

HIGH COURT OF JAMMU AND KASHMIR AT JAMMU

LPASW No. 90/2010
CMP No. 128/2010,
LPASW No. 95/2010,
CMP No. 135/2010,
LPASW No. 87/2010
CMP Nos. 242/2010 & 125/2010

Date of Decision: 07-07-2011

1. Nirmal Singh Bali and ors.	Vs	Mohd Yousif & ors.
2. Narinder Singh	Vs	Mohd Yousif & ors.
3. Sunil Dutt & ors.	Vs	Mohd Yousif & ors.

Coram:

HON'BLE MR. JUSTICE J. P. SINGH, JUDGE.
HON'BLE MR.JUSTICE MUZAFFAR HUSSAIN ATTAR, JUDGE.

Appearing Counsel:

For Appellant(s) : M/s U.K. Jalali, Sr. Advocate with
Ms. Shivani Jalali Advocate & S.K. Shukla,
Advocate.

For Respondent(s) : M/s D.C. Raina, Sr. Advocate with
Mr. Arun Kumar, Advocate & Rohit
Kapoor, Advocate.

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| i) | Whether approved for reporting
in Press/Media | : | Yes |
| ii) | Whether to be reported
in Digest/Journal | : | Yes |
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J.P.Singh,J :

Respondents' Writ Petition SWP No. 921/2010,
seeking issuance of Command to the State-respondents to
settle their seniority taking into account the date of their
passing the Prescribed Examination in terms of the Jammu
and Kashmir Excise and Commercial Taxation
(Departmental Examination) Rules 2006, was allowed by a
learned Single Judge of this Court vide Judgment and Order
dated 07-07-2010.

The appellants, who were not party respondents to the respondents' Writ Petition, were granted permission to appeal against the Judgment delivered in the Writ Petition.

As all the Appeals preferred against the Judgment of the Writ Court raise same question of law, so these were taken up for joint consideration.

The un-disputed facts, necessary for the disposal of these Appeals, may be stated thus:

The appellants and the private respondents in the Appeals are the Members of the Jammu and Kashmir Excise and Sales Tax (Subordinate) Service and were working as Inspector when the Writ Petition was filed. The majority of the appellants are senior to the respondents. The Prescribed Examination in terms of the Jammu and Kashmir Excise and Commercial Taxation (Departmental Examination) Rules 2006, clearance whereof is one of the necessary prescribed conditions, for entry into Gazetted Service, however, appears to have been cleared by the writ petitioners-respondents in the year 2009, i.e., prior to the appellants, who are stated to have cleared it in the year 2010.

It is on the basis of the prior clearance of the Prescribed Examination by the respondents that they claim

them senior to the appellants, who are otherwise indicated senior to them in the Seniority List of the Members of the Subordinate Service. The respondents' claim to seniority over the appellants appears to have been made keeping in view the provisions of the Jammu and Kashmir Excise and Commercial Taxes (Gazetted) Service Recruitment Rules 2007, in terms whereof, only those Inspectors in the Excise and Commercial Taxes Department become entitled to consideration for promotion against 50% posts of the ETO/CTO reserved against the promotional quota, who had not less than five years experience as Inspector and had passed the Prescribed Departmental Examination.

According to the respondents, having passed the Departmental Examination before the appellants, they were entitled to be shown senior to them in the Seniority List, regardless of the fact that they had entered the Subordinate Service prior to them.

The State-respondents, responded to the writ petitioners' claim in the Writ Petition, as follows:

"It is submitted that none of the issues raised in this para need any adjudication as all the issues are well settled under relevant Service Rules. It is submitted that no employee who fails to qualify the requisite Departmental Examination can claim seniority on account of having joined the service at an earlier point of time. The employee who qualifies the departmental examination in the earlier attempt becomes eligible for promotion to next higher rank in preference to those who qualify at a later point of

time in a later attempt. The seniority cannot have an overriding effect on the promotion based upon merit cum seniority ability cum seniority and subject to passing of some test/ examination. The provisions of rule 25 of the Jammu and Kashmir Civil Services (Classification, Control and Appeal) Rules 1956 are self explanatory and needs no further clarification.”

Relying upon *Himachal Pradesh State Electricity Board Vs Som Dutt Uppal and another*, reported as AIR 1993 SC 1234, the learned Single Judge allowed the respondents' Writ Petition commanding the State-respondents to settle the respondents' Seniority on the basis of their having passed the Departmental Examination in August 2009.

