

CASE NO.:
Appeal (civil) 5005-5006 of 2003

PETITIONER:
D.R. Yadav & Anr.

RESPONDENT:
Vs.
R.K. Singh & Anr.

DATE OF JUDGMENT: 18/07/2003

BENCH:
CJI. & S.B. Sinha.

JUDGMENT:

J U D G M E N T

(Arising out of S.L.P. (Civil) No.19788-19789/2002)

S.B. SINHA, J :

Leave granted.

Dispute of inter se seniority between the appellants and the respondent No. 1 is in question in this appeal which arises out of a judgment and order dated 23.5.2002 passed by a Division Bench of the High Court of Judicature at Allahabad, Lucknow Bench in Writ Petition No. 1780(S/B) of 2000 and Writ Petition No. 195(S/B) of 2001.

FACTUAL MATRIX:

The Legislature of the State of U.P. enacted U.P. Urban Planning & Development Act, 1973 (hereinafter referred as '1973 Act'). The said Act was enacted to provide for the development of certain areas of Uttar Pradesh according to the plan and for matters connected therewith and ancillary thereto.

By reason of Section 4 of the said Act an Authority to be called the Development Authority for any development area was constituted. Section 5 deals with the staff of the said authority. Sub-section (2) of Section 5 of 1973 Act contemplates that subject to such control and restrictions as may be determined by general or special orders of the State Government, the authority may appoint such number of other officers and employees as may be necessary for the efficient performance of its functioning. The reason for the said enactment inter alia is stated to be:

"In the developing areas of the State of Uttar Pradesh the problems of town planning and Urban development need to be tackled resolutely. The existing local bodies and other authorities in spite of their best efforts have not been able to cope with these problems to the desired extent. In order to bring about improvement in this situation, the State Government considered it advisable that in such developing areas, Development Authorities patterned on the Delhi Development Authority be established. As the State Government was of the view that the Urban development and planning work in the State had already been delayed it was felt necessary to provide for early establishment of

such authorities."

By reason of the provisions of the said Act, thus, other statutes governing the field relating to town planning and urban development remained suspended in terms of Sub-section (1) of Section 59 of the Act. Sub-Section (3) of Section 59 reads as under:

"On and from the constitution of the Development Authority in relation to a development area which includes the whole of a city as defined in the Uttar Pradesh Municipal Corporations Act, 1959, all posts borne on the establishment of the Municipal Corporation of that city exclusively in connection with its activities under Chapter XIV of the said Adhiniyam or under the Uttar Pradesh (Regulation of Building Operations) Act, 1958, immediately before the date of the constitution of the Development Authority, not being a post governed by the Uttar Pradesh Palika (Centralized) Services Rules, 1956 (hereinafter in this section referred to as the Centralized Services), shall, on and from such date, stand transferred to the Development Authority with such designations as the Authority may determine and officers and other employees who are not members of any Centralised Services, serving under the Municipal Corporation of that city not exceeding the number of posts so transferred shall be selected in accordance with such directions as may be issued by the State Government for being appointed on the said posts and on such selection shall stand transferred to and become officers and other employees of the Development Authority and shall as such hold office by the same tenure, at the same remuneration and on the same terms and conditions of service as they would have held the same if the Authority had not been constituted, and shall continue to do so unless and until such tenure, remuneration and terms and conditions are duly altered by the Authority.

Provided that any service rendered under the Municipal Corporation by any such officer or other employee before the constitution of the Authority shall be deemed to be service rendered under the Authority.

Provided further that the Authority may employ any such officer or other employee in the discharge of such functions under this Act as it may think proper, and every such officer or other employee shall discharge those functions accordingly."

In terms of Section 4 of the said Act, Lucknow Development Authority was constituted on 13.09.1974 whereupon all posts borne on the development wing of the other local bodies like Nagar Mahapalika or Municipal Corporation etc. stood transferred thereto.

