H.S. ATWAL AND ORS. A

v.

UNION OF INDIA AND ORS.

JULY 27, 1994

[KULDIP SINGH AND B.L. HANSARIA, JJ.] B

Service Law—Demobilised Indian Armed Forces Personnel (Reservation of Vacancies) in the Himachal Pradesh Administrative Rules 1974—Rule 4(1)—Interpretation of—Fixation of Seniority—A member of armed forces covered by Rules—No opportunity of entering State Administrative Service C *available during period of military service—Joined Administrative Service after demobilisation—Period of military service for purpose of seniority—Counting of—Whether permissible.*

The appellant had joined the army sometime in 1963 and left it in 1968. Later joined the Himachal Pradesh Administrative Service in 1975. D **The first examination which had been conducted to enable any person to join the State Administrative Service was in 1973. Appellant was denied benefit of period of military service rendered by him for the purpose of his seniority on the ground that no opportunity of entering Administrative Service had become available to him during the period of his military** E **Service. The State Administrative Tribunal rejected the claim. Appeal has been filed challenging order of Tribunal.**

On the question whether a member of armed forces covered by the Rules would get the benefit of period of military service rendered by him for the purpose of his seniority irrespective of the fact that while under F **military Service he did not get any opportunity to enter the Administrative Service which such a member had joined after demobilisation;**

Dismissing the appeals, this Court

HELD : 1.1. When a fiction is created by a legal provision, it cannot G **be carried beyond the purpose for which it has been created. [324-D]**

K.S. Dhamadatan **v.** *Central Govt.*, **[1979] 4 SCC 204, relied on.**

1.2. As the benefit of the military service for the purpose of seniority has been hedged by a condition and as the condition got satisfied in the H

A **instant case only in 1973, the period of military service between 1963 and 1968 was not required to be reckoned to determine the seniority of the appellant. The purpose for which the sub rule (1) was made does not require giving of benefit in question even if the condition mentioned in the sub-rule is not satisfied. The condition imposed is reasonable and sufficiently compensates the members of the armed forces for the contribution**
B **made by them to protect the country during the external aggression, of 1962. [324-E-F]**

1.3. The sub-rule, as it is, tends to show that the opportunity in question should have become available to the incumbents during the period
C **of their military service. This was not so in the present case. It may thus be that the entire sub-rule became non-operational on this ground as well. It has to be seen whether in such a situation it would be open to this Court to give the benefit of period of military service regardless of what has been stated in the sub-rule because of the services rendered by the appellants when our country was in distress. Law does not permit to do so because the**
D **well settled legal principle is that in the absence of rule or executive instruction indicating the manner in which inter-seniority has to be fixed, it is length of service which is the basis for fixing the same. [324-H, 325-A-B]**

Khusbash Singh **v.** *State of Punjab*, **[1981] 2 SLR 576;** *D. Rama Rao,* **v.** *State of A.P.,* **AIR (1988) SC 857 and** *Union of India* **v.** *Ansusekhar Guin,*
E **AIR (1989) SC 377, relied on.**

S.B. Dogra **v.** *State of H.P.,* **[1992] 4 SCC 455;** *Union of India* **v.** *S. Krishna Murthy,* **[1989] 4 SCC 689;** *K.C. Arora* **v.** *State of Haryana,* **[1984] 3 SCC 281 and** *Narendra Nath Pandey* **v.** *State of U.P.,* **[1988] 3 SCC 527 distinguished.**
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CIVIL APPELLATE JURISDICTION : Civil Appeal Nos. 1654-55 of 1990.

From the Judgment and Order dated 22.12.89 of the Himachal Pradesh Administrative Tribunal in T.A. No. 263/86 and 92 of 1987.
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Rajinder Sachhar, Rajiv Dutta and Vipin Nair for the Appellants.

N.N. Goswamy, K. Madhava Reddy, Y.P. Mahajan, P.Parmeswaran, H.S. Munjral and Kawaljeet Kochhe, for J.D.Jain for the Respondents.

