

D.P. DAS

v.

UNION OF INDIA AND ORS.
(Civil Appeal Nos.7002 of 2004)

AUGUST 9, 2011

[G.S. SINGHVI AND ASOK KUMAR GANGULY, JJ.]

Service Law – Seniority – Inter-se seniority of direct recruits – Determination of – Held: Seniority is an incidence of service and where the service rules prescribe the method of its computation, it is squarely governed by such rules – In absence of a rule governing seniority, an executive order may be issued to fill up the gap – Only in the absence of a rule or executive instructions, the court may have to evolve a fair and just principle of seniority, which could be applied in the facts and circumstances of the case – In the instant case, no record has been brought before the Court to ascertain merit wise position of the persons who were directly recruited – Except the office memorandum of 1946, which is still in force, no other rule or executive instruction has been shown to apply to the facts of the case – The argument that the date of interview would have to be considered as a guide for determination of seniority cannot be accepted as such a date is wholly fortuitous – Accepting as guideline, something which is absolutely fortuitous and based on chance, is inherently unfair and unjust – As in this case there is no rule prescribed for the determination of seniority, this Court is left with only the guideline flowing from the executive instruction of 1946, in order to evolve a just policy, for determination of seniority – From the analysis of the executive instructions, it is clear that the 1946 instruction has not been superseded and the same refers to the acceptance of the age of the candidate as the determining factor for seniority – Such a basis is not fortuitous and is otherwise just and reasonable. – In the premises aforesaid the seniority of the officers who were

- A *recommended on the same date must be decided by their respective age – For determination of seniority of the officers who were recommended on the same date, age is the only valid and fair basis as such their seniority should be decided on the basis of age of the candidates who have been recommended.*
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- Service Law – Seniority – Determination of – Held: Is a vital aspect in the service career of an employee – His future promotion is dependent on this – Therefore, the determination of seniority must be based on some principles, which are just and fair – This is the mandate of Articles 14 and 16 – Constitution of India, 1950 – Articles 14 and 16.*
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- In the year 1983, Specialist Medical Officers (SMOs) were recruited in the Ordnance Factories Organization in the category of Obstetrics, Gynaecology, Medicine and Surgery. The appellant was one of the five recruited persons and he belonged to the category of Surgery. In the year 1991, on the recommendation of the Fourth Pay Commission, one post in the Indian Ordnance Factories Health Services (Group A) was sanctioned for filling up amongst the SMOs cadre. The specialists cadre was in different disciplines and hence, there was necessity of preparing a combined gradation list in the SMOs cadre. Respondent No.1 referred the matter to the UPSC for preparation of the common seniority list. The SMOs were recommended by the UPSC by three different lists, two of which were made on the same date and therefore the UPSC was requested to furnish the relative order of seniority of those SMOs who are recommended on the same date. The UPSC decided to fix the seniority, based on the date of interview i.e. candidates interviewed on an early date to be senior to those interviewed on a later date. In the seniority list, respondent Nos. 4, 5 and 6 were placed above the appellant. As appellant felt aggrieved by the publication of the said seniority list, he made representations before respondent No.1. However, no**
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reply was received by the appellant from respondent No.1. Being aggrieved, the appellant preferred an original application before the Administrative Tribunal and prayed to quash the said seniority list and also for maintenance of discipline wise seniority list initially prepared by the UPSC and for keeping Confidential Reports as criteria for selection to the next higher grade and also to rearrange the seniority of the candidates on the basis of age of candidates by placing the oldest candidate on top of the seniority list followed by juniors in age. The application was dismissed by the Tribunal. Aggrieved, the appellant filed writ petition before the High Court. The High Court dismissed the writ petition, affirming the methodology adopted by the UPSC for fixing the seniority of two different disciplines whose recommendations were made on the same date. Hence the present appeal.

Allowing the appeal, the Court

HELD:1. Seniority is an incidence of service and where the service rules prescribe the method of its computation, it is squarely governed by such rules. In the absence of a provision ordinarily the length of service is taken into account. [Para 22] [750-H; 751-A]

2. It is well settled principle of service jurisprudence then in the absence of any specific rule the seniority amongst persons holding similar posts in the same cadre has to be determined on the basis of the length of the service and not on any other fortuitous circumstances. [Para 23] [751-B]

M.B. Joshi & others. v. Satish Kumar Pandey & Ors. AIR 1993 SC 267: 1992 (2) Suppl. SCR 1 – relied on.

