

Before K. Kannan, J

SURESH KUMAR,—Petitioner

versus

STATE OF HARYANA AND OTHERS,—Respondents

CWP No. 1397 of 1989

28th June, 2010

Constitution of India, 1950—Art.226—Dispute regarding inter se seniority—Appointment of petitioner as a Tracer on ad hoc basis without prejudice to rightful claims of 3rd respondent—3rd respondent appointed subsequently against substantive vacancy and ought to be treated as senior to petitioner—Claim of petitioner against 3rd respondent—for placing above him rejected—Promotion of 4th & 5th respondents against reserved category would not entitle them to claim seniority over petitioner—Petitioner held entitled to refixation of seniority of promotion post retaining seniority above both respondent Nos. 4 and 5.

Held, that an *ad hoc* promotion does not create a vested right in a person to claim seniority to a person who is appointed subsequently but in a substantive vacancy for which he had better claims than the person, who had been appointed on *ad hoc* basis. Consequently, if the petitioner had been appointed on *ad hoc* basis without prejudice to the rightful claims of the 3rd respondent and when the 3rd respondent's absence was regularized and was offered promotion in the regular vacancy although subsequently, he ought to be treated as senior to the petitioner. The petitioner cannot have a grievance that by the only fact that he had completed his probation period in *ad hoc* service, he should still be retained as senior to the 3rd respondent. The claim of the petitioner against the 3rd respondent and for a request to be placed above the 3rd respondent does not, therefore, merit acceptance.

(Para 7)

Further held, that as regards the claim of the petitioner against the 4th respondent, it is stated by the State that the 4th respondent although below the petitioner in the order of seniority, he was promoted to the next

higher post against the Backward Class vacancy. The petitioner could retain his seniority position if he is subsequently promoted and catch up his seniority in the promoted post against the 4th respondent. This case comes about prior to the 85th amendment of the Constitution and therefore, it is unlikely that his seniority is lost to the reserved candidate by the only fact that a General candidate obtains a promotion later to a reserved category candidate. The petitioner is, therefore, entitled to be placed higher in the order of seniority to the 4th respondent in the promotion post.

(Para 7)

Further held, that on analysis of seniority lists, we have seen that 3rd respondent is entitled to be treated as senior and will always rank as such. As regards the petitioner's claim to seniority against 4th respondent, while the 4th respondent was entitled to a promotion against a reserved post for Backward Class, the petitioner on being promoted as Assistant Draftsman subsequently was entitled to catch up with the seniority at the promoted post by reference to a relative seniority in the lower cadre. Hence, the 3rd respondent is entitled to be treated as senior and the petitioner's claim against the 3rd respondent cannot be sustained. The date of earlier promotion against a reserved category will not entitle the 4th respondent to claim seniority over the petitioner. For the same reason, the 5th respondent also cannot obtain seniority over the petitioner. The petitioner is entitled to refixation of seniority at the promotion post retaining the petitioner's seniority above both respondent Nos. 4 and 5.

(Para 8)

Arun Jain, Senior Advocate with Amit Jain, Advocate *for the petitioner*.

Ravi Dutt Sharma, DAG Haryana.

Subhash Ahuja, Advocate, *for respondent No. 3*.

Ashok Gupta, Advocate *for respondent No. 4*.

K. KANNAN, J.

(1) The petitioner seeks for refixation of seniority vis-a-vis respondent Nos. 3 and 4. His contention is that he was recruited as a Tracer

in the services of HUDA and respondent Nos. 3 and 4 were also recruited to the same post and joined later than the petitioner. The petitioner figures as one amongst the seven appointees through an order issued by HUDA on 25th July, 1978. The 4th respondent also figures as an appointee on the same date but placed at Sr. No. 7 while the petitioner had been placed at Sr. No. 6. By an order issued on 12th December, 1983, both the petitioner and the 4th respondent have been promoted the next higher post as Assistant Draftsman. The same order states that the promotion had been without prejudice to a decision of the disciplinary case against the 3rd respondent. The 3rd respondent in his written statement referred to the fact that he was also appointed on the same date on 25th July, 1978 against a regular vacancy (R3/1) and joined on 8th August, 1978 in the office of the Superintending Engineer, Faridabad Circle.

