

SHRI GOVINDA CHANDRA TIRIA

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v.

SIBAJI CHARAN PANDA & ORS.

(Civil Appeal Nos. 3542-3543 of 2010)

FEBRUARY 05, 2020

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[SANJAY KISHAN KAUL AND K. M. JOSEPH, JJ.]

Service Law: Absorption – Counting of seniority – On facts, respondent No 1 who was on deputation, instead of going back to the parent cadre seeking absorption with the department on the terms and conditions stated therein that seniority to be counted from the date of absorption – Respondent No.1 accepted the same and was treated as a fresh appointee – Thereafter, circulation of seniority list wherein respondent placed below the appellant – Challenge to – Held: It was not permissible to challenge the seniority list in an oblique manner, and assail the terms and conditions of the absorption – Normally the deputation period would be counted, but this was subject to the caveat that in case the transfers are not strictly in public interest, the transferred officers would be placed below all appointed regularly to the grade on the date of absorption – The said clause would apply as this was not a case “strictly in public interest” – Order passed by the High Court directing fresh gradation list to be drawn set aside – However, since, in the meanwhile, respondent No.1 has earned promotions, while the seniority list would be maintained, respondent No.1 may not be demoted, and an ex-cadre/supernumerary post to be created to keep him in the same post without affecting the seniority list.

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Allowing the appeals, the Court

HELD: 1.1 Despite departmental communications wanting respondent No.1 to go back to the parent cadre it is respondent No.1's insistence and persuasion which prevailed, with the department absorbing respondent No.1 with the terms and conditions mentioned that seniority would be counted from the date of absorption and respondent No.1 accepted the same. That absorption was never challenged in any proceeding, nor the terms

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- A thereof, when he was treated as a fresh appointee. It is only when the seniority list was circulated that the challenge was sought to be made to the seniority list, in an oblique manner, and the terms and conditions of the absorption were sought to be assailed, which is not permissible. [Para 14][718-G-H; 719-A-B]
- B 1.2 OM NO. 20020/7/80-ESTT(D), which, in para 2 sets out that when an officer initially comes on deputation, and is subsequently absorbed, the normal principle that seniority should be counted from the date of such absorption, should mainly apply. This was, however, subject to the caveat of the O.M. dated 22nd
- C December, 1959, which states that if such a person is absorbed in an equivalent grade on a regular basis in the parent department, such regular services in the grade should also be taken into account in fixing his seniority subject to the condition that it would be from the date he had been holding the post on deputation or from the date he had been appointed on regular basis in the same
- D or equivalent grade in his parent department “whichever is later”, which was amended to make it “whichever is earlier”. Thus, normally the deputation would be counted, but this was further made subject to the caveat that in case the transfers are not strictly in public interest, the transferred officers will be placed below all
- E appointed regularly to the grade on the date of absorption. It is the latter clause which would apply as this was not a case “strictly in public interest”. Thus, the impugned judgment cannot be sustained and has to be set aside. [Paras 17-19][719-F-G; 720-A-B]
- F 1.3 It is noted with some regret that the Union of India, having taken a categorical stand before the Central Administrative Tribunal, endeavoured to possibly help respondent No.1 by filing a counter affidavit before this Court, endeavouring to take a slightly different position by observing “however, it is true that the MoEF objected to his continuance in the office of the Res-3 many times but extension was granted base on the request from office of the Res-3”. To say the least, the Union of India should be conscious while preferring affidavits, and if they want to change the stand, they must give reasons for the same. The manner of wording the affidavit seems to be an oblique
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attempt and a closer scrutiny is necessary by the Department as A
to how such a counter affidavit was placed before this Court.
[Para 20][720-C-D]

1.4 In the meantime, respondent No.1 has earned promotions, and is now deployed to the post of Assistant. In view of long pendency of litigation, the effect of the said order would be possibly to demote him. The promotions given to him were subject to the result of the proceedings, as intimated to him by the department. This would be rather harsh. Thus, while the seniority list would be maintained, respondent No.1 may not be demoted, and an ex-cadre/supernumerary post should be created to keep him in the same post without affecting the seniority list. C

[Para 21][720-E-F]

Sub-Inspector Rooplal & Anr. v. Lt. Governor Through Chief Secretary, Delhi & Ors. (2000) 1 SCC 644 – distinguished. D

Mrigank Johri & Ors. v. Union of India & Ors. (2017) 8 SCC 256 – relied on.

