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Court : Allahabad

Decided On : Jan-03-2011

Judge : Sudhir Agarwal, J.

Appeal No. : Civil Misc. Writ Petition No. 41701 of 2008

Appellant : Pankaj Kumar

Respondent : State of U.P. and Others

Advocate for Pet/Ap. : Sri. Naredra Pratat Singh. Learned

Judgement :

1. The petitioner, Pankaj Kumar, working as a Food Inspector, has come to this Court under Article 226 of the Constitution of India aggrieved by the seniority list dated 17.06.2008 (Annexure-1 to the writ petition) issued by the State Government determining inter se seniority of Chief Food Inspectors/Food Inspectors in accordance with U.P. Government Servant Seniority Rules, 1991 (hereinafter referred to as the "Seniority Rules, 1991") read with U.P. Food Inspector (Medical Health and Family Welfare Department) Service Rules, 1992 (hereinafter referred to as the "Food Inspectors Service Rules, 1992") wherein the petitioner has been shown at Serial No. 216. He has also challenged the promotion letter dated 19.04.2010 (Annexure-19 to the writ petition) whereby promotions from the post of Food Inspectors to the post of Chief Food Inspector have been made. A perusal of the aforesaid order shows that 51 persons have been promoted to the posts of

Chief Food Inspector in the scale of Rs. 9300-34800.

2. The facts, in brief, giving rise to the present dispute are as under.

3. The necessity of appointing Food Inspectors said to have arisen by virtue of Section 9 of Prevention of Food Adulteration Act, 1954 (hereinafter referred to as the "1954 Act") which empowers the Central Government or the State Government to appoint such persons as it thinks fit having prescribed qualification to be the "Food Inspector" for such local arias as may be assigned to them by the concerned Government. The Food Inspectors, so appointed are assigned several duties under the provisions of 1954 Act and the rules framed thereunder.

4. Till 1992 no separate rules governing recruitment and conditions of service of Food Inspectors were framed. It was governed by the general rules applicable to the Government employees of equivalent rank and status. For the first time, the statutory rules namely, Food Inspectors Service Rules, 1992 were framed and published in the gazette dated 24.04.1993. The service consists of Food Inspectors, Medical Health and Family Welfare Department. It has two cadres namely, Food Inspector and Chief Food Inspector. Source of recruitment for the post of Food Inspector is 100% by direct recruitment through U.P. Subordinate Services Selection Commission (hereinafter referred to as the "Commission"). The post of Chief Food Inspector is to be filled in by promotion from amongst substantively appointed Food Inspectors. The criteria for promotion is seniority subject to rejection of unfit through a selection committee constituted as per "U.P. Constitution of Departmental Promotion Committee for Post Outside the Purview of Service Commission Rules, 1992".

5. In 1996, Commission advertised certain posts of Food Inspectors for direct recruitment. 506 candidates were declared successful. The petitioner is said to be at Serial No. 174 in the merit list of general candidates published by the Commission. Consequent to the aforesaid selection, appointment letters were issued to the petitioner and others on 09.11.1998. The petitioner joined on the post of Food Inspector on 18.11.1998 in District Badaun. Vide order dated 15.06.2005 the petitioner and a number of Food Inspectors were confirmed.

6. It is said that the letter of appointment issued to petitioner and other selected candidates require them to join by 10.12.1998 failing which their candidature was likely to be cancelled treating as if they are unwilling to join on the post of Food Inspector. Para 8 of the appointment letter also states that the seniority of selected candidates shall be determined later on according to the merit list received from the Commission. The appointments were made on a probation of two years and subject to result of Writ Petition No. 1663 of 1983, U.P. Health Inspectors Association v. State of U.P., Writ Petition No. 9809 of 1997, Dhanesh Dube v. State of U.P. and Writ Petition No. 27853 of 1997, Om Prakash Singh v. State of U.P. and others.

