

Sunaina Sharma vs The State Of Jammu And Kashmir on 26 October, 2017

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Author: Deepak Gupta

Bench: Deepak Gupta, Madan B. Lokur

REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO(S) 4594-4595 OF 2017

Sunaina Sharma & Ors.

... Appellant(s)

Vs.

State of Jammu and Kashmir & Ors.

...Respondent(s)

WITH

CIVIL APPEAL NO(S) 4596-4597 OF 2017

JUDGMENT

Deepak Gupta, J.

1. The issue that arises for determination in these appeals is whether the private respondents, who are promotee Excise and Taxation Officers (ETOs for short) could be granted retrospective promotion from the dates when the vacancies occurred in the promotion quota.

2. The undisputed facts are that appointment to the post of ETO under the J&K Excise & Taxation (Gazetted) Recruitment Rules, 1977 (for short the 'Excise Rules') is made from two sources, promotion and direct recruitment. The appellants are the original writ petitioners. They are direct recruits who were appointed as ETOs on the basis of J&K Combined Competitive Examination. They were issued appointment letters on 23.07.2004. The private respondents are promotees who were promoted to the post of ETOs. The J&K Public Service Commission proposed and cleared the names of the private respondents for promotion on 05.10.2004 and the private respondents were promoted as ETOs on the recommendation of the Public Service Commission on 06.12.2004. It is not disputed that the direct recruits and promotees have been promoted within their quota and there is no violation of quota. However, the private respondents were given retrospective promotion/appointment in the cadre of ETOs on various dates between 01.05.2002 and 01.01.2004. Resultantly, they were deemed to have been appointed as ETOs prior to the appellants who were appointed on 23.07.2004. As such the private respondents were placed senior to the appellants.

3. A seniority list of ETOs was issued on 03.01.2006 in which the promotee/respondents were shown senior to the appellants. The appellants filed a writ petition before the J&K High Court challenging the grant of retrospective appointment to the private respondents. It was urged by the appellants that the private respondents were not even born in the cadre of ETOs when the appellants were appointed as ETOs on 23.07.2004. It was further averred that the private respondents, i.e., promotees had never worked as ETOs either on officiating or stop-gap basis and, in fact, the promotees had worked under the direct recruits for a few months before their promotion. It was further submitted that the post of ETO was in a separate service being a gazetted service and, therefore, the service rendered in the lower post could not be equated with the service rendered in the higher post. The stand of the contesting respondents was that in terms of Rule 23 of the J&K Civil Service (CCA Rules), 1956 (hereinafter referred to as Civil Service Rules), seniority could be assigned to the promotees from the date the vacancy occurred in the quota of promotees. The learned Single Judge held that retrospective promotions could not be granted, and allowed the writ petition. Two Letters Patent Appeals were filed which were disposed of by a common judgment of 06.03.2014 and the Division Bench held that in terms of Rules 23 and 24 of the Civil Service Rules the promotees were entitled to get retrospective promotion. The Division Bench placed reliance on the judgment of this Court in Suraj Prakash Gupta and Others vs. State of J&K and Others 1 to come to the conclusion that promotees were entitled to promotion from a date anterior to their appointment. This judgment is under challenge in these appeals.

(2000) 7 SCC 561

4. It may not be necessary to refer to the J&K Excise Rules in detail. Rule 9 of the Excise Rules provides that a person appointed to the service whether by direct recruitment or by selection shall

be placed on probation for a period of two years. The explanation to Rule 9 provides that appointment on probation will be made against substantive vacancies only. All other appointments will be on trial. It has been further provided that any period of officiating appointment shall be reckoned as period spent on probation when a person appointed on trial is formally appointed to the service. The explanation reads as under :-

“Explanation –Appointments on probation will be made against substantive vacancies only. All other appointments will be on trial; Provided that any period of officiating appointment shall be reckoned as period spent on probation when a person appointed on trial is formally appointed to the service.” Rule 13 of the Excise Rules provides that seniority of members of the service shall be regulated under the Civil Service Rules. Rule 23 of the Civil Service Rules, reads as follows :-

“23. Appointments of members (1) A probationer shall, if a substantive vacancy in the permanent cadre of the category for which he was selected exists, be appointed to the service at the earliest possible opportunity in order of seniority, and if such vacancy existed from a date previous to the issue of the order of appointment, he may be so appointed from the date of retrospective effect from such date or, as the case may be, from such subsequent date from which he was continuously on duty as a member of the service.