H The Judgment of the Court was delivered by

HANSARIA, J. The "spinal issue" (which is the expression used in the impugned judgment of the Administrative Tribunal) in these appeals is relatable to the interpretation of rule 4 (1) of Demobilised Indian Armed Force Personnel (Reservation of Vacancies) in the Himachal Pradesh Administrative Rules 1974, hereinafter, the Rules. The precise point for our consideration is whether a member of armed forces covered by the Rules would get the benefit of period of military service rendered by him for the purpose of his seniority irrespective of the fact that while under military service he did not get any opportunity to enter the Himachal Pradesh Administrative Service which such a member had joined after demobilisation.

2. To answer the aforesaid question we may not the broad facts pretaining to one of the appellants only he being H.S. Atwal, appellant No. 1, as that would serve our purpose. Atwal had joined the army sometime in 1963 and left it in 1968. He joined the Himachal Pradesh State Administrative Service in 1975. The first examination which had been conducted to enable any person to join the State Administrative Service was in 1973. Atwal took a stand, on the strength of the aforesaid rule, that though the first opportunity whcih became available to him was in 1973, his period of military service, which was of about five years, has to be reckoned for the purpose of his seniority, whereas he was taken to have entered the Administrative Service on 25. 7.71, which was the date Himachal Pradesh got Statehood. Atwal thus got benefit of about four and a half years for the purpose of his seniority whereas this period would have been five year if the contention of Atwal were to be accepted. The Tribunal not having done so the present appeals have been preferred.

3. Let us note the material part of rule 4(1):

> "Fixation of pay, seniority and retirement benefits.-(1) The period of military service rendered after attaining the minimum age prescribed for appointment to the Himachal Pradesh Administrative Service, by the candidates appointed against reserved vacancies under rule 2 shall count towards fixation of pay and seniority in the said service subject to the condition that, -
>
> (a) the date of appointment in the Himachal Pradesh Administrative Service in respect of such candidate as are appointed against the reserved vacancies under rule 2 shall be determined on the

A assumption that they joined the service under the State Government at the first opportunity they had after joining military service or training prior to the commission.

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B 4. Shri Sachar, learned senior advocate appearing for the appellants, has strenuously contended that denial of period of military service to the appellants on the ground that no opportunity of entering Administrative Service had become available to them during the period of their military service is not tenable; and is really against the decision of this Court in *C.B. Dogra* v. *State of Himachal Pradesh*, [1992] 4 SCC 455.

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5. Let us first see whether *Dogra's* case can be called in aid, though the first opportunity to join the Himachal Pradesh Administrative Service had become available in 1973. A perusal of the judgment in *Dogra's* case shows that this Court had in fact expressed no view on the legality of the D ground basing on which seniority was given to Dogra from 1964, though in his case also first opportunity had become available in 1973. This becomes apparent from what has been stated in paragraph 10 to which our attention has been invited by Shri Mehta appearing for some of the intervenors. It has been stated therein that as respondent Amist challenged the seniority E of Dogra for the first time in 1983, the same ought not to have been disturbed by the Tribunal after long lapse of time, as it had been finalised in 1979. This Court also observed that the Tribunal should have been slow in these circumstances in interfering with the seniority which was holding the field for last several years. As such what was accepted in Dogra's case cannot assist the appellants.

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6. Let us now see whether the contention of Shri Sachhar has merit Dehors Dogra's decision. He contends that what was held by this Court in *Union of India* v. *S. Krishnamurthy*, [1989] 4 SCC 689 would bear his contention. We do not, however, think so. The point under consideration here had not come up for examination in that case because the appellants G therein had joined the army between 1962-68 and opportunity to join the Indian Police Service and Indian Forest Service had become available to them for the first time in 1963 and so during the period of their military service. That was not a case whether first opportunity to join the civil services had become available after the incumbents had ceased to be in H military service, as in present appeals.

7. The decision in *K.C. Arora* v. *State of Haryana*, [1984] 3 SCC 281 which was heard along with the appeal of *A. S. Parmar* does not also advance the matter because those cases principally dealt with retrospectivity of the benefit given by a parallel provision whose language was also different as has been pointed out in paragraph 7 of Dogra's case. For the same reason the decision of this Court in *Narender Nath Pandey* v. *State of U.P.*, [1988] 3 SCC 527 is no relevant as the language of rule which had come up for consideration in that case too was differently worded as observed in paragraph 9 of Dogra's case.