7. Some of the candidates, it is said, did not join within the time prescribed in the letters of appointment dated 09.11.1998, i.e., by 10.12.1998. One Narendra Pratap Singh who was selected alongwith petitioner and was issued letter of appointment on 09.11.1998 posting him in District Badaun was later on appointed vide order dated 29.07.2005. A copy of said order has been placed on record as Annexure-8 to the writ petition. It shows that Narendra Pratap Singh made a representation on 02.01.2004 stating that he did not receive any letter of appointment hence could not join. His request for appointment was accepted by the Government and non-joining was treated for valid reasons. Hence the letter of appointment was issued again on 29.07.2005.

8. Some more Food Inspectors, including respondent no. 5 confirmed vide order dated 25.07.2007 (Annexure-9 to the writ petition). It shows that 82 Food Inspectors appointed in 1998 and onwards, pursuant to the same selection of 1998 in which the petitioner was selected, were confirmed from various dates commencing from the year 2000 and onwards. The petitioner has said in para 29 of the writ petition about the confirmation of Narendra Pratap Singh but the said order dated 20.07.2007 in fact does not contain name of Sri Narendra Pratap Singh.

9. During the course of arguments learned counsel for petitioner, however, referred the name of Jay Pratap Singh, respondent no. 5, mentioned at serial No. 80 in the confirmation letter showing his date of appointment as 01.07.2003 and

date of confirmation as 01.07.2005. Another order of confirmation of five persons dated 14.07.2008 is on page 117 of the writ petition confirming Sri Jawahar Lal, Sri Ratnakar Pandey, Sri Rakesh Kumar Shukla, Sri Swami Nath and Sri Manoj Kumar Tomar w.e.f. various dates in 2000 and 2001 respectively.

10. It appears that a tentative seniority list of Food Inspectors/Chief Food Inspectors was published on 18.05.2000. The same having not been finalised, Writ Petition No. 5817(SS) of 2006, Sunil Kumar and others v. State of U.P. and others was filed in Lucknow Bench of this Court. Vide order dated 10.07.2006 the Court directed the respondents to finalise the seniority list of Food Inspectors of 1998 batch. Consequently a fresh tentative seniority list was published on 26.02.2007. It mentions that since the Commission did not forward any composite seniority list of various categories, namely, general, other backward class, scheduled caste and scheduled tribe hence for the purpose of seniority list the general candidates have been placed at top, whereafter Other Backward Class and the Scheduled Castes candidates were placed. No representation against the tentative seniority list was made by the petitioner. The inter se seniority of 1998 batch given in the tentative seniority list thus was treated final. Some individual representations were considered and disposed of regarding correction of names, date of birth etc. A final seniority list was consequently published on 14.09.2007 (Annexure-11 to the writ petition). The name of petitioner in the aforesaid seniority list was shown at serial No. 234 while the respondents no. 5 and 6 were shown at serial No. 124 and 129 respectively.

11. Later on amendment was made in respect to reserve category candidates by inserting Rule 8A in the Seniority Rules, 1991 vide U.P. Government Servant Seniority (3rd Amendment) Rules, 2007 (hereinafter referred to as the "3rd Amendment, 2007"). In order to give effect thereto, a tentative seniority list in continuation of earlier final seniority list dated 14.09.2007 was issued on 15.04.2008. After receiving some objections raised therein, the final seniority list was published on 17.06.2008. No objection this time also was made by the petitioner. A comparison of seniority list dated 14.09.2007 and 17.06.2008 would show that about 13 candidates, above the petitioner's name, who retired by 17.06.2008, did not find mention in the later seniority list which obviously resulted

in upward movement of petitioner in the later seniority list. So far as inter-se seniority of petitioner and respondents no. 5 and 6 is concerned it remain unchanged. The respondent no. 5 is at Serial No. 108 and respondent no. 6 is at Serial No. 113 in the seniority list dated 17.06.2008.

12. The petitioner claims that out of 506 candidates selected in 1998 for the post of Food Inspector, only 353 joined till the date of filing of the writ petition. He further states that the seniority list dated 14.09.2007 was a tentative seniority list and was not circulated (served) upon the concerned officials including the petitioner.

