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H.S. SIDHU

v.

DEVENDRA BAPNA & ORS.

(Civil Appeal Nos. 6505-6506 of 2009)

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SEPTEMBER 09, 2015

[DIPAK MISRA AND PRAFULLA C. PANT, JJ.]

Service law – Seniority – Fixation of – Two Direct recruits- Assistant Directors, promoted to the post of Deputy Director – In the cadre, 1st respondent treated as senior to appellant – Thereafter, for the post of Joint Director, Departmental Promotion Committee (DPC) placed appellant as senior to 1st respondent – Both allowed to officiate as Joint Director – 1st respondent challenged the determination of seniority in the cadre of Joint Director – During pendency, appellant promoted temporarily to officiate as Director – 1st respondent challenged the same – Single Judge held that 1st respondent should have been treated as senior to the appellant – Upheld by the Division Bench – Held: DPC after due evaluation of the ACRs and consideration of the merit by ascribing reasons had prepared the merit list and found that the appellant had received more marks than 1st respondent – Neither the appellant nor 1st respondent were confirmed, thus, the rules relating to seniority for confirmed employees not applicable – Proviso to r. 12(c) that if an officer has been selected for officiation from a list in which he is considered suitable for trial in a promotion and the said list has been arranged in order of merit, their inter se seniority would be determined in accordance with the order of merit – In such a situation, when DPC had drawn the list on the basis of inter se merit, fixation of seniority could not be found fault with – High Court cannot sit in appeal over the assessment made by DPC –

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Constitution of India, 1950 – Art. 226 –Madhya Pradesh Services (General Conditions of Service) Rules, 1961. A

Allowing the appeals, the Court

HELD: 1.1 On a scrutiny of the ACRs, and the other materials, the DPC had found that the appellant had received more marks than the 1st respondent. The DPC after due evaluation of the ACRs and consideration of the merit by ascribing reasons had prepared the merit list. Neither the appellant nor the 1st respondent was confirmed and, therefore, the rules relating to seniority as far as the confirmed employees are concerned, do not apply. The Rule 12(c) of the Madhya Pradesh Services (General Conditions of Service) Rules, 1961 which deals with seniority of Government Servant, applies. The proviso to Rule makes it quite vivid that if an officer has been selected for officiation from a list in which he is considered suitable for trial in a promotion and the said list has been arranged in order of merit, their inter se seniority shall be determined in accordance with the order of merit. In such a situation, when the DPC had drawn the list on the basis of inter se merit, the fixation of seniority could not be found fault with. Further, while exercising the power under Article 226 of the Constitution, the High court cannot sit in appeal over the assessment made by the DPC. [Para 10 and 13] [463-C, 465-C-F] B
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1.2 The first respondent retired holding the post of Director after a review DPC was directed to be held by the Division Bench. He would be treated to have retired from the post of Director and would get the pensionary benefits. As far as the appellant is concerned, by virtue of the order passed by the Division Bench, he continued in the post of Director till 5.2.2010 and thereafter he was reverted to the post of Joint Director. As he was already G
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A. selected as a Director because of his seniority which was erroneously set aside by the High Court, the State Government is directed to pay the arrears of salary as also the benefits of the post of Director. [Para 14] [466-B-D]

B. *Union of India v. S.P. Nayyar* 2014 (6) SCR 116: (2014) 14 SCC – referred to.

Case Law Reference

C. 2014 (6) SCR 116 Referred to. Para 13

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D. From the Judgment and Order dated 24.03.2009 of the High Court of Judicature, Jabalpur in Writ Appeal No. 411 of 2008.

WITH

C.A. No. 7308 of 2009

E. C.A. No. 7950 of 2015

Subramaniam Prasad, Prashant Kumar, Joseph Pookkatt, Sunil Singh Parihar, (For AP & J Chambers), B.S. Banthia, Mishra Saurabh for the Appellant.