(2) Where recruitment to any service shall normally be both by direct recruitment and by transfer or promotion, the provision of sub rule (1) shall apply separately as regards :

- (a) vacancies against which person
 have recruited direct; and
- (b) other vacancies.

(3) No probationer shall be required to

produce a medical certificate of physical fitness before appointment as member of service:

Provided that in case of a probationer who is not a member of any other service, the appointing authority may, if it has reason to believe that the probationers physical fitness has seriously deteriorated since he satisfied the authority under clause (c) of rule 17 require him to undergo a fresh medical examination. If on such examination he is found to be physically unfit for the service for which he was selected the appointing authority shall discharge him from the service.

(4) No person shall at the same time be a member of more than one service.” Rule 24 lays down that seniority shall be determined by the date of first appointment to such service, class, category or grade, as the case may be and reads as follows :-

“24. Seniority – (1) The seniority of a person who is subject to these rules has reference to the service, class, category or grade with reference to which the question has arisen. Such seniority shall be determined by the date of his first appointment to such service, class category or grade as the case may be.

Note:- The rule in this clause will not affect the seniority on the date on which these rules come into force of a member of any service, class, category or grade as fixed in accordance with the rules and orders in force before the date on which these rules come into force.

Interpretation – The words ‘date of first appointment’ occurring in the above rule will mean the date of first substantive appointment, meaning thereby the date of permanent appointment or the date of first appointment on probation on a clear vacancy, confirmation in the latter case being subject to good work and conduct and/or passing of any examination or examinations and/or tests:

Provided that the inter se-seniority of two or more persons appointed to the same service, class, category or grade simultaneously, will, notwithstanding the fact that they may assume the duties of their appointments on different dates by reason of being posted to different stations, be determined:

(a) In the case of those promoted by their relative seniority in the lower service, class, category or grade;

(b) In the case of those recruited direct except those who do not join their duties when vacancies are offered to them according to the positions attained by and assigned to them in order of merit at the time of competitive examination or on the basis of merit ability and physical fitness etc. in case no such examination is held for the purpose of making selections;

(c) As between those promoted and recruited direct by order in which appointments have to be allocated for promotion and direct recruitment as prescribed by the rules.”

The interpretation of these Rules is the subject matter of this case.

5. The judgment in Suraj Prakash Gupta (supra) has been relied upon by both the sides and has been referred to by both the learned Single Judge and the Division Bench of the High Court. In this case also, Rule 23 and 24 of the Civil Services Rules were in consideration. Therefore, it is necessary to refer to this case in detail. The facts of Suraj Prakash Gupta (supra) case are that as per the then existing rules 20% of the posts of Assistant Engineers had to be filled by direct recruitment, 60% by promotion from Junior Engineers having degree in Engineering or equivalent qualification and 20% from diploma holders with 10 years’ service. The Government of Jammu and Kashmir upgraded a large number of posts of Assistant Engineers and re- designated them as Assistant Executive Engineers. Therefore, a large number of promotions were made on ad hoc basis, initially for a period of six months. As per the rules, the stop gap/ad hoc arrangement could be made by the State only for

