

Sushil Pandey vs The State Of Uttar Pradesh Thr Principal ... on 16 January, 2023

Author: Aniruddha Bose

Bench: Aniruddha Bose, Ajay Rastogi

REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO. 1838 OF 2018

SUSHIL PANDEY & ANR.

...APPELLANTS

VERSUS

STATE OF U.P. THR. PRINCIPAL
SECRETARY (HOME) & ORS.

...RESPONDENTS

JUDGMENT

ANIRUDDHA BOSE, J.

The subject of controversy in this appeal is legality of a selection list for the posts of Assistant Radio Officers in the Uttar Pradesh Police Radio Department. This list was made on 25th October 2013, though the dispute goes back to the year 1998. As per the Uttar Pradesh Police Radio Service Rules, 1979 ("1979 Rules"), the vacancies in the said posts are required to be filled up 50% through direct recruitment and 50% by promotion from the feeder cadre (in this case Radio Inspectors). The appellants before us are from the feeder cadre. There have been several rounds of litigations in the past as regards formulation of the seniority position and the judgment which is under appeal before us, delivered by a Division of the High Court of judicature at Allahabad, Lucknow Bench on 22nd July 2014 has in substance, sustained the seniority list of 25th October 2013. The appellants have taken out an application (I.A. No. 163147 of 2021) for deletion of proforma respondent nos. 20 and 21. Respondent no. 21 has passed away on 7th July 2017. So far as the said respondent is concerned, the appeal has abated as against him. It has been pleaded in this application that the Registry has informed that there is no evidence of dasti services on the said two respondents. In the office report of 15th December 2015 (annexed as A1 to the application), it has however been recorded that service of show-cause notice is complete with respect to respondent no. 20. This has been followed by the order of the Court of Registrar dated 6th August 2018 (annexed as A3 to the application), in which also it has been recorded that the respondents have been duly served/represented. But no report to that effect is available on records. In such circumstances, learned counsel for the appellants has not pressed this application before us. This application is dismissed as not pressed.

2. Requisitions were sent on 11th January 1992 to the Uttar Pradesh Public Service Commission ("the Commission") for direct recruitment against nineteen vacancies and forty-three vacancies from the Radio Inspectors on permanent basis for the post of Assistant Radio Inspector. These vacancies occurred in different years earlier. The Commission's recommendations were made on 19th September 1995 for the subject posts so far as direct recruits are concerned. For promotee candidates, the recommendations were made on 26th December 1995. Sixteen promotee candidates were issued appointment letters on 31st January 1996 out of the forty-three recommended candidates as the remaining twenty-seven selected candidates had attained the age of superannuation or died. The appointment of the direct recruits took place on 3rd July 1996.

3. A combined selection list was prepared on 10th December 1999, but it was quashed by the High Court for being in violation of Rules 17 and 22 of the 1979 Rules, in a judgment delivered by a Division Bench of the same Court on 12th September 2012. This was a common judgment delivered in three writ petitions. W.P. No. 711(SB) of 2000 was instituted by two Assistant Radio Officers from the reserved category claiming promotion in the next higher post on the basis of their stand that they were the most senior officers in that category. The directly recruited candidates also questioned inter-se seniority with the promotees in Writ Petition No. 104 (SB) of 2000. In Writ Petition No. 10 (SB) of 2000, promotee candidates challenged the same seniority list on the ground that promotee officers were appointed prior to those directly recruited and the directly recruited candidates ought not to be placed above the promotee officers in the combined selection list. The stand of the direct recruits was that as the requisitions for selection were sent to the Commission simultaneously, a common selection list ought to have been prepared and thereafter seniority should have been fixed as per Rule 22. The other point on which the direct recruits founded their case was in relation to inclusion in the seniority list the names of those promotees, who were superannuated or had passed away. It appears that in their places in the selection list, other promotee officers were pushed up. Contention of the direct recruits before the High Court was those should have been declared as fresh vacancies and should have been filled up through a fresh selection process.