F. Aniruddha P. Mayee, A. Selvin Raja, Mishra Saurabh, Ankit Kumar Lal, Anshaja Shukla, Dr. Harsh Pathak, Neeraj Shekhar, Mohit Chowbey, Siddartha Shukla, Merusagar Samantaray for the Respondents.

G. The Judgment of the Court was delivered by

DIPAK MISRA, J. 1. Leave granted in the Special Leave Petition (C) No.28755 of 2009.

H. 2. The present appeals, one preferred by the aggrieved

officer, H.S. Sidhu and the other by the State, call in question the legal vulnerability of the judgment and order dated 24.03.2009 passed by the Division Bench of the high Court of Madhya Pradesh at Jabalpur, in Writ Appeal Nos. 370, 371, 411 and 442 of 2008 whereby it has concurred with the view expressed by the learned Single Judge vide order dated 04.03.2008 in Writ Petition No.23798 of 2003 and W.P.S. No.1119 of 2005.

3. It is seemly to state that the grievance is common in all the appeals. The facts, on a perusal of the order passed by the learned Single Judge as well as by the Division Bench, appear to be complex but they are actually not so. Complexity has been created with ingenious artificiality. Reference to certain dates, the factual position admitted at the Bar, and the relevant rules would suffice the narration. It is not in dispute that the appellant, H.S. Sidhu, and the 1st respondent, Devendra Bapna, were initially appointed as Assistant Directors as direct recruits through the Public Service Commission and their service conditions are governed by the Madhya Pradesh Fisheries (Gazetted) Service Recruitment Rules, 1987 (for brevity, 'the 1987 Rules') with certain incorporation from the Madhya Pradesh Services (General Conditions of Service) Rules, 1961 (For short, 'the 1961 Rules'). There is no cavil over the fact that they were promoted to the post of Deputy Directors and in that cadre Devendra Bopana was treated as senior to the appellant H.S. Sidhu.

4. The question of filling up the post of Joint Director, which is a promotional post from the cadre of Deputy Director, arose in the year 1996. At that juncture, a list of officers who had come within the zone of consideration for the promotion to the post of Joint Director was drawn up and in the said list, the name of Devendra Bopna appeared at serial no.3 and that of H.S. Sidhu at serial no.5. When the matter was placed before

A the Departmental Promotion Committee (DPC), it referred to
the seniority and gradation list, the rule application for
promotion, and took into consideration the ACRs and
accordingly placed H.S. Sidhu at serial no.1 and Devendra
Bapna at serial no.3 in the select list. The DPC for drawing
B the selection list in the aforesaid manner, ascribed the following
reason :

C “As per M.P. Fisheries (Gazetted) Service Recruitment
Rules, 1987 of Sub rule 15(3) DPC found exceptional merit
and suitable to Shri Harpal Singh Sidhu and given higher
place against the senior officers.”

D 5. It is apt to note here that as there were four posts
available in the cadre of Joint Director, both H.S. Sidhu and
Devendra Bapna were allowed to officiate as Joint Directors.
However, as H.S. Sidhu was treated senior to Devendra
Bapna, he preferred OA No.927 of 1997 assailing the
determination of seniority in the cadre of Joint Director. After
abolition of the State Administrative Tribunal, the matter stood
E transferred to the High Court of Madhya Pradesh at Jabalpur
which was registered as W.P. No.23798 of 2003. At this
juncture, it is necessary to note that while both of them were
officiating as Joint Directors, the post of Director fall vacant
and both of them were considered. The DPC, considering
F the merit and suitability of H.S. Sidhu, recommended him to
be promoted to the post of Director. The said exercise was
carried out during the pendency of the writ petition no.23798
of 2003 where the cavil related to the fixation of seniority.