six months without consulting the Commission and if such arrangement was to continue beyond six months, it was necessary to consult the Commission. The State, in violation of the rules, continued the ad hoc promotions for a long time. Direct recruitment to the post of A.E. prior to 1997 was done in the year 1984. Thereafter, no direct recruitment was done. As a result, the promotees worked on ad hoc basis against a large number of higher posts in excess of their quota. The State after a gap of almost 4 years made a reference to the Commission to fill up 10% of the posts by direct recruitment [as against 20% provided in the rules]. The Commission issued advertisements in this regard on 03.12.1987. The finally selected direct recruits applied for the posts and appeared in the test. However, the Commission did not make any recommendations for almost 4 years. Thereafter, the candidates who were successful in the written test were interviewed during 1993-94 and the list of selected candidates of 10% of the posts was sent by the Commission to the State Government. Even then, the appointments were not made and some persons had to approach the High Court of Jammu and Kashmir, which gave directions on 22.02.1994. It was only after issuance of such directions that some of the direct recruits were offered appointment on different dates in the year 1994 and some direct recruits were offered appointment much later. The direct recruits filed writ petitions challenging the ad hoc promotion of Assistant Engineers, made by the Government without consulting the Commission and continued for a period of six months. According to the direct recruits, the service rendered by the promotees became non-est and void and could not be recognised. They sought quashing of the seniority list and also contended that the seniority was in breach of the quota. The promotee officers filed writ petitions and contended that they should be granted promotion from the date when they were working irrespective of the quota. The J&K Government constituted a high level committee to look into the matter and the committee recommended that the seniority of both the direct recruits and the promotees were to be granted by placing them in the vacancies reserved for them in their respective quotas. The committee also recommended that the ad hoc stop-gap appointees, who had continued in violation of the rules, could not be granted any benefit. Despite this recommendation of the committee, the State Government in relaxation of the rules, regularised the promotees from anterior dates. The direct recruits challenged this order. The High Court held that the appointment could not be made to the promotional posts without consulting the Commission. The High Court also held that the promotees whose promotions were in excess of the quota had to be pushed down and those promotees had to be fitted in the subsequent vacancies in their quota in the later years. The High Court also held that the ad hoc appointment can only be made initially for 6 months and where the ad hoc service had continued beyond this period without consultation with the Commission, the promotees were not entitled to seniority. It was held that an ad hoc promotee could not be treated to be a member of the service. The High Court also held that according to rule 24 of the Civil Service Rules, the seniority will have to be reckoned from the first appointment and, therefore, the order of the Government regularising ad hoc promotions was illegal and was accordingly set aside.

6. Thereafter, the matter came to this Court and this Court framed 4 issues. We are concerned with issue nos. 3 and 4, which read as under:

“.....

(3) Whether the ad hoc/stopgap promotion of Assistant Engineers (and Assistant Executive Engineers) could be made beyond six months and till regularization, by the Government without consulting the Public Service Commission? Whether the Government could have regularized the ad hoc service by executive order dated 2.1.1998? Whether the direct recruits' contention that retrospective regularization could not be made in respect of the ad hoc/ stopgap service and could be made only if the initial appointment as Assistant Engineers or Assistant Executive Engineers was "in accordance with rules", was correct?

(4) Whether the direct recruits could claim a retrospective date of recruitment from the date on which the post in direct recruitment was available, even though the direct recruit was not appointed by that date and was appointed long thereafter?

....." Dealing with Rule 23, this Court held as follows :-

"52. Under Rule 23, whenever probation is commenced in respect of an officer, it is permissible to appoint him to the service with retrospective effect from such date from which the person was "continuously on duty as a member of the service". Read with Rule 2(e) which defines 'member of service' it means the time from which he was "continuously holding the pensionable post". Rule 23 does not make any distinction between different modes of recruitment. It is well settled that in the case of a direct recruit, the probation can commence only from a date after his selection and he can hold a permanent vacancy only after such selection. According to service jurisprudence (see in fact, discussion under Point 4), a direct recruit cannot claim appointment from a date much before his selection. So far as a promotee and also one who is recruited by transfer, are concerned, before such persons are appointed as members of the service under Rule 23, first their probation must commence. Then such person becomes a probationer for purposes of Rule 23. Once he is on probation, and if a substantive vacancy in the permanent cadre existed in which the promotee or a recruit by transfer can be accommodated, and if such a vacancy has arisen from a date previous to the issue of the order of appointment (i.e. appointment by promotion or transfer) then under Rule 23 he may be appointed to the service (i.e. regularly) with retrospective effect from such anterior date (or, as the case may be, from such subsequent date) from which (he has been continuing on duty on a non-pensionable post (see 2(e) defining 'member of service']). This period can certainly be one that a person holds in a stop gap or ad hoc manner. The order of 'promoting a person in the service' regularly from an anterior date and the order of probation from an anterior date can be simultaneously passed. That is how under Rule 23, a person holding a temporary, stopgap or ad hoc appointment beyond three months can become a probationer and get appointed regularly to the service with retrospective effect.