13. There are certain other facts pleaded in the writ petition relating to the matter of promotion to the post of Chief Food Inspector but during the course of arguments, learned counsel for the petitioner has confined his submissions only on the question of correctness of seniority list dated 17.06.2008 and has not said anything about the matter of promotion hence I do not find it necessary either to refer pleadings in this regard or to consider validity of promotion list dated 19.04.2010.

14. Three counter affidavits have been filed on behalf of respondents. The respondents no. 1 to 4 have filed counter affidavit through learned Standing Counsel and is sworn by Dr. P.K. Sinha, the then Chief Medical Officer, Allahabad. The respondents no. 5 and 6 have filed separate counter affidavits and are represented by Sri K.C. Shukla and Sri D.S. Srivastava, Advocates, respectively.

15. The official respondents, i.e., respondents no. 1 to 4 have said that seniority list has been prepared in accordance with the Rules, i.e., Rule 5 of Seniority Rules, 1991. Some of the candidates who were allowed to join later, on showing valid grounds, have been allowed to retain seniority after the appointing authority got satisfied about the validity of reasons of late joining as provided in proviso to Rule 5 of Seniority Rules, 1991. It is also stated that against tentative seniority list circulated to all the concerned persons including the petitioner, no objection was received from the petitioner and thereafter the seniority list was finalised. It is also said that seniority list was finalised in 2007 so far as the petitioner's seniority qua respondents no. 5 and 6 was concerned. The same neither was objected nor

challenged by petitioner, hence he has no occasion to challenge later seniority list dated 17.06.2008 which is only consequential and in order to comply Rule 8A of Seniority Rules, 1991 as inserted by 3rd Amendment Rule of 2007.

16. The respondent no. 5 in para 7 of counter affidavit has stated that he was at Serial No. 17 in the appointment letter dated 09.11.1998 and joined his duties on 05.12.1998. His merit position was also 17 in the general category candidates' list. A charge certificate showing his joining in the office of Chief Medical Officer, Etah dated 05.12.1998 has been filed as Annexure-CA-2 to the counter affidavit. He has also filed a photocopy of his service book showing his joining on 05.12.1998. He has also raised a preliminary objection that against the seniority list the petitioner has a statutory alternative remedy of approaching Tribunal under Section 4 of U.P. Public Service Tribunal Act, hence the writ petition deserved to be dismissed on this score.

17. The respondent no. 6 in para 4 of his counter affidavit has said that he was at Serial No. 24 in the merit list and joined on 04.12.1998 in the office of Chief Medical Officer, Khiri. He has said that his seniority has rightly been assigned over the petitioner and he is also rightly promoted as Chief Food Inspector being senior to petitioner.

18. Learned counsel for the petitioner while assailing the seniority list dated 17.06.2008 contended that it ought not to have been prepared on the basis of the merit list prepared by the Commission but from the "date of joining". He drew my attention to the order of confirmation showing the date of appointment of respondent no. 5 as 01.07.2003 and submitted that respondent no. 5 having joined after almost four and half years could not have been placed above the petitioner. No other discrepancy or error he could point out in the impugned seniority list except of his bare submission that the seniority ought to have been determined on the basis of date of joining and not the merit list. In this regard he placed reliance on a five Judges Full Bench decision of this Court in K.N. Singh v. State of U.P. and others, 1999(1) ESC 851.

19. Learned Standing Counsel on the contrary raised certain preliminary objections about the maintainability of writ petition besides making submissions on

merits. It is contended that seniority of petitioner qua respondents no. 5 and 6 was already determined finally on 14.09.2007. The same having not been challenged, the writ petition is liable to be dismissed since the subsequent seniority list is nothing but a consequential updating in view of later amendment in Rule 8A of Seniority Rules, 1991 but it does not affect seniority of petitioner qua respondents no. 5 and 6 in any manner. He further submits that the persons whose promotion is under challenge are not party to the writ petition, hence the relief sought against promotion list cannot be granted. He contends that persons with whom the petitioner feels aggrieved, whose names have been mentioned in para 29 of the writ petition are not party to the writ petition, and in their absence their seniority or promotion cannot be affected otherwise. For this reason also the writ petition is liable to be dismissed. On merits he submitted that admittedly the seniority has been determined in accordance with Rule 5 of Seniority Rules, 1991. The validity of Rule 5 is not under challenge. In the circumstances, the contention of petitioner that seniority ought to have been determined from date of joining, which is not the reckoning point of seniority provided in the rules, cannot be accepted.