G 6. After the appellant was promoted temporarily to
officiate as the Director, the same was also challenged by the
1st respondent herein in Writ Petition No.1119 of 2005. The
learned Single Judge dealt with both the writ petitions together
and came to hold that the writ petitioner should have been
H treated as senior to the appellant herein and, accordingly,

directed as follows :

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“In view of the aforesaid, respondents are directed to re-fix the petitioner’s seniority above to respondent no.2/4 on the post of Joint Director and then to hold a review DPC of 6.8.2004 to consider the case of the petitioner, respondent no.2/4 and other persons those who were within the zone of consideration when the original DPC met on 6.8.04. The review DPC shall take place within a period of two months from the date the petitioner furnishes certified copy of this order to the respondents and the review DPC shall apply the same criteria which was applied by the original DPC to consider the case of the petitioner for his promotion on the post of Director.”

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7. The aforesaid order was assailed by the aggrieved officer as well as by the State. There was an order directing stay of the directions issued by the learned Single Judge. The Division Bench by the impugned judgment, as it appears to us, has gone transient and without proper scrutiny of the rule position agreed with the view expressed by the learned Single Judge on a different score altogether. In fact, it has, if we permit ourselves to say so, has exercised the appellate jurisdiction over the proceedings of the DPC apart from taking note of seniority on an erroneous perception.

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8. We have heard Mr. Subramonium Prasad, learned senior counsel along with Mr. Prashant Kumar, learned counsel for the appellant in the appeals preferred by H.S. Sidhu, Mr. Ankit Lal, learned counsel for the State in the appeals preferred by the State and Mr. Anirudhha P. Mayee on behalf of the 1st respondent, Devendra Bapna.

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9. To appreciate the controversy, we may refer with profit to Rule 15 of the 1987 Rules. It reads as follows :

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A "15. Preparation of list of suitable officers—(1) The
Committee shall prepare a list of such persons who satisfy
the conditions prescribed in rule 14 above and as are held
B by the committee to be suitable for promotion/transfer to
the service. The list shall be sufficient to cover the
anticipated vacancies on account of retirement and
promotion during the course of one year from the date of
preparation of the select list. A reserve list consisting of
25% of the number of persons included in the said list
shall also be prepared to meet the unforeseen vacancies
C occurring during the course of the aforesaid period.

(2) The selection for inclusion in such list shall be based
on merit and suitability in all respects with due regard to
seniority.

D (3) The names of the officers included in the list shall be
arranged in order of seniority in the service or posts as
specified in column (2) of Schedule IV, at the time of
preparation of each select list:

E Provided that any junior officer who in the opinion of the
Committee is of exceptional merit and suitability may be
assigned in the list a higher place than that of officer senior
to him.

F Explanation—A person, whose name is included in a
select list but who is not promoted during the validity of
the list shall have no claim to seniority over those
considered in a subsequent selection, merely by the fact
of his earlier selection.

G (4) The list so prepared shall be reviewed and revised
every year.

H (5) If in the process of selection, reiew or revision, it is

proposed to supersede any member of the Service, the committee shall record its reasons for the proposed supersession.”

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10. On a perusal of the aforesaid Rule, it is clear to us that proviso to sub-rule (3) of Rule 15 postulates that any junior officer who in the opinion of the DPC is of exceptional merit and suitable can be assigned a higher place in the list than that of the officer senior to him. On a scrutiny of the ACRs, and the other materials, the DPC had found that the appellant had received more marks than the 1st respondent. The DPC after due evaluation of the ACRs and consideration of the merit by ascribing reasons had prepared the merit list.

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11. On a close scrutiny of the judgment and orders passed by the learned Single Judge which has been accepted by the Division Bench, we find that they have not appreciated the tenor and content of Rule 15(3), especially, the proviso thereof. As it seems, they have been guided by the principle of seniority-cum-fitness, but the proviso to Rule 15(3) states the position differently laying emphasis on exceptional merit and suitability.