(2) The petitioner's contention is that the 3rd respondent had proceeded on a long leave without seeking prior permission and on coming back to India when he joined the service, the Chief Administrator, HUDA had sought explanation asking the Chief Town Planner, HUDA as to how the 3rd respondent was allowed to join the office and the Chief Town Planner was requested to fix the responsibility for the lapse on the part of the Authorities and failing to direct the 3rd respondent to report to Head Office first. However, all these communications came to nothing other than an order of censure against the 3rd respondent on 25th October, 1984.

(3) In the meanwhile, the petitioner had completed his period of probation in the higher post of Assistant Draftsman on 12th December, 1984. The contention of the petitioner is that the order of promotion of the 3rd respondent and the 4th respondent had been issued only on 11th July, 1988 and that meant that they were juniors to the petitioner, having regard to the fact that the petitioner had already completed his probation successfully even on 12th December, 1984. However, when the orders of promotion for respondent Nos. 3 and 4 had been issued on 4th July, 1988, it had specifically stated that they had been appointed on permanent vacancies while the petitioner had been referred to as promoted purely on ad hoc basis against a leave vacancy of the 3rd respondent. The petitioner, therefore, had a grievance that respondent Nos. 3 and 4 could not have been offered the permanent post while treating the petitioner himself as holding the post on *ad hoc* basis and gave a representation for reviewing

the decision by a letter dated 18th July, 1988. Reminder was given on 31st August, 1988 and an office order was issued on 17th November, 1988 in response to representations when the Chief Administrator, HUDA declared that the petitioner, who had been promoted only on purely *ad hoc* basis against vacancy reserved for Scheduled Caste, was liable to be reverted as Assistant Draftsman at any time without any prior notice. It is this office order dated 17th November, 1988, which is the subject of challenge in the writ petition. The petitioner would contend that with reference to the date of joining, the petitioner had joined on 31st July, 1978 whereas the respondent Nos. 3 and 4 joined on 8th August, 1978 and 25th July, 1978 respectively. He would further contend with reference to his seniority claims by referring to the fact that the petitioner had been promoted as Assistant Draftsman along with respondent Nos. 4 on 12th December, 1983 and has successfully completed the probation on 12th December, 1984 while the 3rd respondent was promoted as Assistant Draftsman on temporary basis only on 28th December, 1984.

(4) Subsequent to the writ petition, yet another person by name Gurinder Singh, who always being seen junior to the petitioner in the tentative seniority list was promoted to the regular post whereas the petitioner still was Junior Draftsman reserved for Scheduled Caste category since 1988. The petitioner's claim was that he was to be promoted to the regular post in preference to Gurinder Singh and therefore, he was also added as 5th respondent in the writ petition. Written statements have been filed by respondent Nos. 2, 3 and 4 while the 5th respondent has chosen to remain absent. It is the contention of the 2nd respondent that in the selection process while drawing up the merit list, the petitioner had been shown at Sr. No. 9 while the respondents No. 3 and 4 were respectively placed at Sr. Nos. 1 and 10. It had been decided to recruit candidates from Sr. No. 1 to 3 on regular basis while the rest were kept on *ad hoc* basis. They were issued with appointment letters accordingly. However, the services of the petitioner and the 4th respondent were regularized with retrospective effect subsequently. The 3rd respondent, who was a regular appointee and who had been placed higher in the order of merit was, therefore, required to be treated as senior to the petitioner. Irrespective of joining report, it is the order of appointment and the merit position, which were relevant for the purpose of fixing the seniority. It is admitted in the written statement of the 2nd respondent that the 4th respondent was junior

to the petitioner, while the 3rd respondent alone was senior to the petitioner. While further admitting the fact that the 3rd respondent had gone on leave without sanction and therefore, proceedings had been initiated against him, it is contended that the petitioner's own promotion was made only without prejudice to the departmental action against the 3rd respondent.