4. The 1979 Rules lay down the procedure for promotion to the subject posts (along with other posts within the said service). So far as the present appeal is concerned, Rules 5(1), 14, 15, 17 and 22 are relevant. These Rules have been set out in the said judgment delivered on 12th September 2012. We quote below these rules, as recorded therein:-

"Uttar Pradesh Police Radio Service Rules, 1979

5. Source of recruitment :- In service the recruitment shall be made on the posts of different categories from the following sources:-

Assistant Radio officer: -

a) by direct recruitment through the commission; and

b) by promotion on the basis of the eligibility of the permanent radio inspectors through the commission;

However from both the above sources the recruitment shall be made in such a manner that 50 percent of the post retained by the direct recruitment and 50 percent post by the persons from promotions;

(2) Additional State Radio officer:-

By promotion on the basis of the seniority while rejecting the unsuitability in the permanent Assistant Radio Officers through the commission;

However if any suitable person is not available for promotion, then the recruitment can be made from direct recruitment;

(3) State Radio officer:-

By promotion on the basis of the seniority while rejecting the unsuitability in the permanent Assistant Radio Officers through the Commission;

However if any suitable person is not available for promotion, then the recruitment can be made from direct recruitment;

(4) Dy. Inspector General of Police Telecom:

By promotion on the basis of the eligibility of the permanent State Audio Officers through the Commission However if any suitable person is not available for promotion, then the recruitment can be made from direct recruitment under Rule 15;

14. Determination of vacancies :- The appointing Authority shall determine the number of vacancies to be filled up during the year and the number of vacancies reserved for the candidates of scheduled caste, scheduled tribe and other categories and shall inform to the commission;

15. Procedure for direct recruitment :- The Commission shall invite an application in the prescribed format, which can be obtained from the Secretary of the Commission after making the payment.

(2) The Commission under Rule 6 after considering the assurance of due representations of candidates belonged to Scheduled Castes, Scheduled Tribes and other categories, shall invite the candidates for interview, who are fulfilling the required eligibilities.

(3) The Commission shall prepare a list of the candidates, in the serial of their proficiency, reflects from the marks secured by the candidate in the oral examination. If two or more candidate would secure the equal marks, then commission shall keep their names for the services on the basis of the general suitability in the serial of eligibility. The number of names in the list shall be more than the vacancies, however not more than 25 percent. The commission shall forward the list to the

Appointing Authority.

.....

17. Combined Selection list - If the appointment has been made through direct recruitment and promotion both, then one combined selection list would be prepared, wherein the name of the candidates would be taken from the list prepared under rule 15 and Rule 16 in such a manner that there would be an ordained ratio of the direct recruitment and promotional officers. The first name would be from the list prepared under rule 16.

.....

22 - Seniority - The seniority of the post on any category of post in the service, would be the same which has been determined since the date of original appointment order and if two or more persons have been appointed, then the same would be determined in the serial, in which their names have been kept in the appointment order.

However One - The mutual seniority of the persons appointed in the service as direct recruitment in the service, would be the same as determined at the time of selection.

Two - the mutual seniority of the persons appointed through the promotion in the service would be, which he was bearing on the original post at the time of promotion.” (quoted verbatim from the paperbook)

5. On the question of determination of seniority, it was held by the Division Bench in the judgment delivered on 12th September 2012:-

“11. The determination of seniority is a vital aspect in the service career of an employee, his future promotion is dependent on this, therefore, determination of his seniority must be in strict compliance of the Rules governing the service. This is also the mandate of Articles 14 and 16 of the Constitution of India. It has been so held by three judges Bench of the Hon’ble Apex Court in the case of Government Branch Press Vs. D.B. Belliappa reported in [(1979) 1 SCC 477]. The law is very clear that seniority is an incidence of service and where service rules prescribe the method of its computation, it must be adhered to strictly.

12. In the facts of this case, the vacancies were relating to different years and vacancies were to be filled up by a common requisition with regard to direct recruits and the promotes, therefore, the selection made by the commission was made in a particular year for vacancies of different years. Before issuing appointment to the promote officers the recommendations regarding direct recruits were also lying with the respondents and no explanation could be furnished by learned counsel for the respondents as to why compliance of Section 17 was not made and appointment letters for promotes were issued.