Pursuant to or in furtherance of applications having been invited to fill up the posts of Assistant Engineer (C), the appellants applied therefor and were subsequently appointed. Appellant No. 1 joined the post of Assistant Engineer (C) on 9.11.1978, whereas the Appellant No. 2 joined his post on

12.07.1979. Respondent No. 1, however, was admittedly appointed on or about 12.10.1976.

The State Government thereafter created Development Authorities Centralised Service with effect from 22.10.1984 by inserting Section 5-A therein. In terms of Sub-Section (2) of Section 5-A, a person serving on the posts included in such service immediately before such creation shall finally or provisionally be absorbed in the Development Authorities Centralised Service if he was confirmed in his post or if he was holding temporary or officiating appointment, as the case may be. The appellants were absorbed in the posts of Assistant Engineer.

It is not in dispute that Respondent No. 1 was provisionally promoted to the Post of Assistant Engineer on purely reference basis by an Office Memorandum dated 3rd May, 1986. Appellants were said to have been promoted to the post of Assistant Executive Engineer on purely ad hoc basis in terms of Office Memorandums dated 3rd May, 1986 and 31st January, 1987. The appellants as also Respondent No. 1 were finally absorbed in the Centralised Service on the post of Assistant Engineers by an Office Memorandum issued on 14 May, 1987.

The State Government issued a seniority list in terms of Office Memorandum dated 12th April, 1996. The said seniority list was the subject matter of Writ Petition filed by Respondent No. 1. In the meantime, Appellant No. 1 was promoted to the Post of Chief Engineer resulting in filing of second Writ Petition before the Lucknow Bench of Allahabad High Court by the Respondent No. 1. However, during pendency of the said Writ Petition, the order of promotion of Appellant No. 1 was rescinded on 29.11.2001. Several applications thereafter were filed before the State Public Services Tribunal questioning the said seniority list and the promotion to the Posts of Executive Engineer and Chief Engineer. The Tribunal allowed the said applications whereagainst the State of Uttar Pradesh preferred several writ applications. The writ petitions together with the writ applications pending before it were taken up for hearing by the High Court and by reason of the impugned judgment dated 23.05.2002 it was held as follows:

"Having examined the materials on record and the submissions made by the parties and in the light of various decisions of the Supreme Court referred hereinabove, we find no infirmity in the impugned judgment of the Tribunal and the Tribunal has not erred in directing the State Government to determine the seniority of the claimants and to grant promotions with effect from the date their juniors have been so promoted.

Therefore, while affirming the judgments of the Tribunal, we direct that in the light of the decision of the Apex Court in the case of Mohan Karan's case, the seniority in the cadre of Junior Engineers, Assistant Engineers and Chief Engineers shall be counted from the date of initial appointment and the members of the Centralised Service who had rendered service in other departments on similar/ equivalent posts, shall be decided in the light of the decisions of the Supreme Court and the observations made hereinabove. The State Government shall make endeavour to comply directions of the Tribunal with respect to fixing of seniority and promotion of the claimant within three months."

It is not in dispute that two different rules relating to determination of

seniority were operating in the field; one being a general rule known as 'The Uttar Pradesh Government Servants Seniority Rules, 1991'; the other being the special rules known as 'U.P. Development Authorities Centralised Service Rules, 1985' framed by the State of Uttar Pradesh in exercise of its powers conferred under Section 55 of the Uttar Pradesh Urban Planning and Development Act, 1973 read with Section 5-A thereof.