(5) Referring to the fact that the 3rd respondent had managed to obtain sanction for extraordinary leave for the period during which he had gone abroad, the 2nd respondent stated that the 3rd respondent had been charge-sheeted for a lapse on his part for taking leave without sanction but since only there was only a punishment of censure, he came by no adverse effect and in view of the fact that the 3rd respondent was senior to the petitioner by virtue of the fact that he had been appointed on regular basis and also placed higher in the order of merit and hence entitled to be considered for promotion ahead of the petitioner. The 4th respondent himself although junior to the petitioner was appointed against a post reserved for Backward Class while the petitioner was a General Category official, he had been promoted only against the leave vacancy of the 3rd respondent. The petitioner had been promoted with effect from 25th November, 1988 as Junior Draftsman on *ad hoc* basis against the post reserved for Scheduled Caste and was continuing as such.

(6) The 3rd respondent has also filed his written statement reiterating the fact that he was higher in the order of merit and the order of appointment against substantive vacancy on 25th July, 1978 ranked him above the petitioner, who was appointed only on *ad hoc* basis and was subsequently regularized. The date of joining itself ought not to have been the determining criterion for the determination of seniority. Referring to the fact that his own absence was subsequently regularized by granting him leave of the kind due and visited with the punishment of censure and consequently he was entitled to be considered for promotion while still retaining his seniority to the higher post. The 3rd respondent pointed out to the Haryana Service Class-III Department of Architecture Rules (adopted by the respondent-department also) where Rule 13 provides that the order of appointment alone would govern the issue of seniority irrespective of the date of joining. Rule 10 of the relevant rules provides that promotion to the post of Junior Draftsman shall be made on the basis of merit and suitability in all respects and the promotion from the post of Tracer to that

of Assistant Draftsman was made on the basis of merit and suitability and seniority itself is not the basis for such promotion. Even at the time when the petitioner was promoted in the year 1984, it was specifically provided that he was being offered promotion on *ad hoc* basis without prejudice to the claim of the 3rd respondent and this according to the 3rd respondent meant that he was treated as more meritorious.

(7) It is too well established that an *ad hoc* promotion does not create a vested right in a person to claim seniority to a person who is appointed subsequently but in a substantive vacancy for which he had better claims than the person, who had been appointed on *ad hoc* basis. Consequently, if the petitioner had been appointed on *ad hoc* basis without prejudice to the rightful claims of the 3rd respondent and when the 3rd respondent's absence was regularized and was offered promotion in the regular vacancy although subsequently, he ought to be treated as senior to the petitioner. The petitioner cannot have a grievance that by the only fact that he had completed his probation period in *ad hoc* service, he should still be retained as senior to the 3rd respondent. The claim of the petitioner against the 3rd respondent and for a request to be placed above the 3rd respondent does not, therefore, merit acceptance. As regards the claim of the petitioner against the 4th respondent, it is stated by the State that the 4th respondent although below the petitioner in the order of seniority, he was promoted to the next higher post against the Backward Class vacancy. The petitioner could retain his seniority position if he is subsequently promoted and catch up his seniority in the promoted post against the 4th respondent. This case comes about prior to the 85th amendment of the Constitution and therefore, it is unlikely that his seniority is lost to the reserved candidate by the only fact that a General Candidate obtains a promotion later to a reserved category candidate. The petitioner is, therefore, entitled to be placed higher in the order of seniority to the 4th respondent in the promotion post. As regards the petitioner's claim against the 5th respondent, we already noticed that the 5th respondent has not filed his written statement. In response to amended writ petition, the State has filed the written statement pointing out to the fact that the 5th respondent had been appointed as a Tracer,—*vide* order dated 7th December, 1981 and joined as such on 18th December, 1981. He was promoted as an Assistant Draftsman on 6th May, 1987 and therefore, placed below the petitioner in the seniority list. Written statement of the 2nd respondent to the amended