Therefore, the compliance of Section 17, in our considered opinion, was necessary and only after preparing the combined select list, the appointment ought to have been made and seniority was to be determined in accordance with Rule 22 of the Rules, that has not been done in the present case.” (quoted verbatim from the paperbook)

6. As regards reflection of the names of superannuated officers and the officers who had expired in the combined selection list, the Division Bench found:-

“13. The other blunder that has been committed is that the names of the superannuated/dead officers were removed from the seniority list and in their place the other promote officers were pushed up, this exercise is absolutely unheard in the service jurisprudence. This mistake, by itself, made the seniority list unsustainable under law. If this exercise of the Respondents is permitted to prevail, then it would result in great injustice to the officers who on their merit join the services at an early age because in that situation, the officers who were senior to them and are older in age shall stand superannuated and in their place the officers who are junior to them shall be pushed up making them juniors to officers, who were subsequently appointed or were appointed in the vacancies of the following years. The vacancies so fallen by the superannuation or by the death of the officers were to be filled up by way of fresh selection process, therefore, the impugned seniority list is unsustainable under law and deserves to be quashed.” (quoted verbatim from the paperbook)

7. After delivery of the aforesaid judgment, the fresh selection list was prepared on 25th October 2013. This seniority list had been unsuccessfully assailed by the appellants before the High Court. Main argument of the writ petitioners therein was that the directives contained in the judgment of the Court delivered on 12th September 2012 were not complied with. The argument of the promotees to be kept higher in seniority on the basis of their earlier entry into the cadre was urged before the Division Bench. In the judgment under appeal, however, the Division Bench repelled the challenge to the said seniority list, inter-alia holding:-

“We have given our thoughtful consideration to the aforesaid arguments advanced and the facts on record and we find that the impugned final seniority list dated 25th of October, 2013 categorically places the promotes and the direct recruits vis-à-vis the year of vacancy serial wise beginning from the year 1990-1991. The placement as per the year of vacancy and the names of such persons who were entitled to occupy the same has not been questioned on any firm factual foundation. What has been argued is that Rule 17 and Rule 22 has not been complied with as noticed above. Having considered the submissions raised we find that in the absence of any averment indicating any factual fallacy in the year of placement mentioned in the seniority list, the contention of the counsel for the petitioner cannot be accepted.

The division bench while proceeding to issue directions had observed that Rule 17 and 22 had not been shown to be complied with when the earlier seniority list had been circulated. The bench further observed that the State Counsel had not been able

to explain as to why such compliance with regard to issuance of simultaneous letters of appointment had not been made.

In the aforesaid circumstances what we find is that now the rules appear to have been strictly complied with and it is in compliance of such rules that the names of the respective promotes and direct recruits one after the other have been placed.

Sri Manish Kumar tried to question the correctness of the said placement alleging that as against the direct recruits, the space for year of vacancy has been left as blank without mentioning the year of placement. The said argument cannot be accepted, inasmuch as, the list appears to have been prepared by placing first a promote and then the direct recruit according to the year of vacancy.

This factual position could not be therefore successfully assailed by the learned counsel for the petitioner on violation of any rule. The contention therefore, in our opinion, questioning the correctness of the seniority list on the basis of non-compliance of the earlier judgment does not hold water. We do not find any merit in the petition. The writ petition is accordingly dismissed.” (quoted verbatim from the paperbook)

8. So far as the seniority list of 2013 is concerned, the main grievance of the appellants is that the direct recruits (who are the private respondents in this appeal) were positioned as per the rota system in the combined list without mentioning the year of vacancies and the promotees in respective vacancies of earlier years were ignored in the process while fixing their seniority. The first appellant was positioned at serial number 52 whereas second appellant was positioned at serial number 48 and they were shown to be in respect of the vacancies for the year 1993-1994. So, essentially the appellants are aggrieved on two counts. The first is that the direct recruits have been placed in the seniority list ignoring the year of vacancy. Secondly, they contend that as their appointment and confirmation was prior to those from the stream of direct recruits, the appellants were born into the cadre earlier than the direct recruits. According to the appellants, on this reasoning they should have been placed above the direct recruits in the seniority list. What has been argued on this point is that the selection list prepared under Rule 17 of the 1979 Rules deal with apportionment of the vacant positions between promotee officers and direct recruits but this list does not deal with the question of seniority. In this regard, Rule 8 (3) (ii) of the U.P Government Servant Seniority Rules, 1991 has been referred to. This rule stipulates:-

“8. Seniority where appointments by promotion and direction recruitment.-

(1) Where according to the service rules appointments are made both by promotion and by direct recruitment, the seniority of persons appointed shall, subject to the provisions of the following sub-rules, be determined from the date of the order of their substantive appointments, and if two or more persons are appointed together, in the order in which their names are arranged in the appointment order:

Provided that if the appointment order specifies a particular back date, with effect from which a person is substantively appointed, that date will be deemed to be the date of order of substantive appointment and, in other cases, it will mean of issuance of the order: Provided further that a candidate recruited directly may lose his seniority, if he fails to join without valid reasons, when vacancy is offered to him the decision of the appointing authority as to the validity of reasons, shall be final.