RELEVANT STATUTORY PROVISIONS:

The relevant rules of U.P. Development Authorities Centralised Service Rules, 1985 which are material for the purpose of this case read as under:

"PART II

CADRE AND STRENGTH

3. (1) There shall be the following categories of the posts in the cadre of the service and they shall consist of the posts mentioned against them

Service

Posts included in the service

Scales of Pay

in Rs

1

2

3

I to III

Omitted

IV. Town

Planning &

Architectural

1. Mukhya Nagar Niyojak

1780-2300

2. Nagar Niyojak

1250-2050

3. Sahayak Nagar Niyojak

850-1720

4. Vastuvid/Statistical

Assistant

570-1100

5 to 10 Omitted

V to VIII

Omitted

Note. - The undernoted posts, as specified above, shall include the post or posts mentioned against them as also the posts carrying identical scales of pay in the same or equivalent cadre.

Post

Post(s) included

(1) to (8)

Omitted

(9) Mukhya Nagar Niyojak

Vastuvid Niyojak

(10) Sahayak Nagar Niyojak

Vastuvid (Rs. 850-1720)/Sahayak

Vastuvid/Landscape

Vastuvid/

Vastuvid Niyojak/Research Officer.

(11) to (22)

Omitted

Note. - (2) The post or posts specified above but not existing in any Development Authority on the date of enforcement of these rules, shall not mean to have been created or come into existence by virtue of the provisions of this rule.

7. (1) Notwithstanding anything in Rule 28 the seniority of such officers and other employees who are finally absorbed in the service under sub-section (2) of Section 5-A of the Act shall be determined on the criterion of continuous length of service including the services rendered in a Development Authority, Nagar Mahapalika, Nagarpalika or Improvement Trust on similar posts.

21. Procedure for recruitment by promotion: Recruitment by promotion shall be made on the basis of seniority subject to the rejection unfit (in accordance with the Uttar Pradesh Promotion by selection in Consultation with Public Service Commission (Procedure) Rules, 1970 as amended from time to time.

28. (1) Except as hereinafter provided, the seniority of persons in any category of post, shall be determined from the date of order of appointment and if two or more persons are appointed together, by the order in which their names are arranged in the appointment order : Provided that if more than one order of appointment are issued in respect of any one selection the seniority shall be as mentioned in the combined order of appointment issued under sub-rule (3) of Rule 25.

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(3) The seniority inter se of persons appointed by promotion shall be the same as it was in the cadre from which they were promoted.

The relevant provisions of Uttar Pradesh Government Servants Seniority Rules, 1991 read as under:

"2. These Rules shall apply to all government servants in respect of whose recruitment and conditions of service, rules may be or have been made by the Governor under the proviso to Article 309 of the Constitution.

3. These Rules shall have effect notwithstanding anything to the contrary contained in any other service rules made heretofore.

4. In these Rules, unless there is anything repugnant in the subject or context, the expression

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(f) 'service' means the service in which the seniority of the member of the service has to be determined;

(g) 'service rules' means the Rules made under the proviso to Article 309 of the Constitution, and where there are no such rules, the executive

instructions issued by the Government regulating the recruitment and conditions of service of persons appointed to the relevant service;

6. Where according to the service rules, appointments are to be made only by promotion from a single feeding cadre, the seniority inter se of persons so appointed shall be the same as it was in the feeding cadre."

PRIMAL QUESTION:

The dispute between the parties before the High Court as stated in the impugned judgment is as under:

"The crux of the matter in these petitions is fixation of seniority and consequential promotions. As mentioned earlier with effect from 12.6.1973 the Uttar Pradesh Planning and Development Ordinance, 1973 was promulgated for the purpose of creating various development authorities in Uttar Pradesh. The said ordinance later on became the Act (U.P. Act No. 11 of 1973) which came into existence on 7.11.1973. In pursuance of the said ordinance and Act, various development authorities were created through notification issued in exercise of the powers under Section 4 of the said Act of 1973. In the development authorities, initially besides other staff, Junior Engineers and Assistant Engineers were appointed by the concerned authorities of respective development authorities. Thereafter, some Junior Engineers were promoted to the post of Assistant Engineer in 50% promotion quota and some Assistant Engineers were promoted to the post of Executive Engineer."