writ petition of the petitioner points out further to the fact that one Usha Kiran belonging to the Scheduled Caste category became eligible for promotion as Junior Draftsman on which the petitioner had been promoted on *ad hoc* basis on 25th November, 1988 and therefore, she was promoted as a Junior Draftsman against the reserved post on 9th February, 1995 and the petitioner, who belongs to General Category continued as Junior Draftsman on *ad hoc* basis against the post that became available on 9th February, 1995. Thereafter, when another post of Junior Draftsman became available for General Category, the 5th respondent who belonged to General Category was promoted as Junior Draftsman on 30th July, 1997. The tentative seniority list had been prepared on 14th January, 1999 when respondent Nos. 3 and 4 were shown as senior to the petitioner because they were promoted as Junior Draftsman on regular basis prior to the petitioner and the 5th respondent had been shown junior to the petitioner. It is stated by the 2nd respondent that after the representation of the petitioner and on going through the records, the *ad hoc* promotion of the petitioner to the Junior Draftsman was regularized with effect from 9th February, 1995 when the post of Junior Draftsman for General Category became available without prejudice to the contention raised in the writ petition by the petitioner. Respondents No. 3 and 4 have always been seniors to the petitioner as Assistant Draftsmen and also Junior Draftsmen and 4th respondent had been promoted along with 3rd respondent as Senior Draftsman on 25th October, 2000. This is again stated to be without prejudice to the finalization of seniority in the list of Junior Draftsmen subject to any decision in this writ petition viz., C.W.P. No. 1397 of 1989. The petitioner appears to have been promoted subsequently on 14th December, 2001 to the post of Senior Draftsman.

(8) From the time when the writ petition was filed, there have been several seniority lists prepared tentatively which have been stated to be subject to the decision in this writ petition. On analysis, we have seen that 3rd respondent is entitled to be treated as Senior and will always rank as such. As regards the petitioner's claim to seniority against 4th respondent, while the 4th respondent was entitled to a promotion against a reserved post for Backward Class, the petitioner on being promoted as Assistant Draftsman subsequently was entitled to catch up with the seniority at the promoted post by reference to a relative seniority in the lower cadre. It is contended on behalf of the respondents that the petition shall fail for

non-joinder of necessary parties. The petitioner had only a grievance against the 3rd respondent and 4th respondent and the presence of 4th respondent, who was junior to him and who according to the petitioner had been promoted earlier to the post of Assistant Draftsman was sufficient to justify his claim. The petition regarding non-joinder of necessary parties is, therefore, not tenable. Learned counsel appearing for the respondent also makes reference to a judgment of the Hon'ble Supreme Court in **Tejinder Singh Sandhu versus The State of Punjab and others (1)** that date of joining will not be relevant for determination of seniority and it is the order of appointment that will be relevant. We have already considered this issue with reference to the relevant Service Rules themselves to arrive at the same conclusion. Yet another objection by the respondent is that there is a delay in challenging the seniority. I do not think that there is any delay. The delay is explained by the fact that the petitioner could take notice about the seniority position and the seniority was affected only when the promotion to the post of Assistant Draftsman was treated as *ad hoc* when the respondent Nos. 3 and 4 were considered for promotion in the year 1988. The writ petition filed immediately after a representation is, therefore, within time. The reference to a judgment of the Hon'ble Supreme Court in **Y. Ramamohan and others versus Government of India and others (2)** to support his contention that the delay in approaching the Court on issues of seniority will disentitle the person, again therefore cannot apply. It is also contended by learned counsel appearing for the respondent that a disciplinary proceeding that does not result in any punishment cannot stand in the way of the rightful consideration for promotion by reference to a judgment of the Hon'ble Supreme Court in **Md. Habibul Haque versus Union of India and others (3)**. This is in reference to a situation that the 3rd respondent, who was merely censured for his long absence cannot suffer any disentitlement from consideration for promotion. We have come to the same conclusion already by reference to the fact that the 3rd respondent is entitled to be treated as Senior and the petitioner's claim against the 3rd respondent cannot be sustained. The date of earlier promotion against a reserved category will not entitle the 4th respondent to claim seniority over the petitioner. For the same reason, the 5th respondent also cannot obtain

(1) 1978(2) SLR 115

(2) 2004(4) RSJ 708

(3) 1994 SLR 152

seniority over the petitioner. The petitioner is entitled to refixation of seniority at the promotion post retaining the petitioner's seniority above both respondent Nos. 4 and 5.

(9) The writ petition is, therefore, partly allowed. The petitioner's claim for seniority above 3rd respondent is dismissed. The petitioner is entitled to have the seniority refixed to respondent Nos. 4 and 5 and will be treated as promoted to the higher post as Junior Draftsman from the post as Assistant Draftsman from the day when the 4th respondent was promoted with all consequential monetary benefits.

(10) The writ petition is disposed of on the above terms.