Case Law Reference

(2000) 1 SCC 644	distinguished	Para 14	E
(2017) 8 SCC 256	relied on	Para 16	

CIVIL APPELLATE JURISDICTION: Civil Appeal Nos. 3542-3543 of 2010.

From the Judgment and Order dated 22.08.2008 of the High Court of Orissa at Cuttack in W.P. (C) No. 1645 of 2004 and order dated 27.11.2008 in RVWPET No. 186 of 2008. F

Shibashish Misra, S. Debabrata Reddy, Chandan Kumar Mandal, Advs. for the Appellant.

Arunav Patnaik, Ms. Anandini Kumar, Dhananjay Bhaskar Ray, Milind Kumar, Abhijit Sengupta, Ms. Seema Bengani, Manan Pohli, Prem Prakash, Anas Zaid, G.S. Makker, Advs. for the Respondents. G

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- A The Judgment of the Court was delivered by
SANJAY KISHAN KAUL, J.
1. On the recommendation of the Staff Selection Commission, the respondent No.1 before us was so offered an appointment to the post of Lower Division Clerk (LDC) Group C in the Ministry of Environment & Forests, Government of India, New Delhi in the pay scale of Rs.950-1500/- vide letter dated 24.05.1993. In terms of this letter of appointment, the head quarter of the work was at New Delhi, but the appointment carried with it a liability to serve anywhere in India. On completion of the period of probation of two years, the respondent NO.1 made an application dated 22.07.1994 in pursuance to Circular dated 24.11.1993, seeking options from the staff for the post of LDC on “*transfer on deputationbasis*” initially for a period of one year, which was likely to be extended to a further period of maximum three years. The application of respondent No.1 was accepted and he joined the office of Deputy Conservator of Forests as LDC at Bhubaneshwar on 10.5.1994 in pursuance to his selection vide letter dated 12.04.1994.
2. In terms of the Circular dated 24.11.1993, respondent NO.1 was granted the maximum number of extensions, for a period of three years, periodically after obtaining the no objection certificate from the Central office at Delhi.
- E 3. In the course of the tenure of deputation, respondent No.1 made a request for transfer on a permanent basis to the regional office at Bhubaneshwar and vide letter dated 21.11.1994, from the Central office to the Easter Regional Office, MoEF, Bhubaneshwar, it was informed that no further extension could be given to respondent No.1 and calling upon the Bhubaneshwar Office to make its own recruitments. Respondent NO.1, however, persisted with his request and then sent a letter on 22.09.1995, seeking the consideration of his case sympathetically. The relevant part of this letter is extracted as under:
- G “That I am the only earning member of my family. My family depends upon me both financially and physically. During posting at Delhi I had to send a major portion of my salary to my family. When I was far away from my home I was unable to attend the needs of my family members. So I had to work under great mental tension.
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Therefore, I request you to kindly consider my case A sympathetically and allow me No Objection Certificate for my posting in any Central Govt. office located in Orissa.

In this connection, I request you to refer to my applications dated 30.01.95 and 17.05.95 and request you to take necessary action at any early date.”

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4. On 05.09.1996, once again respondent No.1 made a representation to the Bhubaneshwar office for absorption on “*compassionate grounds*” as LDC (Hindi Typist) on transfer basis. The endeavour of respondent No.1 finally succeeded when an office memorandum dated 13.11.1996 was issued intimating him about the approval of the competent authority for absorption on a transfer basis in the Eastern Regional Office and seeking his consent on the terms and conditions set out in the letter. The said conditions are are under:

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“(i) He should sever fully his link or lien with the CSCS cadre.

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(ii) He will be treated as fresh appointee in the Eastern Regional Office, Ministry of Environment & Forests, Bhubaneswar and he will be ranked junior most in the cadre of LDC in ERO, MOEF, after his appointment in this office.

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(iii) His present posting shall be at Bhubaneswar (Orissa) but he is liable to be posted anywhere of India in this Ministry.

(iv) The transfer is at his own request and as such, he is not entitled to TTA/Joining time etc.

In case he is willing to accept all the conditions stipulated above, in addition to all the rules and regulations applicable to his grade in Govt. of India, he may please got relieved of his duties from Ministry of Environment & Forest, New Delhi after completing all the required formalities and thereafter report for duty in the Ministry of Environment & Forests, Eastern Regional office, Bhubaneswar.”