3. Determination of seniority is a vital aspect in the service career of an employee. His future promotion is dependent on this. Therefore, the determination of seniority must be based on some principles, which are

A just and fair. This is the mandate of Articles 14 and 16.
[Para 24] [751-C]

The Manager, Government, Branch Press and another v. D.B. Belliappa AIR 1979 SC 429: 1979 (2) SCR 458 –
B relied on.

4. In absence of a rule governing seniority, an executive order may be issued to fill up the gap. Only in the absence of a rule or executive instructions, the court may have to evolve a fair and just principle of seniority, which could be applied in the facts and circumstances of the case. In the instant case, no record has been brought before the Court to ascertain merit wise position of the persons who were directly recruited. On 28.8.1946, the Government of India, Department of Home had issued an Office Memorandum (O.M.) for determination of seniority of direct recruits. Except the office memorandum of 1946, which is still in force, no other rule or executive instruction has been shown to apply to the facts of the case. [Paras 13, 26, 27] [748-G; 751-F-H; 752-AJ]
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Bimlesh Tanwar v. State of Haryana & other (2003) 5
SCC 604: 2003 (2) SCR 757 – relied on.

5. The argument that the date of interview would have to be considered as a guide for determination of seniority cannot be accepted as such a date is wholly fortuitous. Accepting as guideline, something which is absolutely fortuitous and based on chance, is inherently unfair and unjust. As in this case there is no rule prescribed for the determination of seniority, this Court is left with only the guideline flowing from the executive instruction of 1946, in order to evolve a just policy, for determination of seniority. [Paras 28, 29] [752-B-C]
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H 6. From the analysis of the executive instructions, it

is clear that the 1946 instruction has not been superseded and the same refers to the acceptance of the age of the candidate as the determining factor for seniority. Such a basis is not fortuitous and is otherwise just and reasonable. In the premises aforesaid the seniority of the officers who were recommended on the same date must be decided by their respective age. The contrary view taken by the High Court of fixing seniority on the basis of date of interview, being wholly fortuitous, cannot be accepted. [Paras 30, 31, 32] [752-D-F]

7. In the instant case, there is no rule and thus this Court has to evolve a fair and just basis of seniority on the basis of the office memorandum of 1946. For determination of seniority of the officers who were recommended on the same date, age is the only valid and fair basis as such their seniority should be decided on the basis of age of the candidates who have been recommended. [Para 27 & 34] [751-H; 752-H; 753-A]

B. Premanand and others v. Mohan Koikal and others (2011) 4 SCC 266 – distinguished.

Case Law Reference:

1992 (2) Suppl. SCR 1	relied on	Para 23
1979 (2) SCR 458	relied on	Para 25
2003 (2) SCR 757	relied on	Para 26
(2011) 4 SCC 266	distinguished	Para 33

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 7002 of 2004.

From the Judgment and Order dated 30.06.2003 of the High Court of Madhya Pradesh at Jabalpur in W.P. No. 5238 of 2000.

A Shashi B. Upadhyay, Y.K.S. Chauhan and Kumud Lara Das for the Appellant.

T.S. Doabia, Sunita Sharma and K.K. Sharma for the Respondents.

B The Judgment of the Court was delivered by

C **GANGULY, J.** 1. This appeal has been preferred from the final judgment and order passed by the High Court of Madhya Pradesh at Jabalpur in Writ Petition No.5238 of 2000 dated 30th June, 2003.

D 2. The facts and circumstances giving rise to this appeal are that in the year 1983, the first batch of the Specialist Medical Officer (SMO) in the Ordnance Factories Organization was recruited in the category of Obstetrics, Gynecology, Medicine and Surgery. The appellant was one of the five recruited persons and he belonged to the category of Surgery.