(2) The seniority inter se of persons appointed on the result of any one selection,-

(a) Through direct recruitment, shall be the same as it is shown in the merit list prepared by the Commission or by the Committee, as the case may be;

(b) by promotion, shall be as determined in accordance with the principles laid down in Rule 6 or Rule 7, as the case may be, according as the promotion are to be made from a single feeding cadre or several feeding cadres.

(3) Where appointments are made both by promotion and direct recruitment on the result of any one selection the seniority of promotes vis-à-vis direct recruits shall be determined in a cyclic order (the first being a promotee) so far as may be, in accordance with the quota prescribed for the two sources.

Illustrations (1) Where the quota of promotes and direct recruits is in the proportion of 1:1 the seniority shall be in the following order-

First ... Promotee Second ... Direct Recruits and so on.

(2) Where the said quota is in the proportion of 1:3 the seniority shall be in the following order-

First	...	Promotee
Second to Fourth	...	Direct recruits
Fifth	...	Promotee
Sixth to eight	...	Direct recruits

and so on:

Provided that-

(i) Where appointment from any source are made in excess of the prescribed quota, the persons appointed in excess of the prescribed quota, the persons appointed in excess of quota shall be pushed down, for seniority, to subsequent year or years in which there are vacancies in accordance with the quota;

(ii) Where appointments from any source fall short of the prescribed quota and appointment against such unfilled vacancies are made in subsequent year or years, the persons so appointed shall not get seniority of any earlier year but shall get the seniority of the year in which their appointments, are made, so however, that their names shall be placed at the top followed by the names, in the cyclic

order of the other appointees;

(iii) Where, in accordance with the service rules the unfilled vacancies from any source could, in the circumstances mentioned in the relevant service rules be filled from the other sources and appointment in excess of quota are so made, the persons so appointed shall get the seniority of that very year as if they are appointed against the vacancies of their quota.” (quoted verbatim from the paperbook)

9. Appellants have also argued against inclusion of the names of expired or superannuated persons in the selection list. Their contention is that the names of the dead or superannuated persons ought not to have been included at all in the selection list and those promotee officers with seniority ranking lower than them ought to have been pushed up and accommodated in the position allocated to the dead or superannuated officers.

10. On the question of granting seniority to the directly recruited officers in the select list treating them as senior to the appellants, three authorities have been relied upon by the appellants. These are *State of Uttar Pradesh vs. Ashok Kumar Srivastava & Anr.* [(2014) 14 SCC 720], *K. Meghachandra Singh & Ors. vs. Ningam Siro & Ors.* [(2020) 5 SCC 689] and *B. S. Murthy & Ors. vs. A. Ravinder Singh & Ors.* [2022 SCC Online SC 317]. These decisions hold against giving retrospective seniority. In the case of *B. S. Murthy* (supra) it has been held:-

“60. From the above discussion, it is clear that no appointee from any one channel (direct recruits or promotees) can lay claim to seniority from a date before her or his appointment. That being the position in law, it would be now necessary to consider the reasons which weighed with the High Court to hold that promotees (in regular and substantive capacity from 1988) had to make way for direct recruits, who were appointed in 1991-92. Simply stated, the High Court was of the opinion that promotees had to be treated as occupying posts in excess of the quota allocated to them, on an application of the 1986 OM. Now, as a matter of fact the materials on record establish that there were promote vacancies at a time when the ban on direct recruitment was in force (during 1984-1990). To the query dated 11-06-2007, the Commissionerate concerned, at Hyderabad stated, in its reply dated 30-08.2007, as follows:

“In this Commissionerate whatever vacancies occurred in a year, the same were divided in the ratio 3:1 during the period 1986 to 1990 and the share of vacancy which comes for direct recruit were reported to SSC and the promotee quota vacancies were filled up by holding DPC.”

11. We agree with the argument of the appellant that birth in the cadre first would automatically accord the seniority over and above those who are appointed at a later date. It has been held so in the case of *Ashok Kumar Srivastava* (supra). This principle, however, is to apply in absence of any contrary provision in the applicable service rule. In the present case this aspect has been addressed by the Division Bench

in the judgment delivered on 12th September 2012. We have quoted paragraphs 11 and 12 of this judgment above. The opinion of the High Court in this judgment was that since there was a common requisition, the appointments should have been made only after preparing the combined select list and seniority ought to have been determined in accordance with Rule 22. This part of the judgment has remained unaltered. Admitted position is that a review petition in relation to this judgment was filed but the review judgment did not upset this finding of the Division Bench. In the decision under appeal, the Division Bench has relied on these two paragraphs of the earlier judgment and come to its finding. Thus, so far as the appellants and other parties to this appeal are concerned, the said finding has attained finality and we cannot reopen this question in an appeal arising out of a subsequent proceeding on near identical factual background.

