA & OTHERS

Vs.

RESPONDENT:

STATE OF U.P. & OTHERS

DATE OF JUDGMENT 07/05/1982

BENCH:

FAZALALI, SYED MURTAZA

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FAZALALI, SYED MURTAZA

VARADARAJAN, A. (J)

CITATION:

1982 AIR 1244

1982 SCR (3) 719

1982 SCC (2) 319

1982 SCALE (1) 481

ACT:

U.P. Government Service-Seniority-Recruitment from two sources-Promotees appointed first and direct recruits much later-Seniority of promotees based on length of service not affected by later induction of direct recruits.

HEADNOTE:

According to the relevant orders of the State Government, seniority in service was generally to be determined from the date of substantive appointment in a substantive vacancy but. where appointments to a service were made both by promotion and direct recruitment, a combined waiting list was to be prepared by taking candidates alternately from the lists of promoted candidates

and direct recruits and appointments made in accordance with that combined list.

The posts of Senior Marketing Inspector under the Food
JUDGMENT:

by way of promotion from the category of Marketing Inspector. But, with effect from April 15, 1964, the State Government decided to fill up these posts by way of promotion as well as direct recruitment in the ratio of 50:50.

Respondents 2 to 5 who had entered service as Marketing Inspectors were promoted as Senior Marketing Inspectors in September, 1964, in the quota of promotees. The appellants, who were direct recruits to the post of Senior Marketing Inspector were appointed much later but were placed above respondents 2 to 5 in the seniority list of Senior Marketing Inspectors issued in 1977 which resulted in the reversion of respondents 2 to 5 from the posts of Deputy Marketing Regional Officers to which they had been further promoted in 1974.

Allowing the petition of respondents 2 to 5, the High Court quashed the seniority list holding that appointments already made by departmental promotion to substantive posts would not be affected by the direct recruits coming subsequently through the Public Service Commission.

In appeal, the appellants contended that the direct recruits had to be adjusted alternately with the promotees even though the promotees had been appointed in their own quota long before the direct recruits joined service, Dismissing the appeal, ^ HELD 1. The promotees were entitled to maintain their seniority as from the date of their promotion and it was not open to the Government to prepare a seniority list by pushing the promotees far below the position of seniority which they would legally occupy merely to accommodate the direct recruits. The rule of alternate seniority does not mean that the genuine seniority based on length of service should be completely overlooked. [726 G]

2. The normal rule is that seniority should be measured by the length of continuous officiating service unless a contrary intention appears from the rules. In this case, according to the orders issued by the Government, the length of service was the prime criterion for determining seniority. [726 A-B]

3. Promotees regularly appointed during a particular period within the quota of promotees can claim their whole length of service for the purpose of seniority as against direct recruits who may turn up in succeeding periods. [726 C] Bishan Sarup Gupta v. Union of India & Ors., [1975] 1 S.C.R. 104 held inapplicable; N.K. Chauhan & Ors. v. State of Gujarat & Ors. [1977] 1 S.C.R. 1037 and B.S. Yadav & Ors. v. State of Haryana & Ors., [1980] 1 S.C.R. 1024 referred to.

& CIVIL APPELLATE JURISDICTION : Civil Appeal No. 3148 of 1979.

Appeal by special leave from the judgment and order dated the 18th May, 1979 of the Allahabad High Court in Writ Petition No. 1372 of 1977.

Dr. Y.S. Chitale and A.K. Srivastava for the Appellant. R.K. Garg, G.N. Dikshit, V.J. Francis, D.K. Garg, S. Dikshit and Ashok Grover for the Respondents.

The Judgment of the Court was delivered by FAZAL AIL, J. This appeal by special leave is directed against a judgment dated 18-5-79 of the Allahabad High Court quashing the impugned seniority list dated 4.4.77 issued by the Government of U.P. (hereinafter referred to as the 'Government') which resulted in the reversion of respondents 2 to 5 to lower posts.

The facts of the case lie within a narrow compass and, in our opinion, seem to be concluded by several decisions of this Court, Respondents 2 to 5 had passed the High School Examination and entered the service of the Government as Marketing Inspectors under the establishment of Food & Supplies Department on various dates and were later confirmed on these posts. In fact, to begin with, the Department itself was temporary but was later on made permanent. It may be stated here that the post of Marketing Inspector was exempted from the scope of the Public Service Commission. The next higher post in the hierarchy of the Department was that of Senior Marketing Inspector and previous to the year 1964 these posts were filled entirely by promotion from Marketing Inspectors. As respondents 2 to 5 were already confirmed in their original post of Marketing Inspector, they were promoted to the rank of Senior Marketing Inspectors with effect from September 1964 and since then had been holding the post until their further promotion as Deputy Marketing Regional Officers in June 1974.