E 3. In the year 1991, on the recommendation of the Fourth Pay Commission, one post in the Indian Ordnance Factories Health Services (Group A, grade of Rs.5900-6700) was sanctioned for filling up amongst the SMOs cadre. The specialists cadre was in different disciplines and hence, there was necessity of preparing a combined gradation list in the SMOs cadre. The respondent No.1 referred the matter to the UPSC for preparation of the common seniority list. Further, the SMOs were recommended by the UPSC by three different lists, two of which were made on the same date and therefore the UPSC was requested to furnish the relative order of seniority of those SMOs who are recommended on the same date.

F 4. Accordingly, the seniority list of SMOs in the grade of Rs.4500-5700/- was prepared on 1.7.1992 and published vide order dated 21.8.1992. In the seniority list respondent Nos. 4, 5 and 6 were placed above the appellant.

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5. As the appellant felt aggrieved by the publication of the said seniority list, he made representations in the year 1992, 1993 and 1995 before the respondent No.1. However, no reply was received by the appellant from the respondent No.1.

6. Being aggrieved, the appellant preferred an original application (O.A.No.457 of 1995) before the Central Administrative Tribunal, Jabalpur Bench ('the Tribunal') and prayed to quash the said seniority list and also for maintenance of discipline wise seniority list initially prepared by the UPSC and for keeping Confidential Reports as criteria for selection to the next higher grade and also to rearrange the seniority of the candidates on the basis of age of candidates by placing the oldest candidate on top of the seniority list followed by juniors in age. The appellant contended, inter alia, before the Tribunal that the:

- (a) The relative seniority of SMOs was not determined by UPSC, at the time of selection
- (b) The Department should have requested the UPSC to recommend candidates for such posts on the basis of a consolidated order of merit and not subject wise
- (c) The Department never requested the UPSC to prepare a combined seniority list as per merit on the basis of performance in the interview. It was therefore not possible for the UPSC to prepare a combined seniority list in the year 1992.

7. The UPSC before the Tribunal contended, inter alia, that the interview for different disciplines viz specialists I medicine, surgery and gynecology in Ordnance Factories Organization were conducted on different dates. Before the Tribunal UPSC further contended that:

- (i) As far as the Specialist (Obstetrics and Gynecologist) is concerned the date of

A advertisement was 13.11.1982, date of interview was 28.2.1983 and date of UPSC recommendation letter was 16.3.1983.

B (ii) Insofar as the Specialist (Medicine) is concerned the date of advertisement was 6.11.1983, date of interview was 15/16.03.1983 and date of UPSC recommendation letter was 14.4.1983.

C (iii) And so far as the Specialist (Surgery) is concerned, the date of advertisement was 13.11.1982, date of interview was 22/24.03.1983 and date of UPSC recommendation letter was 14.4.1983.

D 8. The UPSC also filed the extracts of its file which contain the note sheets from Page 2 to Page 13. From those extracts the basis of arriving at the methodology adopted for fixing the seniority of two different disciplines, whose recommendations were made on the same date were available.

E 9. By a judgment and order dated 26.7.2000, the Tribunal dismissed the O.A.457 of 1995 and in paragraph 8.4 held as under:

F "8.4 It is fact that date of recommendation of the applicant who belongs to surgery discipline and the private respondents belonging to medicine discipline was same i.e.14.4.1983. Also that the rules provide for fixing the seniority based on the date of recommendations of the UPSC maintaining inter se merit as per the recommendation. It is also fact that respondent did not approach the UPSC for preparing a combined merit list of such specialist which they should have done as per DOPTs instructions for seeing future promotion prospects for these specialists and also the fact that separate seniority list for number of specialist disciplines and separate promotion prospects thereof were not feasible. From the extract of note sheet filed by the respondent, it

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is seen that the Commission, based on detailed examination decided to fix the seniority in such case, based on date of interview i.e. candidates interviewed on an early date to be senior to those interviewed on a later date. The contention of learned counsel for applicant that their seniority should have been fixed based on the date of birth cannot be accepted since presuming this criteria was to be adopted then very purpose of preparation of merit list of the candidates, will get defeated. The reckoning of seniority based on age may be relevant in cases of recruitment where no merit list is made and the selection criteria is for qualifying the test along or where the recommendations are only as 'fit' of 'unfit'."

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10. Being aggrieved, the appellant filed a writ petition before the High Court of Madhya Pradesh.