20. Sri K.C. Shukla, Advocate adopting the argument of learned Standing Counsel stated that the date of appointment mentioned in the confirmation order in regard to respondent no. 5 appears to be some typographical error. He has placed on record the charge certificate as also photocopy of his service book which could not be controverted by petitioner by placing any relevant material on record, hence no valid objection can be taken regarding his seniority qua petitioner.

21. Having heard learned counsel for the parties and perusing the record I have no hesitation in observing that this writ petition is thoroughly misconceived and ill-advised.

22. The petitioner has claimed that the seniority list dated 14.09.2007 was tentative and not circulated hence he could not file his objections. However, a perusal of seniority list dated 14.09.2007 makes it clear that it is a final seniority list and had been published in furtherance of earlier tentative seniority lists dated 18.05.2000 and 26.02.2007. The petitioner has nowhere stated that the tentative seniority list dated 18.05.2000 or 26.02.2007 were never circulated or served upon

him. It is also not his case that he filed any objection against the earlier tentative seniority lists. The seniority, therefore, having been determined finally on 14.09.2007 and the same having not been challenged by petitioner, either within a reasonable time after issuance of the said list or even in the present writ petition, this Court finds no occasion for petitioner to challenge the subsequent seniority list which is in substance nothing but a reiteration of the earlier seniority list. The only difference it has made is certain updating and corrections in the light of the Rule 8A of Seniority Rules, 1991 (vide 3rd Amendment of 2007). This amendment does not affect the petitioner's seniority qua respondents no. 5 and 6.

23. Next obstruction in the way of petitioner is non impleadment of necessary parties. In para 29 of the writ petition the petitioner has mentioned names of 16 persons including the respondent no. 5. No person except respondent no. 5 has been impleaded. In case the petitioner's submission that the persons whose names are mentioned in para 29 of the writ petition since joined late, i.e., after the joining of petitioner, or the date prescribed in appointment letter and hence ought to be placed below petitioner, it was incumbent upon him to implead all those persons. They are necessary parties since any order passed as desired by petitioner against these 15 persons would obviously be adverse to them and in their absence no such adverse order can be passed. So far as respondent no. 5 is concerned, he has already shown to have joined in December, 1998. The two documents, namely, his charge certificate and photocopy of the service book could not have been controverted by petitioner by placing relevant material on record. In the circumstances, regarding the date of joining of respondent no. 5, this Court has no reason to discard the material placed on record by him and hold that he having joined on the post of Food Inspector on 05.12.1998 cannot be said to have joined in 2003 and if there is some discrepancy in the letter of confirmation that would not make no difference in seniority.

24. It is also admitted that validity of rule laying down the principle of determining seniority is not under challenge. Food Inspectors Service Rules, 1992 provides the manner in which seniority is to be determined vide Rule 20, which reads as under:

"20. Seniority:-The seniority of persons substantively appointed in any category of posts shall be determined in accordance with the Uttar Pradesh Government Servants Seniority Rules, 1991, as amended from time to time."

25. This Rule 20 takes us to Seniority Rules, 1991. Rule 5 of Seniority Rules, 1991 which is admittedly applicable in the case in hand, reads as under:

"5. Seniority where appointments by direct recruitment only.--Where according to the service rules appointments are to be made only by the Direct recruitment the seniority inter se of the persons appointed on the result of anyone selection, shall be the same as it is shown in the merit list prepared by the Commission or the Committee, as the case may be:

Provided that a candidiate 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:

Provided further that the persons appointed on the result of a subsequent selection shall be junior to the persons appointed on the result of a previous selection.

Explanation--Where in the same year separate selections for regular and emergency recruitment are made, the selection for regular recruitment shall be deemed to be the previous selection."