8. Having found that the no light is shed by any of the aforesaid cases, let the point under consideration be examined on first principle. Shri Sachhar's main contention stenuously advanced is that what has been stated under clause (a) of the sub-rule dealing with the condition cannot take away the benefit conferred by the main part of sub-rule (1) which is about reckoning of military service for the purpose of seniority. According to the learned counsel this benefit has to be given irrespective of the fact whether the condition mentioned under clause (a) gets satisfied or not. This legal contention is disputed by the learned counsel of the respondents, according to whom the sub- rule has to be read as a whole and the main part of it cannot be read in isolation, that is, without taking note of the condition subject to which the period of the military service has to be reckoned for the purpose of seniority.

9. To decide as to which of the contentions merits our acceptance we have to know the purpose for which the benefit had been given. The same apparently is to see that the persons who joined military service to defend the country from external aggression which took place in 1962 do not suffer from disadvantage as regards their seniority in civil services which they had joined after demobilisation. It may be pointed out that before the Rules at hand came into existence, there had been similar administrative circulars, the first of which seems to be one which was issued in July 1963 which has been noted in *K.C. Arora's* case. The benefit sought to be conferred however was hedged by the condition mentioned in the clause (a).

9A. A Full Bench of the Punjab and Haryana High Court had occasion to deal with the question under examination, though in a different context. That was in the case of *Khusbash Singh* v. *State of Punjab*, (1981)

A 2 SLR 576. In that case the incumbent claimed the benefit of similar rule from 1964, in which year the first examination for the purpose of recruiting the member for the Service in question was held, though by that year he was not qualified to appear in the examination. The Full Bench held that the rule did not permit the benefit of the military service to be given for the purpose of seniority, the incumbent being not qualified to appear in B the examination which was held in 1964. It was observed in paragraph 10 that the opportunity of which the rule speaks of, though presumptive, has to satisfy the conditions prescribed by the Rules. It was also stated that rule 4(1)(a) does not tend to make the opportunity fictional and it does not relax the rigours imposed; one of which was the necessity of having C required qualification before one could be accepted as eligible for appearing in the examination.

10. We may point out that when a fiction is created by a legal provision, it cannot be carried beyond the purpose for which it has been D created, as pointed out by this Court in *K.S. Dharmadatan* v. *Central Government*, [1979] 4 SCC 204. This view had been taken after noting some important Indian and English decisions to which reference was made in paragraphs 11 to 13.

11. As the benefit of the military service for the purpose of seniority E has been hedged by a condition and as the condition got satisfied in the present cases only in 1973, we cannot agree with Shri Sachhar that the period of military service between 1963 to 1968 was required to be reckoned to determine the seniority of Atwal; so too in case of other appellants who are similarly situated. The purpose for which the sub-rule was make F does not require giving of benefit in question even if the condition mentioned in the sub-rule is not satisfied. The condition imposed is reasonable and sufficiently compensates the members of the armed forces for the contribution made by them to protect the country during the year of 1962 external aggression.

G 12. We have another observation to make. The same is that the sub-rule, as it is, tends to show that the opportunity in question should have become available to the incumbent during the period of their military service. This was not so in the present case. It may thus be that the entire sub-rule became non- operational on this ground as well. Question is H whether in such a situation in would be open to this Court to give the

benefit of period of military service regardless what has been stated in the sub-rule because of the services rendered by the appellants when our country was in distress. We have given our due thought to this aspect and we feel that law does not permit us to do so because the well settled legal principle is that in the absence of rule or executive instruction indicating the manner in which *inter-se* seniority has to be fixed, it is length of service which is the basis for fixing the same, as pointed out by a two-Judge Bench in paragraph 5 of *D.Rama Rao*, v. *State of Andhra Pradesh*, AIR (1988) SC 857. The same view was expressed in *Union of India* v. *Ansusekhar Guin*, AIR (1989) SC 377 in which another two-Judge Bench of this court stated that continuous length of service is the well accepted rule of fixing *inter-se* seniority, when the service rule does not prescribe any mode of fixing the same (See paragraph 5).

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13. In the aforesaid premises, we are not in a position to accept the legal submission advanced by Shri Sachhar because of which the appeals stand dismissed. We, however, leave the parties to bear their own costs.

A.G. Appeals dismissed.