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ALLAHABAD HIGH COURT (LUCKNOW BENCH)

DIVISION BENCH

ANIL KUMAR — Appellant

Vs.

STATE OF UTTAR PRADESH — Respondent

(Before : S.N. Shukla, J; Rajan Roy, J)

Writ Petition No. 276 (SB) of 2015

Decided on : 19-05-2015

A. Service Law — Seniority — U.P. Police Radio Service Rules, 1979 — U.P. Government Servants Seniority Rules, 1991 — Post of State Radio Officer — Promotion vs. Direct Recruitment — Determination of Seniority — Petitioner (direct recruit) appointed 13.11.1998; Opposite party (promotee) appointed 18.11.1998 — Tribunal erred by considering vacancy year and feeding cadre appointment for seniority. (Paras 4, 5)

B. Service Law — Seniority — State Radio Officer — Source of Recruitment — Rule 5(iii) of 1979 Rules — Promotion as primary source, direct recruitment as alternative when no suitable person available for promotion. (Para 5)

C. Service Law — Seniority — Combined List — Rules 16, 17, 18 of U.P. Police Radio Service Rules, 1979 — Mandate to prepare combined list when appointments by direct recruitment and promotion occur in the same recruitment year — Promotee to be placed first in combined list. (Para 5)

D. Service Law — Seniority — Cyclic Order — Rule 8(3) of U.P. Government Servants Seniority Rules, 1991 — Seniority of promotee vis-a-vis direct recruit to be determined in a cyclic order (promotee first), even if no specific quota for direct recruitment, considering the peculiar facts and proviso to Rule 5(iii) of 1979 Rules — "Selection in the same year" implies the year of

selection, not the vacancy year. (Para 5)

E. Service Law — Seniority — Relevance of Vacancy Year — Year of vacancy is irrelevant for determining seniority in a cadre; seniority is determined by rules applicable when appointments are made in the same recruitment year. (Para 5)

F. Service Law — Seniority — Date of Appointment vs. Combined List — Seniority not solely determined by date of substantive appointment but also by the order in which names are placed under Rules 16, 17, and 18 of 1979 Rules, along with Rule 22 read with Rule 8(3) of 1991 Seniority Rules. (Para 6)

G. Service Law — Seniority — Remand — Matter remanded for redetermination of seniority in accordance with the observations and rules discussed. (Para 8)

Counsel for Appearing Parties

V.K. Srivastava, for the Appellant; I.M. Pandey and Rajnish Kumar, Advocates for the Respondent

Final Result : Partly Allowed

JUDGMENT

S.N. Shukla and Rajan Roy, JJ.—Heard Sri V.K. Srivastava, learned Counsel for the petitioner and Sri I.M Pandey for opposite party No. 4 and learned Standing Counsel for official opposite parties.

By means of this writ petition the petitioner has challenged the judgment dated 17.12.2014 passed by the U.P. Public Service Tribunal, Lucknow in Claim Petition No. 687 of 2006 filed by opposite party No. 4, Ram Shanker Dwivedi.

The post of State Radio Officer is a promotional post as per Rule 5 (iii) of the U.P. Police Radio Service Rules, 1979. However, the proviso to the said rule provides that if no suitable person is available for promotion, the post may be filled by direct recruitment. The petitioner herein was appointed as State Radio Officer through U.P. Public Service Commission by way of direct recruitment vide order dated 13.11.1998 under the proviso to the aforesaid Rule whereas opposite party No. 4 was promoted against the said post as per Rules on 18.11.1998. The opposite party No. 4 raised a seniority dispute before the authorities claiming placement in the seniority list above the petitioner, relying upon the provisions contained in Rule 22 of the Service Rules of 1979 as also Rule 8(3) of the Seniority Rules, 1991, on the ground that the appointment on the in question having been made by way of direct recruitment as well as promotion in the relevant recruitment year the