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11. By the impugned judgment dated 30.6.2003, the High Court dismissed the writ petition, affirming the methodology adopted by the UPSC for fixing the seniority of two different disciplines whose recommendations were made on the same date.

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12. The High Court in para 15 held that:

"15. What is reasonable to be seen in the obtaining factual matrix is that under regrettable circumstances the inter se merit list was not available as there was no requisition for fixing such seniority. However, the UPSC had evolved a base which indicates that the date of interview would be the criteria for fixing the seniority, in such a case. Ordinarily this may look quite peculiar but it has to be borne in mind that peculiar circumstances are solved by taking recourse to innovative methods. The tribunal in paragraph 6.1 has reproduced the date of advertisement and the date of recommendation letter of UPSC. We have also reproduced the same above. The date of advertisement for the post of Specialist

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A (Surgery) was 13.11.1982. The date of advertisement for
 post of Specialist (Medicine) was 6.11.1983. Definitely
 there was advertisement for the post of Specialist
 (Surgery) earlier than Specialist (Medicine) but the
 interview of Specialist (Medicine) was on 15/16.3.83
 B whereas the date of interview of Specialist (Surgery) was
 on 22/24.3.93. The Tribunal has taken note of the fact that
 from the note sheets, which has been produced by the
 UPSC, it was perceivable that recommendations were
 made on the date of interview. Thus, selection was made
 C on that date. It is noticeable that recommendations were
 sent on the same date i.e. 14.4.1983. Thus, the date of
 interview has earned the status of date of selection.
 Submission of Mr. Gupta is that it can be fortuitous
 D circumstances as the interview in one subject may take
 place earlier than the other. The aforesaid submission may
 appear on a first blush to be quite attractive but on a closer
 scrutiny of the same it has to be repelled..... The
 UPSC has determined the seniority on the basis of the date
 of interview and the date when selection had taken place.
 E In the absence of any document on record, in the absence
 any preparation of merit list, in the absence of drawing of
 the seniority list at the initial stage and taking note of the
 peculiar facts and circumstances of the case, we are of
 the considered view that the UPSC has adopted a rational
 F approach and the Tribunal has not flawed in accepting the
 same.....”

13. It is pertinent to note here that on 28.8.1946, the
 Government of India, Department of Home issued an Office
 Memorandum (O.M.) for determination of seniority of direct
 G recruits

14. Clause 2(iv) thereof provides as under:

H “When a number of vacancies for direct recruits are filled
 simultaneously without candidates first being placed in
 order of merit or preference, seniority should be

determined by age provided a candidate joins within such period not exceeding one month from the date of appointment as may be fixed by the appointing authority. A candidate who does not join within the time so specified will rank below those who did so join, and seniority among the later arrivals will be according to the date of joining.

The orders in this paragraph will be of general application."

15. Vide an Office Memorandum dated 22.12.1959, the Government of India, Ministry of Home Affairs issued general principles for the determination of seniority in Central Civil Services.

16. It is pertinent to note that the O.M. dated 22.12.1959 does not supersede Office Memorandum of 1946 but expressly discontinues the application of some previous Office Memorandum cited below:

- Office Memorandum No. 30/44/48- Appts, dated the 22nd June, 1949.
- Office Memorandum No. 65/28/49 – DGS.(Appts.) dated the 3rd February, 1950 and other subsequent Office Memorandum regarding fixation of seniority of ex-employees of the Government of Burma
- Office Memorandum No. 31/223/50 – DGS, dated the 27th April, 1951 and other subsequent Office Memorandum regarding fixation of seniority of displace Government Servants.
- Office Memorandum No. 9/59/56 – RPS dated the 4th August, 1956.
- Office Memorandum No. 32/10/49 – CS dated the 31st March, 1950

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A Office Memorandum No. 32/49/CS(C) dated the 20th September, 1952.

B 17. Para 4 of the Annexure attached to the said O.M. dated 22.12.1959 specifically provides that ".....the relative seniority of all direct recruits shall be determined by the order of merit in which they are selected for such appointment on the recommendations of the UPSC or other selecting authority, persons appointed as a result of subsequent selection."

C 18. But this circular fails to address the situation, where no combined merit list is prepared in the order of merit in which the candidates are appointed and their date of recommendation being the same, as in the present case.