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12. Mr. Mayee, learned counsel for the 1st respondent would submit that as both of them are officiating as Joint Directors, he could not have been ranked as junior in the said cadre. To bolster the said submission, he has drawn our attention to Rule 12(b) and 12(c) of the 1961 Rules which read as under :

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“(b) Promoted Government Servant.-

a promoted Government servant shall count his seniority from the date of his confirmation in the service to which he has been promoted and shall be placed in the gradation list immediately before the last confirmed member of that service but above all the probationers:

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A Provided that where two or more promoted Government servants are confirmed with effect from the same date, the appointing authority shall determine their inter se seniority in the service in which they are confirmed, with due regard to the order in which they were included in the merit list, if any, prepared for determining their suitability for promotion and their relative seniority in the lower service from which they have been promoted.

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C (c) Officiating Government Servant.- The inter se seniority of Government servant promoted to officiate in a higher service or a higher category of posts shall, during the period of their officiation, be the same as that in their substantive service or grade irrespective of the dates on which they began to officiate in the higher service or grade:

D Provided that-

E (i) If they were selected for officiation from a list in which the names of Government servants considered suitable for trial in a promotion, to the Higher service or grade were arranged in order of merit, their inter se seniority shall be determined in accordance with the order of merit in such list;

F (ii) The seniority of a permanent Government servant appointed to officiate in another service or post by transfer shall be determined ad hoc by the appointing authority.

G Provided that the seniority proposed to be assigned to such Government servant shall be determined and intimated to him in the order of appointment,

H (iii) Where a permanent Government servant is reduced to a lower service, grade or category of posts, he shall rank in the gradation list of the latter service, grade or

category of posts above all the others in that gradation list, unless the authority ordering such reduction by a special order indicates a different position in the gradation list for such reduced Government servant. A

(iv) Where an officiating Government servant is reverted to his substantive service or post, he shall revert to his position in that gradation list relating to his substantive appointment which he held before he was appointed to officiate in the other service or post.” B

13. Be it clarified that neither the appellant nor the 1st respondent was confirmed and, therefore, the rules relating to seniority as far as the confirmed employees are concerned, do not apply. The Rule that really applies is Rule 12(c) which deals with seniority of Government Servant. The proviso to Rule 12(c) makes it quite vivid that if an officer has been selected for officiation from a list in which he is considered suitable for trial in a promotion and the said list has been arranged in order of merit, their *inter se* seniority shall be determined in accordance with the order of merit. In such a situation, there can be no scintilla of doubt that when the DPC had drawn the list on the basis of *inter se* merit, the fixation of seniority could not be found fault with. It needs no special emphasis to state that while exercising the power under Article 226 of the Constitution, the High Court cannot sit in appeal over the assessment made by the DPC. In ***Union of India v. S.P. Nayyar***¹, it has been stated that if the assessment made by the DPC is perverse or not based on record or proper record has not been considered by the DPC, it is open to the High Court under Article 226 of the Constitution to remit the matter back to the DPC for recommendation, but it cannot assess the merit on its own on perusal of the service record of one or C
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¹(2014) 14 SCC 370

A the other employee. Thus, analysed the view expressed by the High Court in the impugned order is wholly unsustainable.

14. The controversy does not rest there. We have been apprised that the first respondent has retired holding the post of Director after a review DPC was directed to be held by the Division Bench. Regard being had to the fact that he has already retired on 31.10.2010, he shall be treated to have retired from the post of Director and shall get the pensionary benefits. As far as the appellant is concerned, by virtue of the order passed by the Division Bench, he continued in the post of Director till 5.2.2010 and thereafter he was reverted to the post of Joint Director. As he was already selected as a Director because of his seniority which has been erroneously set aside by the High Court, we direct the State Government to pay the arrears of salary commencing 05.02.2010 to 31.08.2010. That apart, he shall also reap the benefits of the post of Director. We will be failing in our duty if we do not state that there was serious opposition by Mr. Mayee, learned counsel for the State but the said resistance is absolutely inconsequential in view of the findings recorded by us.

15. Resultantly, the appeals are allowed and the judgment and orders passed by the learned Single Judge as well as by the Division Bench of the High Court are set aside. There shall be no order as to costs.

Nidhi Jain

Appeals allowed.