It appears that right from 7.12.44 upto Sept. 1964 the criteria for determining the seniority of the aforesaid employees was total length of service including identical and higher scale of pay. It is not disputed that respondents 2 to 5 fulfilled both the criteria mentioned above. Sometime in 1964, however, the Government took a policy decision that so far as the cadre of Senior Marketing Inspectors was concerned, the posts would be filled by two sources, viz., (1) promotion and (2) direct recruitment in the ratio of 50:50. As a result of this decision a very large number of posts were sanctioned to accommodate the direct recruits who were to be appointed through a competitive examination held by the Public Service Commission. The Government also ordered that henceforward the posts of Senior Marketing Inspectors should be brought within the purview of the Public Service Commission. We have mentioned this fact expressly because one of points that was raised before the High Court by the appellants was that respondents 2 to 5 had not been cleared by the Public Service Commission nor were their cases referred to it. Nothing much turns upon this point because it was not argued before us in the appeal. Moreover, as respondents 2 to 5 were confirmed hands question of taking the formal sanction of the Public Service Commission would be more or less inconsequential and could be given subsequently with retrospective effect. We might further state another undisputed fact-the posts of the Senior Marketing Inspector at the time of the new policy taken by the Government were increased and respondents 2 to 5 who had been promoted purely in the quota when the Government decided to recruit the other 50% by direct recruitment. This fact is rather important because it distinguishes the present case from some of the decisions of this Court on which heavy reliance had been placed by the counsel for the appellants.

The principles concerning the recruitment of the promotees and the direct recruits were contained in a letter of the Government (Annexure C to the petition) relevant portion of which may be

extracted thus:

"I am directed to address you on the above subject and to say that the post of Senior Marketing Inspector has been placed within the purview of Lok Seva Ayog with effect from 15 April 1964. The recruitment to this post will now therefore be made on the principles indicated below:

(i) 50% of the posts will be filled by promotion from amongst the Marketing Inspectors and the remaining 50% by direct recruitment through Lok Seva Ayog.

(ii) Educational qualifications for direct recruitment through Ayog will be graduate of a recognised University with preference to graduate in Agriculture.

(iii) Age limit is 21 to 25 years. Age limit for departmental candidate for promotion will be 40 years. Officials who start officiating as Senior Marketing Inspector before the age of 40 years will, however, be considered for promotion.

(iv) All permanent Marketing Inspectors who have put in 5 years service, permanent and temporary both, will be eligible for promotion. No educational qualification has been prescribed for promotion except that no one who has not got the minimum qualification shall be eligible for promotion."

A perusal of this letter would clearly show that the quota of the promoted Senior Marketing Inspectors was not at all touched or altered and even the age-limit for the candidates who had been promoted was extended upto 40 years and it is not disputed that respondents 2 to 5 were within that age-limit.

Regarding the question of seniority, which is the fundamental point in issue in the appeal, the Rules provide thus:

"(xi) Seniority Seniority in service shall generally be determined from the date of substantive appointment to a service or from the date of the order of appointment in a substantive vacancy. In special cases seniority may be determined in accordance with the conditions which may suit a particular service. If two or more candidates are appointed on the same date, their seniority will be determined according to the order in which their names are mentioned in the appointment order.

Where appointments to a service are made both by direct recruitment and promotion, a combined waiting list would be prepared of the candidates recruited by both the sources and appointments made in accordance with that combined list. The combined list is to be prepared by taking candidates alterantly from the lists of promoted candidates and direct recruits." The High Court has rightly construed the aforesaid Rule of seniority to connote that appointments already made by departmental promotion to substantive posts would not be affected by the direct recruits coming subsequently through the Public Service Commission. Reliance was, however, placed by the

appellants on the 2nd paragraph of the Rule which stated that the combined list was to be prepared by taking candidates alternately from the list of promoted candidates and direct recruits. This clause has to be interpreted rationally so as to advance the real object of the Government which was merely to enlarge the area of recruitment of Senior Marketing Inspectors without affecting the persons who had already been promoted to the higher post long before even the policy of taking direct recruits through Public Service Commission was born. Unfortunately however after the direct recruits were taken as Senior Marketing Inspectors, sometime after 1970 they were put above respondents 2 to 5 who, by the time the direct recruits were appointed, had already been promoted even to a higher post, viz., Deputy Marketing Regional Officers. The High Court relied on a Government order setting out guidelines relating to seniority which has already been extracted above.

Perhaps the Government was under the impression that as the quota of 50% was reserved for direct recruits and they had come through competitive examination with higher qualifications, they would have to take precedence over the promotees even though the promotee had occupied the post in their own quota long before the direct recruits appeared on the scene. Under this erroneous impression the Government issued the impugned seniority list of 1977 which has, in our opinion, rightly been quashed by the High Court.

The first point raised by the counsel for the appellants was that in view of the fact that the direct recruits possessed a higher qualification and were recruited through the Public Service Commission, they had to be given priority in respect of seniority over the promotees.