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56. It is true that while Rule 15 permits probation to be commenced from an anterior date in the case of one “appointed” temporarily there is no such clause in rule 25 dealing with “promotions”. That does not, in our opinion, mean that in respect of a person temporarily promoted or a person temporarily appointed by transfer, probation cannot be commenced from an anterior date. In our view, this power is implicit in Rule 23 itself when it speaks of a probationer being appointed as a member of a service with retrospective effect. Once a promotee or recruitee by transfer is appointed on probation, it is permissible to appoint him under Rule 23 as a member of the service from an anterior date when a substantive vacancy existed in his quota. It is then obvious that such power to make a retrospective appointment of a member implies a power to commence probation of such person from an anterior date when a clear vacancy existed in his quota. We cannot imagine that the rule-making authority did not visualize delays in regularization of ad hoc or stopgap or temporary service rendered by the promotees or those recruited by transfer and kept in mind delay only in cases of appointments under Rule 14.

57. Thus, the stopgap/ad hoc or temporary service of a person appointed by transfer as an Assistant Engineer or by promotion as an Assistant Executive Engineer can be regularized through PSC/DPC from an anterior date in a clear vacancy in his quota, if he is eligible and found suitable for such transfer or promotion, as the case may be, and his seniority will count from that date.”

7. Since judgment in Suraj Prakash Gupta’s case (supra) deals with very same Rules which fall for consideration in the present case, it is relevant for decision of our case. There is however, one marked difference between this case and the case of Suraj Prakash Gupta (supra). In Suraj Prakash Gupta (supra) all the promotees had actually worked in the higher posts and the challenge was that they could not get the benefit of the higher posts since they had not worked as per the rules. In the present case, the promotees have not worked even for a day in the higher post before being regularly promoted. In the present case, the learned Single Judge relied upon this judgment to hold that the promotees could not get benefit of anterior appointment under Rule 23. The Division Bench held otherwise. The difference of opinion is only because of one factor. According to the learned Single Judge, the promotees should have actually worked either on ad hoc basis or officiating basis on the promotional post, whereas according to the Division Bench, regardless of the fact whether the employee had actually worked on the promotional post or not, he is entitled to claim promotion from the date the vacancy arises in the promotional cadre, as long as he was working on a pensionable post and is a member of the service.

8. At this stage, it would be pertinent to mention that it is a settled principle of law that normally no person can be promoted with retrospective effect from a date when he was not born in the cadre. Seniority has to be reckoned only from the date the person entered into that service. In this behalf reference may be made to the judgment of this Court in State of Bihar Vs. Akhouri Sachindra Nath & Ors.2 where this Court held as follows :-

“12.It is well settled that no person can be promoted with retrospective effect from a date when he was not born in the cadre so as to adversely affect others. It is well settled by several decisions of this Court that amongst members of the same grade seniority is reckoned from the date of their initial entry into service.....” Thereafter, in Kaushal Kishore Singh vs. Dy. Director of Education³ this Court held as follows :-

“5. The claim of seniority of the employee is always determined in any particular grade or cadre and it is not the law that seniority in one grade or cadre would be dependent on the seniority in another grade or cadre.....”