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5. The crucial aspect is that respondent No.1 was to be treated as a ‘fresh appointee’ in the Regional Eastern Office and rank junior most in the cadre after his appointment to that office. He was called upon to give his willingness to all the conditions, which were duly accepted by respondent No.1. He gave his technical resignation thereafter (annexure P-9) and consequently the office order dated 02.01.1997 was issued,

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- A relieving him. He also addressed a letter on 31.01.197 giving his willingness in writing to transfer, on permanent absorption basis, on the terms and conditions specified under O.M. No.2-56/FCE dated 13.11.1996, and accordingly joined.

6. On 08.03.2001, the provisional seniority list was circulated by B an office order of the even date, in terms whereof respondent No.1 was shown at serial No.3, while the appellant was shown at serial No.2. The respondent No.1 filed objections dated 12.03.2001 seeking to rely on O.M. No.AB-140171/89-Est(RR) dated 03.10.1989. This was despite his consent as according to him the said O.M. would govern the terms of absorption and not his consent. The representation was rejected on C 22.06.2001. The rejection takes note of the interim developments during this period of time, i.e. issuance of an office memorandum dated 27.03.2001 arising from a judgment of this Court in *Sub-Inspector Rooplal & Anr. v. Lt. Governor Through Chief Secretary, Delhi & Ors¹*, in terms whereof the terms and conditions of O.M. No.20020/7/ D 80-Esst(D), dated 29.05.1986, were struck down to the extent it provided as under:-

"- the date he has been holding the post on deputation

or

- E - the date from which he has been appointed on a regular basis in the same or equivalent grade in his parent department.

whichever is later."

(emphasis supplied struck down)

- F The instructions were to take effect from 14.12.1999, which was the date of the judgment of the Supreme Court (the latter part is not an aspect which we are examining). The final seniority list was published on 3.7.2001, maintaining the provisional seniority list and thus respondent No.1 filed an Original Application NO.584/2001 before the Central Administrative Tribunal, Cuttack Bench challenging the seniority list on G the ground that his seniority had been calculated in violation of Government of India circulars and guidelines issued from time to time, and his name had been placed below two persons (including the appellant). This Original Application was, however, dismissed by order dated 17.10.2003 based on the counter affidavit filed by the Central Government to the effect

H ¹ (2000) 1 SCC 644

that the latter part of the O.M. No.22011/7/86-Est.(D) would govern the present case as the absorption of respondent No.1 was not in public interest. The relevant clauses of O.A. No.20020/7/80-ESTT(D) dated 29.05.1986 are being extracted hereunder:

“ NO. 20020/7/80-ESTT(D)
GOVERNMENT OF INDIA/BHARAT SARKAR,
MINISTRY OF PERSONNEL, PUBLIC GRIEVANCE AND
PENSIONS DEPARTMENT OF PERSONNEL & TRAINING
NEW DELHI, the 29th May, 1986
OFFICE MEMORANDUM

Subject: Seniority of persons absorbed after being on deputation.

The undersigned is directed to say that the existing instructions on seniority instructions on seniority of transferees contained in para -7 of the Annexure to this Department's O.M. No.9/11/-55-RPS dated the 22nd December, 1959 (copy enclosed) mainly deal with cases where persons are straight way appointed on transfer. It is, however, observed that most of the cases of permanent absorption are those where the officers were taken on deputation initially under the method of transfer on deputation/transfer contained in the relevant recruitment rules. The O.M. is intended to fill this gap in the existing instructions.

2. Even in the type of cases mentioned above, that is, where an officer initially comes on deputation and is subsequently absorbed, the normal principle that the seniority should be counted from the date of such absorption, should mainly apply. Where, however, the officer has already been holding on the date of absorption in the same or equivalent on grade on regular basis in his parent department, it would be equitable and appropriate that such regular service in the grade should also be taken into account in determining his seniority subject only to the condition that at the most it would be only from the date of deputation to the grade in which absorption is being made, it has also be ensured chart the fixation of seniority of a transfer in accordance with the above principle will not effect any regular promotions made prior to the date of absorption. Accordingly, it has been decided to add the