We have considered the submissions of learned Counsel for the parties and gone through the Judgment relied upon by the learned Single Judge while allowing the respondents' Writ Petition.

The appellants and the private respondents are the Members of the Jammu and Kashmir Excise and Sales Tax (Subordinate Service) and their conditions of service are governed by the Jammu and Kashmir Excise and Sales Tax (Subordinate Service) Recruitment Rules, 1991.

Rule 9 of the Rules aforementioned, which govern the maintenance of Seniority List of the Members of the Subordinate Service, referred to hereinabove, reads thus:-

“Rule 9 - Seniority of the Members of the Service shall be regulated under the Jammu and Kashmir Civil Services (Classification, Control and Appeal) Rules 1956. The administrative department shall

maintain an up-to-date and Final Seniority List of the Service."

Rule 24 of the Jammu and Kashmir Civil Services (Classification, Control and Appeal) Rules 1956, referred to in the above Rule, which was relied upon by the appellants' learned Counsel and Rule 25 of the Rules which was relied upon by the respondents' learned Counsel, to support their respective contentions are reproduced hereunder for reference:-

"24. Seniority-(1) The seniority of a person who is subject to these rules has reference to the service, class, category or grade with reference to which the question has arisen. Such seniority shall be determined by the date of his first appointment to such service, class, category or grade as the case may be.

Note 1- The rule in this clause will not effect the seniority on the date on which these rules come into force of a member of any service, class, category or grade as fixed in accordance with the rules and orders in force before the date on which these rules come into force.

Interpretation.- The words "date of first appointment" occurring in the above rule will mean the date of first substantive appointment, meaning thereby the date of permanent appointment or the date of first appointment on probation on a clear vacancy, confirmation in her latter case being subject to good work and conduct and/or passing of any examination or examinations and/or tests:

Provided that the inter se seniority of two or more person appointed to the same service, class, category or grade simultaneously will, notwithstanding the fact that they may assume the duties of their appointments on different dates by reason of being posted to different stations, be determined-

(a) in the case of those promoted by their relative seniority in the lower service, class, category or grade;

(b) in the case of those recruited direct except those who do not join their duties when vacancies are offered to them according to the positions attained by and assigned to them in order of merit at the time of competitive examination or on the basis of merit, ability and physical fitness etc., in case no such examination is held for the purpose of making selections:

(c) as between those promoted and recruited direct by the order in which appointments have to be allocated for promotion and direct recruitment as prescribed by the rules.

Note: 2- Any substantive appointments or permanent promotions made in any department prior to 15th May, 1953, will not be disturbed if otherwise in order unless such appointments or promotions are already the subject of any appeal, review or revision or otherwise pending decision.

(2) A member of a service, class, category or grade, unless he is reduced in seniority as a punishment shall retain seniority in such service or grade as determined by sub-rule (1) notwithstanding any delay in the completion of his probation or his appointment as a member of such service, class category or grade.

(3) Where a member of any service, class, category or grade reduced to a lower service, class, category or grade he shall be placed at the top of the latter unless the authority ordering such reduction directs that he shall rank in such lower service, class, category or grade next below any specified member thereof."

"25. Promotions-

(1) All promotions shall be made by the appointing authority.

(2) Promotions to a service or class or to a selection category or grade in such service or class shall be made on grounds of merit and ability and shall be subject to the passing of tests that Government may prescribe in this behalf, seniority being considered only where the merit and ability are approximately equal.

(3) All other promotions shall be made in accordance with seniority and subject to any tests or special qualifications prescribed by Government unless-

(a) the promotions of a member has been withheld as a penalty; or

(b) a member is given special promotion for conspicuous merit and ability.

(4) Where it is necessary in the public interest owing to an emergency which has arisen and could not have been foreseen, to fill immediately a vacancy by promotion from a lower category and where promotion in accordance with these rules would involve undue delay or expenditure or cause administrative inconvenience, the appointing authority may promote a person otherwise than in accordance with these rules temporarily until a person is promoted in accordance with these rules, but such temporary promotion shall in no case exceed three months on each occasion.

(5) A person promoted under sub-rule (4) shall not be entitled by reason only of such promotion to any preferential claim to future promotion."

Before proceeding further reference needs to be made to Clause 8 (ii) of the Regulations which had fallen for consideration of the Supreme Court of India in the Himachal Pradesh State Electricity Board Case (*Supra*). It reads thus:-

“A person, who passes SAS Exam, in an earlier exam, shall have precedence in appointment to the service over a person who passes in a later exam. As amongst persons who pass the same exam, the total length of service as UDC/Assistant/Divisional Accounts (sic) shall be determining factor in offering the appointment.”