26. At this stage, Rule 8A as was inserted by 3rd Amendment Rules, 2007 may also be reproduced as under:

"8A. Entitlement of consequential seniority to a person belonging to Scheduled Castes or Scheduled Tribes.--Notwithstanding anything contained in Rules, 6, 7 or 8 of these rules, a persons belonging to

the Scheduled castes or Scheduled Tribes shall, on his promotion by virtue of rules of reservation/roster, be entitled to consequential seniority also."

27. Rule 8A, therefore, would have been relevant in the seniority list in dispute so far as it relates to determining seniority of Chief Food Inspectors. Since the post of Food Inspector is 100% by direct recruitment it is governed by Rule 5 only which provides principle for seniority, the order of selection, i.e., the merit list prepared by the Commission. It also says that if a person fails to join without valid reason, when vacancy is offered to him, only then he may loose his seniority, and not otherwise. In this regard decision of appointing authority as to the validity of reasons shall be final.

28. It is not the case of petitioner that seniority list of Food Inspectors has not been prepared according to the order of merit prepared by the Commission. On this aspect the petitioner has no grievance at all.

29. His sheet anchor is the decision of this Court in K.N. Singh (supra) which provides seniority from the "date of joining" in respect to direct recruits. In this regard learned counsel for the petitioner placed reliance on para 10 of the judgment, relevant extract whereof is as under:

". . . . and the Supreme Court further held that for determining the seniority of the direct recruits the only date for consideration was the date of joining the service."

30. I am constrained to observe that reference and reliance on the aforesaid judgment is thoroughly misconceived. Learned counsel for the petitioner without looking into the relevant service rules and the matter which was considered by the Court, in a blindfold manner has placed reliance on certain observations which are nothing but reiteration of the relevant service rules applicable in that case. This writ petition appears to have been filed only on the basis thereof and this itself is a sufficient reason for dismissal of the present writ petition. K.N. Singh (supra) was a decision relating to the dispute of seniority in U.P. Higher Judicial Service. It is

admitted that U.P. Higher Judicial Service is governed by separate set of rules namely, U.P. Higher Judicial Service Rules, 1975. Rule 26 thereof lays down the principle of seniority in U.P. Higher Judicial Service, and that which came up for consideration before this Court in K.N. Singh (supra), reads as under:

> **"26. Seniority--(1) Except as provided in sub-rule (2), seniority of members of the service shall be determined as follows:**
>
> **(a) Seniority of the officers promoted from the Nyayik Sewa vis-a-vis the officers recruited from the Bar shall be determined from the date of continuous officiation in the service in the case of promoted officers and from the date of their joining the service in the case of direct recruits. Where the date of continuous officiation in the case of an officers promoted from the Nyayik Sewa and the date of joining the service in the case of a direct recruit is the same, the promoted officer shall be treated as senior;**
>
> **Provided that in the case of promoted officer the maximum period of continuous officiation in the service shall not, for the purpose of determining seniority exceed three years immediately preceding the date of confirmation."**

31. Since Rule 26 itself provides different reckoning point of seniority for promotees and direct recruits in U.P. Higher Judicial Services, the Apex Court considered the aforesaid provision in O.P. Garg and others v. State of U.P. and others, AIR 1991 SC 1202 and held that seniority of promotees shall be determined from the date of continuous officiation against the vacancy in their quota while seniority of direct recruits would be determined from the date of their joining service and none else. This was only a reiteration of what was provided in Rule 26(2) as it stood at that time which was up for consideration before Apex Court in O.P. Garg (supra). Same was followed by this Court in K.N. Singh (supra).

32. A judgment in the matter of seniority based on a precise and specific service rule applicable to the particular service cannot be relied on or made a foundation for advancing arguments in respect to a different service governed by different set of service rules having different principles for determination of seniority. Rule 26 of U.P. Higher Judicial Service Rules 1975 was totally differently worded than Rule 5 of Seniority Rules, 1991 which is applicable in the present case. Therefore decision in K.N. Singh (supra) involving a different set of service rule and different service, relied on by learned counsel for the petitioner is wholly inapplicable. That would not carry his case further to support him at all.