- A following sub-para (iv) to para -7 of general principles communicated vide O.M. dated 22nd December, 1959.
- “(iv) In the case of a person who is initially taken on deputation and absorbed later i.e. where the relevant recruitment rules provide for transfer on deputation/transfer, his seniority in this grade in which he be absorbed will normally be counted from the date of absorption. If he has, however, been holding already from the date of absorption), the same is equivalents grade on regular basis in parent department, such regular services in the grade shall also be taken into account in fixing his seniority, subject to the condition that he will be given seniority from
- C - the date he has been holding the post on deputation.
- OR
- the date from which he has been appointed on a regular basis in the same or equivalent grade in his parent department.
- D Whichever is later.
- The fixation of seniority of transferee in accordance with the above principle will not, however, affect any regular promotions to the next higher grade, made prior to the date of such absorption. In other words, it will be operative only in filling up of vacancies in higher grade taking places after such absorption.
- In cases in which transfers are not strictly in public interest, the transferred officers will be placed below all officers appointed regularly to the grade on the date of absorption.” (emphasis supplied)
- F We may repeat here that the expression *whichever is later* as appearing in the Circular stood modified in pursuance to the judgment of this Court in *Sub-Inspector Rooplal (supra)*.
- G 7. The respondent No.1, aggrieved by the order of the Central Administrative Tribunal filed a Writ Petition before the Orissa High Court under Articles 226 and 227 of the Constitution of India, being Writ Petition No.1645/2004, which was allowed vide judgment dated 22.08.2008, directing a fresh gradation list of LDC to be drawn and to consider the case of respondent No.1 for promotion to the post of UDC, if he is so entitled. The judgment took note of the opinion of this Court in *Sub-Inspector Rooplal (supra)* and simultaneously also took note of the
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conditions imposed at the time of absorption of respondent No.1, which had been accepted by respondent No.1 as “the only hurdle”. Thereafter, it proceeded to record its reasons in para 11:

“The learned Assistant Solicitor General has not been able to place any rule/circular/office memorandum to show that if an employee is to be permanently absorbed in the borrowing department he has to accept the bottom most seniority in the cadre. In absence of anything in support of such condition, we are of the view that imposition of such condition on contrary to the office memorandum dated 29th May 1986 and 27th March 2001 and, therefore, the petitioner cannot be bound by that. Since we are of the view that the seniority of the petitioner in the cadre of LDC in the Eastern Regional Office is to be reckoned from the date he joined on deputation in the office of opposite party No. 2, the gradation list prepared for LDC is liable to be set aside and, therefore, a fresh gradation list is required to be drawn.”

8. The appellant, his seniority being disturbed thus, approached this Court, though the Union of India did not approach this Court. Leave was granted on 16.04.2010, and the matter is listed before us, unfortunately, after almost a decade.

9. We have heard learned counsel for parties.

10. In sum and substance, there are really two submissions on behalf of the appellant – a) the terms of the absorption of respondent No.1 itself stipulated that his seniority would rank below the others, and having accepted the terms and conditions of absorption, he cannot be permitted to resile from the same, and consequently affect the seniority of the appellant, b) the High Court fell into error while observing in para 11 that the office memorandum dated 29.05.1986 and 27.03.2001 will prevail, and that in those memorandums, there was nothing which could affect the seniority of respondent No.1 from his initial date of appointment at Delhi.

11. The second aspect is assailed on the basis that the crucial aspect of extracted O.M. dated 29.5.1986 has not been considered i.e. that such seniority would not be available in cases in which transfers are “*not strictly in public interest*”. This was a pre-condition. The fact that the department wanted respondent No.1 to go back to his parent cadre, the communication substantiated the same. It was the insistence

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- A of respondent No.1, by way of repeated representations, which resulted in the office order for his absorption on the terms and conditions set out in the said office order dated 13.11.1996. Thus, such an observation can hardly be stated to be “*strictly in public interest*”, much less in public interest. This is also the stand of the Union of India taken in the counter affidavit filed in the Court below.
- B 12. Learned counsel for respondent No.1 endeavoured to persuade us to the contrary by referring to the judgment of this Court in *Sub-Inspector Rooplal* (supra). We may note that all principles of law arise in the given factual situation. If we consider the factual situation of that case, which had quashed a part of OM No.20020/7/80-ESTT (D) dated 29.5.1986 insofar as it provided for ‘*whichever is later*’, and replaced it with ‘*whichever is earlier*’, we are faced with a scenario where the police authorities, with a view to strengthen their existing security system in the capital, had created 12 new police stations in Delhi, and the posts were required to be filled in the shortest possible time so that there was an immediate impact on the law and order situation in Delhi. As the normal course of recruitment would take a longer period of time, in view of the urgent need of the hour, a decision was taken for suitable persons to be deployed on deputation basis to the ranks of Inspector, Sub-Inspector, Assistant Sub-Inspector, Head Constable, Constable and Driver. The request letter also stated that those officials taken on deputation were likely to be considered for permanent absorption after one year, if found suitable.
- C 13. The opinion of this Court was that such deputationists were permanently absorbed but were not being given the benefit of service of equivalent post, and that they should have been so conveyed in order to make an informed choice of whether to seek or not to seek permanent absorption i.e. there had to be full disclosure and transparency in respect of the terms and conditions of the absorption. It was not a case of request for absorption, but, the exigencies of service, and that too, without putting them to notice of this fact.
- D 14. The facts of the present case are completely to the contrary. Despite departmental communications wanting respondent No.1 to go back to the parent cadre it is respondent No.1’s insistence and persuasion which prevailed, with the department absorbing respondent No.1 with the terms and conditions aforementioned. One of the terms and conditions H was that seniority would be counted from the date of absorption and