SUBMISSIONS:

Mr. Rakesh Dwivedi, learned senior counsel appearing on behalf of the appellants raised a short question in this appeal. The submission of learned counsel is that the High Court went wrong in applying the 1991 rules relying on or on the basis of decision of this Court in Mohan Karan (supra) without effectively considering the provisions of Article 309 of Constitution of India. It clearly stipulates that in terms of proviso appended thereto the Governor can frame a rule so long as the State or the concerned statutory authorities do not make any provisions laying down the conditions of service by or under a statutory enactment. In other words, once a Legislation has come into being and rules have been framed thereunder governing the field, the general rules made by the Governor in terms of proviso appended to Article 309 of the Constitution of India must give way to the special rules framed under the statute. Thus, when there exist Special Rules, General Rules cannot be applied. Strong reliance in this behalf has been placed on Chandra Prakash Tiwari and Others Vs. Shakuntala Shukla and Others [(2002) 6 SCC 127].

The learned counsel would further submit that the decision of this Court in Mohan Karan (supra) does not lay down a good law.

Mr. Dwivedi would urge that as the appellants were absorbed in the centralised services, their seniority shall be determined in terms of Rule 7 of the 1985 Rules. He would in this connection lay emphasis on the words 'on similar posts' occurring in Rule 7.

Mr. Harish Salve, the learned Senior Counsel, on the other hand, would submit that assuming that the special rule shall apply in the instant

case; the same would be of not much relevance as the seniority has to be determined in terms of Sub-Rule (1) of Rule 7 of 1985 Rules on the criteria of continuous length of service including the service rendered in a Development Authority, Nagar Mahapalika, Nagarpalika or Improvement Trust on similar posts, and as the manner for determination of continuous length of service is not provided in the said sub-rule, the general rule must be taken recourse to for the said purpose. In this connection our attention has been drawn to the cadre of Service contained in Rule 3 of the 1985 Rules.

FINDINGS

It appears that having regard to the absorption of the employees from different authorities in the Centralised Service on 22.10.1984, according to the High Court, some sort of chaos was created amongst the members of the Service. The High Court relying on or on the basis of a Division Bench decision of this Court in Mohan Karan's case (supra) held that the provisions of the Rules 1991 shall apply for the purpose of determination of inter se seniority. Therein it was held:

14. We have already extracted Rule 6 of these Rules, which relates to seniority where the appointments are by promotion only from a single feeding cadre. But for Rule 3 above mentioned, we would have accepted the contentions of learned counsel for the appellant and upset the judgment of the High Court. Rule 3, in our view, overrides all other rules made earlier in other services in the State, whereas Rule 7 of the Centralised Services Rules has the overriding effect against Rule 28 of those Rules only. Further, the title of 1991 Rules clearly suggests that the seniority among the government servants in U.P. should be fixed in the light of these Rules. Therefore, we are inclined to hold that Rule 6 of the U.P. Government Servants' Seniority Rules, 1991 cannot be ignored as it has overriding effect on Rule 7 of the Centralised Services Rules.

The 1991 Rules were framed by the Governor of Uttar Pradesh in exercise of his power conferred under the proviso appended to Article 309 of the Constitution of India. The Proviso appended to Article 309 of the Constitution reads thus:

"Provided that it shall be competent for the President or such person as he may direct in the case of services and posts in connection with the affairs of the Union, and for the Governor of a State or such person as he may direct in the case of services and posts in connection with the affairs of the State, to make rules regulating the recruitment, and the conditions of service of persons appointed, to such services and posts until provision in that behalf is made by or under an Act of the appropriate Legislature under this article, and any rules so made shall have effect subject to the provisions of any such Act."

On a plain reading of the said provision, there cannot be any doubt whatsoever that rules framed thereunder would apply so long as a statute or statutory rules or any other subordinate legislation governing the conditions of service are not enacted or made or not otherwise operating in the field. In other words, rules made under proviso to Article 309 of the Constitution are for a transitory period and the same would give way to the special rules once framed. However, if a statute or rules made thereunder was/were already

operating in the field, the general rules made under proviso to Article 309 would not apply to the Services created thereunder.