It was further argued that as a result of the Government Orders, the direct recruits had to be adjusted alternately with the promotees even though the promotees had been appointed in their own quota long before the direct recruits joined the service. We are, however, unable to agree with this somewhat broad and ingenious argument. It is true that where there are two sources of recruitment and the Rules expressly provide that one source would have precedence over the other, then the position as contended by the counsel for the appellants would have to be accepted. In the instant case, we are unable to find any such inhibition or prohibition in the order passed by the Government. In fact in *N.K. Chauhan and Ors. v. State of Gujarat and Ors.* (1) to which one of us (Fazal Ali, J.) was a party, it was clearly laid down that so long as the promotees do not exceed their quota they were entitled to maintain their seniority as from the date of their promotion, where this Court made the following observations:-

"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.

+ + + + Seniority, normally, is measured by length of continuous, officiating service-the actual is easily accepted as the legal. This does not preclude a different prescription, constitutionally tests being satisfied.

+ + + + Promotees regularly appointed during period in excess of their quota, for want of direct recruits (reasonably sought but not secured and because tarrying longer would injure the administration) can claim their whole length of service for seniority even against direct recruits who may turn up in succeeding periods.

Promotees who have been fitted into vacancies beyond their quota during the period B-the year being regarded as the unit-must suffer survival as invalid appointees acquiring new life when vacancies in their quota fall to be filled up. To that extent they will step down, rather be pushed down as against direct recruits who were later but regularly appointed within their quota."

This case clearly laid down three important principles.

(1) Normal rule is that seniority should be measured by the length of continuous officiating service unless a contrary intention appears from the rules.

We have already shown from the Rules framed by the Government that the length of service was determined as the prime criteria for determining the seniority.

(2) Promotees regularly appointed during a particular period in excess of their quota for want of direct recruits can claim their whole length of service for seniority even against direct recruits who may turn up in succeeding periods.

(3) Promotees who had exceeded their quota would have to be pushed down to accommodate direct recruits coming after their appointment.

The case of respondents 2 to 5 clearly falls within the first two principles.

The admitted position is that respondents 2 to 5 had not exceeded their quota of 50% when they were promoted as Senior Marketing Inspectors. In fact, they were promoted as Senior Marketing Inspectors long before the Government evolved the policy of filling up the posts of Senior Marketing Inspectors by direct recruits. It is also clear that none of the respondents had encroached on the 50% quota which was reserved for direct recruits under the new Rules framed by the Government.

In these circumstances, therefore, it was not open to the Government to prepare a seniority list by pushing the promotees far below the position of seniority which they would legally occupy merely to accommodate the direct recruits. The rule of alternate seniority does not mean that the genuine seniority based on length of service by a previous employee should be completely overlooked or obliterated.

Reliance was, however, placed on an earlier decision of this Court in *Bishan Sarup Gupta etc. v. Union of India and Ors.*

In this case also it was clearly held that the promotees could be pushed down only if they had exceeded the quota allotted to them. In the instant case not only the respondents 2-5 did not exceed their quota but had secured much higher promotions by the time the direct recruits came to be recruited and had to be reverted to lower posts in order to accommodate the direct recruits. Such a gross injustice, in our opinion, cannot be countenanced by the rules or orders made by the Government nor can such a course of action be spelt out from *Bishan Sarup Gupta's case (supra)*.

In *B.S. Yadav and Ors. v. State of Haryana and Ors.* the earlier decision of this Court in *Chauhan's case (supra)* was reiterated and Chandrachud, CJ speaking for the Court observed thus:

"Is it proper and fair to defer the confirmation of the promotees merely because direct recruits are not available at that point of time so as to enable the High Court to make confirmations from both the sources by rotation ? This, precisely, is what the High Court has done by the impugned notification dated 25-8-1976 and that is the reason why it has not confirmed ten more promotees in Punjab, for whom vacancies are available within the quota of promotees.

... ..

What is relevant is the decision of the Court that the quota rule will be enforced at the time of initial recruitment and not at the time of confirmation ?... Seniority of promotees, according to this decision, could not be upset by later arrivals from the open market, save to the extent to which any excess promotees have to be pushed down."

It is, therefore, clear from an analysis of the decisions of this Court cited before us that the quota rule and the rota rule must be applied in a practical fashion so as not to cause injustice to any employee. In the instant case, as the Government by virtue of the impugned seniority list had completely upset the seniority of respondents 2 to 5, the principles governing the order were directly opposed to what has been held and pointed out by this Court. The High Court, in our opinion, was fully justified in quashing the seniority list.

Lastly, it was contended that the High Court while striking down the seniority list has not struck down the Government Order which had fixed the rota and the quota rule. As indicated above, if the rota and the quota rules are properly interpreted, as held by this Court in the cases cited above, the Government order cannot be said to be bad or legally invalid. The defect lay in the Government itself misconstruing its own order while issuing the seniority list, which error was rightly corrected by the High Court.

The Government shall now issue a fresh seniority list in the light of the observations made and principles enunciated by this Court and the High Court so as to avoid any reversion of promotees

who had been promoted within their quota as senior Marketing Inspectors or above.

For the reasons given above, all the contentions raised by the appellants are overruled and the appeal fails and is dismissed but in the circumstances without any order as to costs.

H.L.C.

Appeal dismissed.