respondent No.1 accepted the same. That absorption was never challenged in any proceeding, nor the terms thereof, when he was treated as a fresh appointee. It is only when the seniority list was circulated that the challenge was sought to be made to the seniority list, in an oblique manner, and the terms and conditions of the absorption were sought to be assailed. This is not permissible.

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15. Learned counsel for the appellant has also drawn our attention to the judgment of this Court in *Mrigank Johri & Ors. v. Union of India & Ors.*², wherein it has been held that benefit of past service rendered in a cadre is usually reckoned for the purpose of seniority. In the instant case, where the conditions were categorically stated that the absorption would be “*deemed to be new recruitment*” and the previous service would be counted for all purposes “*except his or her seniority in the cadre*”, appellant having accepted it without any demur, the seniority list prepared as a sequitur to the terms and conditions of the absorption could not be faulted with.

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16. This principle applies on all fours to the facts of the present case. Learned counsel for the appellant has also rightly contended that the plea based on the fact that the appointment of respondent No.1 was with a provision for transfer would not assist the said respondent as the present case is not one of transfer but of deputation, in pursuance to an O.M. and thus, the principle of a person moving to another cadre would squarely apply. Such depute would also, thus, have to be governed by the terms and conditions of such absorption.

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17. In this behalf we may note OM NO. 20020/7/80-ESTT(D), which,in para 2 sets out that when an officer initially comes on deputation, and is subsequently absorbed, the normal principle that seniority should be counted from the date of such absorption, should mainly apply. This was, however, subject to the caveat of the O.M. dated 22nd December, 1959, which states that if such a person is absorbed in an equivalent grade on a regular basis in the parent department, such regular services in the grade should also be taken into account in fixing his seniority subject to the condition that it would be from the date he had been holding the post on deputation or from the date he had been appointed on regular basis in the same or equivalent grade in his parent department “*whichever is later*”, which was amended to make it “*whichever is earlier*”.

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- A 18. Thus, normally the deputation would be counted, but this was further made subject to the caveat that in case the transfers are not strictly in public interest, the transferred officers will be placed below all appointed regularly to the grade on the date of absorption. It is the latter clause which will apply as this was not a case “*strictly in public interest*”.
- B 19. We are thus, of the view that the impugned judgment cannot be sustained and has to be set aside.
20. We must note with some regret that the Union of India, having taken a categorical stand before the Central Administrative Tribunal, endeavoured to possibly help respondent No.1 by filing a counter affidavit
- C before this Court, endeavouring to take a slightly different position by observing “*however, it is true that the MoEF objected to his continuance in the office of the Res-3 many times but extension was granted base on the request from office of the Res-3*”. To say the least, the Union of India should be conscious while preferring affidavits, and if they want to change the stand, they must give reasons for the same. The manner of wording the affidavit seems to be an oblique attempt and we are of the view that a closer scrutiny is necessary by the Department as to how such a counter affidavit was placed before us.
21. We are, however, faced with a situation that in the meantime, respondent No.1 has earned promotions, and is now deployed to the post of Assistant. The long pendency of litigation has resulted in a scenario where the effect of the aforesaid order would be possibly to demote him. We are conscious that the promotions given to him were subject to the result of the proceedings, as intimated to him by the department. This would be rather harsh. Thus, while the seniority list would be maintained, we are of the view that respondent No.1 may not be demoted, and an ex-cadre/supernumerary post should be created to keep him in the same post without affecting the seniority list.
22. The appeals are accordingly allowed leaving the parties to bear their own costs.

Nidhi Jain

Appeals allowed.