The submission of Mr. Dwivedi to the aforementioned extent appears to be correct.

In the event two conflicting rules are operating in the same field, the doctrine of *generalalia specialibus non derogant* shall apply. It was so held in Chandra Prakash Tiwari (*supra*).

But the question which arises for consideration in these appeals does not solely depend on the applicability of the general rules vis-à-vis the special rules.

It is true that the appellants were sought to be promoted to the Posts of Assistant Executive Engineer. The said posts, however, were not available. They were, therefore, absorbed ultimately in the posts of Assistant Engineer. The State of U.P. in its counter affidavit stated:

"It is stated that petitioner No. 1 was promoted on temporary basis by Lucknow Development Authority till further orders on the post of Assistant Executive Engineer. It is relevant to mention that on 22.10.1984, the petitioners were working on the post of Assistant Executive Engineer. Upon creation of the U.P. Development Authorities Centralised Service, since there was no post of Assistant Executive Engineer in the said service, hence the petitioners were absorbed on the post of Assistant Engineer in the service."

What was, therefore, relevant for the purpose of determination of seniority even in terms of Rule 7 of the 1985 Rules, was the continuous service rendered by the concerned employees 'on similar posts', which would mean posts which were available having been legally created or borne on the cadre.

The ad hoc or temporary promotion granted to the appellants on 03.05.1986 and 13.01.1987 respectively on non-existent posts of Assistant Executive Engineer would not, therefore, confer any right of seniority on them. Thus, for all intent and purport for the purpose of determination of seniority, the appellants were not promoted at all. Once they have been absorbed with Respondent No. 1 and other employees similarly situated, their inter se seniority would be governed by the statutory rules operating in the field. The case of the appellants vis-à-vis Respondent No. 2 although may be governed by the special rules, in terms of Rule 7, the same has to be determined on the criteria of continuous length of service including the service rendered in a Development Authority, Nagar Mahapalika, Nagarpalika or Improvement Trust on similar posts. The appellants, it will bear repetition to state, although were promoted at one point of time on purely ad hoc basis to the posts of Assistant Executive Engineer as the said posts even in their parent authority were not of similar type, the same would not be relevant for the purpose of determining the inter se seniority. If the rule of continuous service in same and similar posts is to be resorted to, the date of initial appointment would be a relevant criteria therefor. [See *M. Ramachandran Vs. Govind Ballabh and others* [(1999) 8 SCC 592], *K. Anjaiah and Others Vs. K. Chandraiha and others* [(1998) 3 SCC 218], *Vinod Kumar Sharma Vs State of U.P. and Another* [(2001) 4 SCC 675], *S.N. Dhingra and others Vs. Union of India and others* [(2001) 3 SCC 125].

In a recent decision in *Kaushal Kishore Singh Vs. Dy. Director of Education and others* [(2002 AIR SCW 19)], this Court held:

"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 other Grade or Cadre."

As the post of Assistant Executive Engineer was not a cadre Post, the appellants cannot be said to have been working on a higher post for the purpose of Rule 7 of the 1985 Rules.

Yet again in Md. Israils and others Vs. State of West Bengal and others (2002 AIR SCW 68), it was held:

"The corollary of the above Rule is, where the initial appointment is only adhoc and not according to the rules and made as a stop-gap arrangement, the officiation in such post cannot be taken into account for considering the seniority."

CONCLUSION:

In view of our findings aforementioned, we have no other alternative but to uphold the order of the High Court, albeit for different reasons. Accordingly, the Appeals are dismissed. The parties shall pay and bear their own costs in these appeals.

In view of aforementioned, it is not necessary to pass any separate order on the Interlocutory Applications.