In State of Uttaranchal vs. Dinesh Kr. Sharma ⁴ this Court held as follows :-

(1991) Supp.1 SCC 334 (2002) 9 SCC 634 “34. 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 1995-96 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.” This principle was followed in Sheikh Abdul Rashid & Ors.

vs. State of J&K & Ors. ⁵ again dealing with J&K Civil Service Rules. Again in State of Uttar Pradesh and Others vs. Ashok Kumar Srivastava and Another⁶ this Court held that the normal rule is that seniority should be reckoned from the actual date of appointment. It was held thus:-

“25. In view of the aforesaid enunciation of law, the irresistible conclusion is that the claim of the first respondent for conferment of retrospective seniority is absolutely untenable and the High Court has fallen into error by granting him the said benefit and accordingly (2007) 1 SCC 683 (2008) 1 SCC 722 (2014) 14 SCC 720 the impugned order deserves to be lanced and we so do.”

9. The respondents have relied upon two judgments in U.D. Lama and Others vs. State of Sikkim and Others⁷ and Asis Kumar Samanta and Others vs. State of West Bengal and Others⁸. In both the cases this Court upheld the grant of promotion from a retrospective date. The facts in U.D. Lama and Others case (supra) are very peculiar. The State of Sikkim was formed on 26th April, 1975. The Sikkim State Civil Service Rules, 1977 came into force on 01.07.1977 which provided for consultation with the State Public Service Commission. Surprisingly however, there was no Public Service Commission in the State and Chairman to the Public Service Commission was appointed for the first time on 20th November, 1981 and he assumed office on 11.01.1982. Prior to the constitution of the Commission, the State Government took a decision to induct officers into the State Public Service on the basis of a written examination and interview. Certain officers were selected and so appointed.

The second set of (1997) 1 SCC 111 (2014) 10 SCC 357 officers were those who had been selected by the Sikkim Public Service Commission. The first set of officers were appointed in 1982 whereas the second set of officers were appointed in 1990 but the officers who were appointed in 1990 were given retrospective appointment from the date of vacancy. This Court held that the appointment of the first batch of officers though upheld by this Court in another case, having been made without consultation with the Commission, these officers appointed in violation of the Rules cannot claim seniority over those who had been appointed strictly in accordance with the Rules and in consultation with the Commission. In *Asis Kumar Samanta and Others* case (supra) also the situation was very unusual. Vacancies in the promotion quota occurred in 01.01.1989 but the promotions could not be made because of interim stay granted by the High Court. The stay order was vacated on 11.12.1990 and the selection process for promotions commenced only thereafter. In these circumstances the Public Service Commission recommended that the promotees be given retrospective seniority with effect from 31.12.1990 because for almost two years the promotion process had been stalled. It would be pertinent to mention that in both these cases normal principle that seniority should be considered from the date of appointment has not been overruled but these judgments have been rendered in the peculiar facts and circumstances of these cases.

10. On behalf of the private respondents-promotees, it was urged that the promotees had passed the departmental exam many years back and became eligible to be promoted much earlier. It is submitted that in view of these peculiar facts, the State was justified in granting permission to the promotees retrospectively. We are not impressed with these arguments because even the direct recruitment process took an inordinately long time. The vacancies in the quota of direct recruits also occurred much earlier. The combined competitive examination was held in the year 2002 and it took more than 2 years to finalise the process of direct recruitment. Therefore, the delay has affected both the promotees and the direct recruits.

11. From the judgments referred to hereinabove it is apparent that the normal rule is that a person is entitled to seniority only from the date when the said person actually joins the post. True it is, that there are exceptions and sometimes “in service” candidates can be granted promotion from a date anterior to their being regularly promoted/appointed. However, this can be done only if the rules enable retrospective appointment and on fulfilling the other requirement of the rules.

12. As far as the present case is concerned, Rule 23 of the Civil Services Rules has been extracted hereinabove. It, no doubt, postulates the appointment of a probationer to the service on a date anterior to his regular appointment. However, this is subject to two conditions. The first, is that the vacancy in his category should have existed and no appointment can be made from a date prior to the date of existence of vacancy. The second condition is that the person must have been continuously on duty as member of service from the said date. As far as the first condition is concerned there is no doubt that the promotees have been appointed from the date when the vacancies existed in their promotional quota. It is the second aspect of the matter which needs to be analysed in detail.