33. Various decisions in matter of seniority, relating to different services and different service rules, cannot be relied on interchangeably unless it is shown that the rules are pari materia in all respects, bereft of relevant facts. The five Judges Bench of this Court in K.N. Singh (supra) has also led stress on this aspect, in para 9 of the judgement, which reads as under:

> **"The learned counsel no doubt made reference to various case-laws on the question of inter se seniority between promotee officers and directly recruited officers in different service. All these cases dealt with the particular rules applicable to the service in question in those cases and the Courts had given interpretations of those Rules. . . . . "**

34. It is thus evident that question of applying date of joining for the purpose of seniority in the present case does not arise. Even otherwise, normally the date of joining bereft of natural expediency and contingencies has never been accepted as a valid reckoning point of seniority. I take up an illustration in this regard though there may be many of such kind. Appointment letters are issued at Lucknow appointing 100 candidates throughout the State. It may happen that all the individual letters are dispatched by the office concerned on the same date or it may take two or more days. The candidates residing in the nearby area of Lucknow or in the same city may receive letters of appointment in one or two days while those residing at different corners of the State, namely, Gorakhpur, Saharanpur, Lalitpur etc. may take much more time. Then the place of their joining

and its distance would also be a relevant aspect. A person residing at Lalitpur, if is required to join at Gorakhpur or Kushinagar may take a longer time than a candidiate residing at Rai Bareilly or Sitapur if required to join at Lucknow or in the nearby districts. Then some credit has been given to the postal delay also inasmuch as there may be some reason for the postal department in delivering the letters of appointment to the candidates across the State. These considerations and similar others may result in delay in joining the service by the candidates irrespective of their position in merit list and the order of appointment. If the accidental date of joining in such circumstances is taken to be the reckoning point of seniority which is quite fortuitous by very nature, given some of the illustrations above, in my view, this would itself vitiate such provision which may provide for date of joining as reckoning point for seniority unless a fixed reckoning point which has no fortuitous aspect in its application is provided. Rule 5 of Seniority Rules, 1991 has been couched with the words that it is the merit prepared by the Commission which will govern inter se seniority of all direct recruits. This excludes the scope of arbitrariness or fortuitous circumstances which may affect inter se seniority of the candidates selected in the same selection. The rule framing authority in its wisdom has recognised this principle, which is not challenged before this Court in the present writ petition. I, therefore, have no reason to look into another aspect of the matter except what has been prescribed in the rules, applicable in the present case.

35. Learned counsel for the petitioner however submits that some candidates were allowed to join after several years and to allow them to retain seniority also is not only extremely harsh and unjust but travels in the realm of arbitrariness.

36. Answer to this submission is that Rule 5 takes care of such circumstances. It says that if a late joining is for valid reason, the candidiate would not suffer. The decision in this regard is to be taken by the appointing authority whose decision has been declared final. No such decision in respect of any individual case has been challenged before this Court on the ground that such discretion has been exercised by appointing authority in reference to any individual candidiate arbitrarily or illegally. In absence of any such challenge, if for valid reaons, the appointing authority has allowed a candidiate, higher in merit, to join later, may be

after a few years, in absence of any challenge thereto, I do not find any reason to interfere in such individual case. The petitioner though has not impleaded Sri Narendra Pratap Singh whose case in this regard has been referred to in para 29 of the writ petition but as I have already mentioned, Sri Narendra Pratap Singh represented before the appointing authority that he did not receive appointment letter dated 09.11.1998 as a result whereof he could not join. This claim of Sri Narendra Pratap Singh having not been found untrue, the appointing authority accepted his representation and allowed him to join in 2005. In absence of any challenge to such decision of appointing authority, no observation can be made by this Court adverse to Sri Naredra Pratat Singh. Learned counsel for the petitioner even otherwise could not point out any inherent fallacy or illegality therein.

37. the above discussion leads me to no other inference but to dismiss this writ petition being wholly devoid of merit.

38. In the result, the writ petition is dismissed with costs which is quantified to Rs. 20,000/-.

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