opposite parties ought to have prepared a combined list under Rule 17 of the Service Rules 1979 by taking the names of the candidates in such a manner that the prescribed percentage of direct recruitment and promotion is maintained from the list prepared under Rules 15 and 16, the first name being from the list prepared under Rule 16 i.e. of a promotee. He relied upon Rule 18 of the Service Rules, 1979 which provides that the appointing authority shall make appointment by taking the candidates in the order they stand in the list prepared under Rules 15, 16 and 17, as the case may be. He also relied upon Rule 22 which provides that seniority in any category of posts in the service shall be determined from the date of order of substantive appointment and if two or more persons are appointed together, from the order in which the names are arranged in the appointment order. His claim was rejected by the opposite parties vide order dated 18.5.2006. Being aggrieved he filed a claim petition bearing No. 687 of 2006 which has been allowed vide judgment dated 17.12.2014. It is this judgment which is under challenge before this Court.

The contention of learned Counsel for the petitioner is that the Tribunal has misdirected itself by allowing the claim of opposite party No. 4 on the ground that his selection and appointment was against the vacancy of 1995-96 and there was no explanation with the opposite parties as to why the appointment order of opposite party No. 4 was issued late than the appointment order issued to the petitioner on 13.11.1998. He relied upon a decision of the Supreme Court in the case of [Pawan Pratap Singh and Others Vs. Reevan Singh and Others](#), (2011) 2 JT 248 : (2011) 2 SCALE 327 : (2011) 3 SCC 267 : (2011) 1 SCC(L&S) 481 : (2011) 2 SCR 831 : (2011) AIRSCW 1365 : (2011) AIRSCW 3916 : (2011) 5 Supreme 579 , to contend that seniority is not to be reckoned from the date of vacancy rather from the date of substantive appointment, as, in this case the date of substantive appointment of the petitioner was prior to the date of substantive appointment of opposite party No. 4 therefore, the Tribunal has erred in issuing a direction to the opposite parties to re-determine the seniority in the light of the observations made by it, which is bound to result in his placement over the petitioner.

2. On the other hand learned Counsel for opposite party No. 4 contended firstly that there were only 5 posts in the cadre of Radio Officer, therefore, the petitioner could not have been given the benefit of reservation in view of the various decisions of the Supreme Court, one of them being [R.S. Garg Vs. State of U.P. and Others](#), AIR 2006 SC 2912 : (2006) 111 FLR 616 : (2006) 7 JT 1 : (2006) 7 SCALE 405 : (2006) 6 SCC 430 : (2006) SCC(L&S) 1388 : (2006) 4 SCR 120 Supp : (2006) AIRSCW 4040 : (2006) 6 Supreme 324 , and the Full Bench decision of this Court in the case of Hira Lal v. State of U.P. and others, reported in (2010) 3 UPLBEC 1761, by which the law has been clarified, based on already existing provisions contained in the Reservation Act, 1994. He further contended that the official opposite parties while rejecting his claim vide order dated 18 5 2006 had not considered the provisions of Rules 5, 16, 17, 18 and 22 of the Service Rules, 1979 nor Rule 8(3) of the U.P. Government Servants Seniority Rules, 1991 and had rejected the claim in an arbitrary manner based on reasons which were not germane in the eyes of law. He relied upon a Division Bench decision of this Court dated 12.9.2012 passed in Writ

Petition No. 10 (SB) of 2000 Syed Zia Abbas Razvi and others v. State of U.P, and others and connected matters.

3. We have heard the contentions of the rival parties and perused the record.

4. On a perusal of the judgment of the Tribunal impugned before us we find that instead of considering the points raised by opposite party No. 4 herein in the claim petition, the Tribunal misdirected itself by taking into consideration the vacancies against which the petitioner and opposite party No. 4 were appointed and the year in which the vacancies occurred and took a view that opposite party No. 4 having been appointed against the vacancy of the year 1995-96 there was no justification for issuing appointment order to him subsequent to the issuance of appointment order to the petitioner on 13.11.1998. It has further observed that opposite party No. 4/claimant was appointed in the feeding cadre at a date earlier than opposite party No. 3 (petitioner herein) and he was promoted on the promotional post on the recommendation of the commission. It also took note of the fact that the posts of Radio Officer were required to be filled first through promotion.