With the above prelude, we now proceed to examine the issue that falls for determination in these Appeals. But before we so do, it needs to be recorded that there is no such provision in the Rules governing the Service conditions of the Members of the Excise and Sales Tax Subordinate Service or in the Jammu and Kashmir Civil Services (Classification, Control and Appeal) Rules 1956, as it existed in the Regulations, which were referred to in the *Himachal Pradesh State Electricity Board Case* (*Supra*) by the Supreme Court.

The admitted case of the parties is that their service conditions are governed by the Jammu and Kashmir Excise and Sales Tax (Subordinate Service) Recruitment Rules, 1991, And the Jammu and Kashmir Excise and Commercial Taxes (Gazetted Service) Recruitment Rules published vide

Notification SRO 80 of March 12, 2007 govern their promotion to the Gazetted cadre.

The appellants and respondents having not yet become the Members of the Jammu and Kashmir Excise and Commercial Taxes (Gazetted Service), their conditions of service, which include the determination of their Seniority in the Subordinate service, is therefore governed by the Jammu and Kashmir Excise and Sales Tax (Subordinate Service) Recruitment Rules, 1991.

The reference made by the respondents' learned Counsel to the Gazetted Rules to project that the date of passing of the Prescribed Examination under the Examination Rules, was germane to determine the issue in question as to whether the respondents were entitled to superior position in the Seniority because of their having cleared the Prescribed Departmental Examination before the appellants could successfully so do, is, therefore, misconceived.

Rule 9 of the Subordinate Service Rules, expressly provides that Seniority of the Members of the Subordinate Service shall be regulated by the provisions of the Jammu and Kashmir Civil Services (Classification, Control and Appeal) Rules, 1956.

It, therefore, becomes explicit that the determination of Seniority of the Members of the Subordinate Service, is governed by the provisions of Rule 24 the Jammu and Kashmir Civil Services (Classification, Control and Appeal) Rules, 1956, in terms whereof the Seniority of a person has reference to the Service, Class, Category or Grade and shall be determined by the date of his first appointment to such Service, Class, Category or Grade, as the case may be.

There is no dispute that the appellants and the private respondents are placed in the same Class, Category and Grade of the subordinate service.

In this view of the matter, it is the date of their first appointment to the Subordinate Service that would govern their Seniority. There being no similar provision in the Rules governing the Subordinate Service, as it existed in the Service which was the subject matter of adjudication in the Himachal Pradesh State Electricity Board Case (*supra*), so the date of passing of the Prescribed Examination under the Examination Rules has absolutely no relevance in the determination of the Seniority of the Members of the Subordinate Service.

We are, therefore, of the view that determination of the Seniority of the Members of the Subordinate Service is governed by Rule 24 of the Jammu and Kashmir Civil Services (Classification, Control and Appeal) Rules, 1956, in terms whereof, the date of first appointment to the service determines the Seniority of the Members of the Subordinate Service.

Rule 25 referred to by the respondents' learned Counsel may not be irrelevant to determine the Seniority, in that, it governs promotions and prescribes the mode therefor.

We, therefore, find that the reliance placed by the learned Single Judge on the Regulation, referred to in *Himachal Pradesh State Electricity Board v. Somdutt Uppal and another (Supra)*, when no such provision existed in the Rules governing the determination of Seniority of the Members of the Subordinate Service, And on the State-respondents' misconceived and confused Response to Writ Petition No. 921/2010, which was not in line with the statutory provisions governing the determination of Seniority of the Members of the Subordinate Service, was, therefore, unwarranted.

For all what has been said above, the Judgment and order passed by the learned Single Judge issuing directions to the State Respondents to settle the Seniority of the Members of the Jammu and Kashmir Excise and Sales Tax Service, on the basis of the passing of the prescribed Departmental Examination, cannot, therefore, be sustained and the respondents' Writ Petition, SWP No. 921/2010, being devoid of merit deserves to be dismissed.

These Appeals, accordingly, succeed and are, therefore, allowed, setting aside the Judgment impugned in the Appeals and dismissing the respondents' Writ Petition SWP No. 921/2010, with no order as to costs.

(MUZAFFAR HUSSAIN ATTAR)
JUDGE

(J.P. SINGH)
JUDGE

JAMMU:
07.07.2011.
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