12. The appellants, however, point out that in determining seniority in the 2013 list, Rule 22 has not been complied with as dates of appointment have not been adhered to for such determination. This Rule contemplates conferment of seniority as per original appointment order. We find from the judgment delivered in the year 2012 that while the Division Bench found issue of appointment orders to the two categories of candidates before preparation of selection list to be contrary to law, the appointment orders themselves were not quashed.

Neither was any specific date notionally directed to be taken as the date of appointment.

13. The High Court, in the earlier judgment found that compliance of Rule 17 was not made in preparing the seniority list of 1999. The subsequent selection list was made in terms of decision of the High Court delivered on 12th September 2012. The general principle of service jurisprudence that seniority is required to be computed from the date of actual entry into a particular cadre cannot operate in a case where there is an undisturbed judicial finding that appointments were made on different dates in breach of the applicable Rules. Moreover, selection list per se does not determine seniority as the said list is only to contain names of persons who are to be part of a particular cadre. In the 1979 Rules also, selection list is to be prepared as per Rule 17 whereas seniority is to be determined in terms of Rule

22. What the authorities have done in finalising the 2013 selection list is that positioning of incumbents in this list have been made on the basis of their seniority. Thus, it has become a combined selection and seniority list.

14. We find that in the judgment under appeal, stand of the authorities before the Division Bench on the question of fixing of seniority was recorded as:-

“He contends that so far as determination of seniority is concerned the same has been done applying the quota and rota system meant for the first place to promotees and second place to direct recruits, vis-à-vis the year of availability of respective vacancies.” (quoted verbatim from the paperbook)

15. This practise, in our opinion, is contrary to the seniority order as contemplated in Rule 17. The selection list stipulated how the vacancy positions shall be filled but for determination of seniority, the dates of appointment were to be treated as dates of birth in the cadre. In relation to the two streams of entry, after they entered the cadre, their seniority were to be decided on the basis of such dates of entry. In the present proceeding, the manner in which appointment orders were issued was found to be in breach of the provisions of Rule 17 in the first judgment. But neither the first judgment nor the judgment under appeal stipulated in what manner the dates of birth into the cadre for individual candidates from the two streams were to be determined. We are not inclined to remand this matter for that purpose, considering that the present dispute is continuing for about three decades. But since the main reasoning of the High Court for deciding the matter was that selection from both streams was made from a common recruitment process, in our opinion, the dates of appointment orders of both the streams ought to be treated from a particular date and 30th January 1996, being the date on which the appointment letters of the promotee candidates were issued, would be such date.

16. As regards the manner in which the names of the superannuated and dead officers were to be dealt with, the High Court in its judgment delivered on 12th September 2012 has already given its findings and directions. Those directions having attained finality, we are not taking any decision in respect of that part of the controversy.

17. We, accordingly, hold and direct that the seniority of the candidates including the appellants should be determined treating the entry into the cadre of both sets of candidates (i.e. promotees and direct recruits) on 30th January 1996 and the seniority position should be recast on that basis. We issue this direction invoking our jurisdiction under Article 142 of the Constitution of India. On the question of intra-stream seniority, the provision of Rule 22 shall be followed. In the recast list, however, the position for the posts left vacant on death of dead or superannuated officers shall be treated as fresh vacancies and filled up through fresh selection process.

18. In the event any incumbent, whether superannuated or not at present, has already enjoyed career related benefit as per the seniority position made in terms of the judgment delivered on 22nd July 2014 they shall not be disturbed, having regard to the long time-gap between the origin of the dispute and its conclusion by this judgment. But any officer holding the subject-post, who would have derived career improvement from the recast seniority list shall be given such benefits. For those superannuated, notional benefits shall be given.

19. The judgment under appeal shall stand modified accordingly, and the appeal shall stand disposed in the above terms.

20. Pending application(s), if any, shall stand disposed of.

21. There shall be no order as to costs.

.....J. (AJAY RASTOGI)J. (ANIRUDDHA BOSE) NEW DELHI;

16th January, 2023.