5. In our view the reasoning given by the Tribunal is not sustainable in law. The year in which the vacancies occurred is not at all relevant for the purpose of determination of seniority in a cadre of service either under the Rules of 1979 or under the Seniority Rules of 1991. The Tribunal has erred in observing that opposite party No. 4 herein was appointed prior to the petitioner herein taking into consideration the appointment in the feeding cadre, which is absolutely irrelevant as the petitioner was directly appointed as State Radio Officer. It failed to appreciate that both the petitioner and opposite party No. 4 were appointed in the same recruitment year, therefore, the provisions of Rules 16, 17 and 18 of the Rules of 1979 were clearly applicable as appointments had been made in the said recruitment year by direct recruitment as well as promotion. The fact that the appointment were made against the vacancies of different recruitment years was not at all relevant for the purposes of the said rules and determination of the seniority thereafter. Therefore, the judgment of the Tribunal cannot be sustained and the same is accordingly quashed.

Now coming to the validity of the rejection order dated 18.5.2006 we find that the source of recruitment on the post of State Radio Officer is promotion. Direct recruitment has been permitted as an alternative in the event no eligible person is available for promotion. Nevertheless considering the fact that both direct recruitment and promotion to the post in question was made in the same recruitment year, a combined list ought to have been prepared as per the said provisions of Rule 16, 17 and 18 of the Rules 1979 wherein the promotee officer should have been placed first. As the source of recruitment under Rule 5 (iii) is promotion, therefore, the promotee officer ought to have been placed above for this reason also. On the same analogy a combined list ought to have been prepared under Rules 16 and 17 and based thereon the combined appointment orders ought to have been issued placing the names in the same order as they figure in the seniority list prepared under Rules 16 and 17, but it does not appear to have been done. Even under Rule 8(3) of the Seniority

Rules, 1991 the placement in the seniority list where appointments are made both by promotion and direct recruitment, the seniority of promotee viz a viz direct recruit shall be determined in a cyclic order (the first being a promotee), as far as may be, in accordance with the quota prescribed for the two sources, though no quota is prescribed for such direct recruitment, nevertheless, considering the peculiar facts of the case and the proviso to Rule 5 (iii) of the Rules 1979, the principle applicable in Rule 8(3) of the Seniority Rules, 1991 should have been applied and based thereon the seniority ought to have been determined. As there cannot be "one selection" for direct recruitment and promotion, therefore, the words mentioned in Rule 8(3) can only mean 'selection in the same year'. In these circumstances the order of rejection can also not be sustained.

6. In the peculiar facts of the present case the determination of seniority is not to be made on the basis of the date of order of substantive appointment but as per the order in which the names are to be placed under Rules 16, 17 and 18 of the Rules of 1979 keeping in mind Rule 22 of the Rules of 1979 in so far as they are not inconsistent with the provision of Rule 8(3) of the Seniority Rules, 1991. In view of the proviso to Rule 5 (iii) of the Rules 1979 even though there is a single feeding cadre and the post in question is a promotional post, the provisions of Rule 6 of the Seniority Rules, 1991 would not be applicable and it is Rule 8 of the Seniority Rules, 1991 which will apply.

7. In views of the above the reasons mentioned in the order of rejection dated 18.5.2006 cannot be sustained, therefore, it is also quashed.

8. The matter is remanded back to opposite party No. 1 to reconsider determination of seniority between petitioner and opposite party No. 4 strictly in accordance with the observations and rules referred to hereinabove. With the aforesaid observations the writ petition is partly allowed.