13. In *Suraj Prakash Gupta's* case (supra) this Court held that direct recruits could not claim seniority from a date anterior to their appointment. The reason is simple. The direct recruits were

not even born in the cadre and were not holding any post in the service. There can be no manner of doubt that direct recruits cannot get seniority from a date prior to their appointment. While interpreting Rule 23, we must also take note of Rule 9 of Excise Rules which deals with probation. When a person is appointed to the post of ETO whether by promotion or by way of direct recruitment, he shall be on probation for a period of two years. The explanation to Rule 9 provides that appointment on probation shall be made against substantive vacancies only. The explanation also provides that any period of officiating service shall be reckoned as period spent on probation when a person is formally appointed to the service. This clearly envisages that the person should have been actually working on the post of ETO to be considered to be on probation. The whole concept of probation is to judge the suitability of the candidate appointed to the post. There can be no objective assessment if the person is not actually working on the post. The promotees never worked as ETOs prior to their formal promotion. Therefore, though vacancies may have been there in their quota, they having not worked against the post of ETO could not have been appointed and granted seniority from an anterior date.

14. In our view the rules in question clearly provide that not only vacancies should have been existing from an earlier date but the person to be granted retrospective promotion should have also been working against the post. To give an example in the context of the present Rules, a vacancy in the promotional cadre existed on 01.01.10. However, a person from the feeder category is promoted on temporary/officiating/adhoc/or on any other basis to work against the post on 01.01.11. He is thereafter regularly appointed on 01.01.12. Though the vacancy may have existed from 01.01.10 the employee can get promotion only from 01.01.11 when he actually started working against the said post.

15. It is well settled that retrospective promotion to a particular group can violate Article 14 and 16 of the Constitution of India. Even if the Rules enable the State to make retrospective promotion, such promotion cannot be granted at the cost of some other group. Therefore, the only reasonable interpretation can be that the promotees can get promotion from an anterior date only if they have worked against the said post even if it be on temporary or officiating, or ad-hoc basis etc.

16. On analysis of Rule 24 of the Civil Services Rules, it is apparent that as per this Rule the seniority of a person subject to the said Rules is to be determined by the date of first appointment to such service, class, category or grade, as the case may be. Therefore, it is apparent that only the service rendered in a particular service, class, category or grade can be taken into consideration and not the service rendered in some other service, class, category or grade while determining the seniority. Note-1 to the Rules also makes it clear that the date of first appointment shall mean the date of permanent appointment or the first appointment on probation on a clear vacancy. We have already held above that appointment on probation obviously envisages that the person is working against the said post in the particular service, class, category or grade.

17. Therefore, on a combined reading of Rule 9 of the Excise Rules and Rule 23 and 24 of the Civil Services Rules, we are clearly of the view that promotion can be granted on retrospective basis to promotee officers from a date on which the clear-cut vacancy in the promotional cadre has occurred subject however to the conditions that the promotee should have worked against that post prior to

his regular appointment.

18. The Division Bench relied upon the definition of the 'member of service' as defined in Section 2(e) of the Civil Service Rules, according to which the 'member of service' is a person who holds a pensionable post. According to the Division Bench, since the promotees were working against pensionable posts in the feeder category they were members of the Service and thus they satisfied the conditions of Rule

23. We cannot agree with this proposition. The post of ETO is a gazetted post in a totally different cadre. The promotees were not members of the Service as ETOs. They may have been holding pensionable posts but that does not mean that they were members of the Service as ETOs. The learned Single Judge was right in holding that the promotees could not have been given the benefit of retrospective promotion and seniority from a date when they were not even born in the cadre and not working against the post. We are also of the view that this retrospective promotion also violates the provisions of Rule 9 of the Excise Rules.

19. In view of the above discussion we set aside the judgment of the Division Bench dated 06.03.2014 and restore the judgment of the learned Single Judge dated 07.05.2013 in S.W.P. No.2356 of 2009.

20. The appeals are accordingly allowed.

.....J. (Madan B. Lokur)J. (Deepak Gupta) New Delhi
October 26, 2017