D 19. The learned counsel for the appellant contended that the O.M. dated 22.12.1959 has not repealed O.M. dated 28.8.1946 and therefore the O.M. of 1946 shall be applicable in this situation.

E 20. The learned counsel for the respondents contended that the intention of the authorities was clear in O.M. of 1959, so as to repeal all the prior O.Ms. in relation to the determination of seniority, which is expressed in para 2 of the O.M. which reads as under:

F ".....It has therefore, been decided in consultation with the UPSC, that hereafter the seniority of all persons appointed to the various Central Services after the date of these instructions should be determined in accordance with the General Principles annexed here to."

G 21. However as noted above, office memorandum of 1959 does not answer the problems arising in this case.

H 22. The law is clear that seniority is an incidence of service and where the service rules prescribe the method of its computation, it is squarely governed by such rules. In the

absence of a provision ordinarily the length of service is taken into account. A

23. The Supreme Court in *M.B. Joshi & others. V. Satish Kumar Pandey & Ors.*, AIR 1993 SC 267 has laid down that it is the well settled principle of service jurisprudence then in the absence of any specific rule the seniority amongst persons holding similar posts in the same cadre has to be determined on the basis of the length of the service and not on any other fortuitous circumstances. B

24. Determination of seniority is a vital aspect in the service career of an employee. His future promotion is dependent on this. Therefore, the determination of seniority must be based on some principles, which are just and fair. This is the mandate of Articles 14 and 16. C

25. In *The Manager, Government, Branch Press and another v. D.B. Belliappa* reported AIR 1979 SC 429, a three-Judge Bench of this Court construing Articles 14 and 16 interpreted the equality clause of the Constitution as follows:- D

"...The executive, no less than the judiciary, is under a general duty to act fairly. Indeed, fairness founded on reason is the essence of the guarantee epitomized in Articles 14 & 16(1)." (see para 24 at page 434) E

26. Another three-Judge Bench of this Court in *Bimlesh Tanwar v. State of Haryana & other*, (2003) 5 SCC 604, while dealing with the question of absence of a rule governing seniority held that an executive order may be issued to fill up the gap. Only in the absence of a rule or executive instructions, the court may have to evolve a fair and just principle of seniority, which could be applied in the facts and circumstances of the case. (see para 47 at page 619) F G

27. In the instant case, no record has been brought before the Court to ascertain merit wise position of the persons who were directly recruited. Except the office memorandum of 1946, H

A which is still in force, no other rule or executive instruction has been shown to apply to the facts of the case.

28. The appellant argued that the date of interview would have to be considered as a guide for determination of seniority.

B This cannot be accepted as such a date is wholly fortuitous. Accepting as guideline, something which is absolutely fortuitous and based on chance, is inherently unfair and unjust.

29. As in this case there is no rule prescribed for the determination of seniority, this Court is left with only the guideline flowing from the executive instruction of 1946, in order to evolve a just policy, for determination of seniority.

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30. From the analysis of the executive instructions referred to hereinabove, it is clear that the 1946 instruction has not been superseded and the same refers to the acceptance of the age of the candidate as the determining factor for seniority. Such a basis is not fortuitous and is otherwise just and reasonable.

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31. In the premises aforesaid the seniority of the officers who were recommended on the same date must be decided by their respective age.

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32. The contrary view taken by the High Court of fixing seniority on the basis of date of interview, being wholly fortuitous, cannot be accepted.

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33. The reliance by the respondent(s) on judgment of this Court in *B. Premanand and others v. Mohan Koikal and others*, (2011) 4 SCC 266, is misconceived in the facts of the case. In that case this Court was dealing with Rule 27(c) of the Kerala State and Subordinate Services Rules, 1958. In the instant case there is no rule. Therefore in this case, this Court has to evolve a fair and just basis of seniority on the basis of the office memorandum discussed herein above.

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34. For the reasons aforesaid this Court holds that for determination of seniority of the officers who were

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recommended on the same date, age is the only valid and fair basis as such their seniority should be decided on the basis of age of the candidates who have been recommended. A

35. The appeal is, thus, allowed. The judgment of the High Court which has taken a contrary view is set aside. In the facts of the case, there will be no orders as to costs. B

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Appeal allowed.