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K. R. BABU

v.

STATE OF KERALA & ORS.

(Civil Appeal No. 7849 of 2009)

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SEPTEMBER 21, 2017

[KURIAN JOSEPH AND R. BANUMATHI, JJ.]

Service law – Seniority – Effective date of advice – Determination of – Held: Seniority is determined on the basis of effective date of advice – Advice is based on the list prepared by the Public Service Commission on the basis of comparative merit in the selection and on the basis of principles of communal rotation – Appointment is made pursuant to the advice – On facts, as regards respondent's grievance to be entitled to be advised from the rank list, High Court rightly held that respondent should have been advised at least after the last advice as on the date of the judgment and that the seniority of all those candidates advised and appointed already should not be disturbed – Respondent entitled to take a position below the 83 rd candidate for the purposes of seniority, having regard to the next advisable vacancy, which is the effective advice – Immediate senior to respondent was advised on 05.01.1998 and was appointed in the cadre of Excise Inspector thereafter – Thus, respondent is entitled to get the advice after the last advice from the 1992 list i.e. 05.01.1998, which is the effectively advisable vacancy for the respondent – Respondent entitled to his seniority based on the effective date of advice in the next advisable vacancy namely, 01.04.1999 – On the basis of the revision of seniority, respondent to be given the appropriate appointments and promotion – Kerala State and Subordinate Service Rules, 1958 – r. 27.

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CIVIL APPELLATE JURISDICTION: Civil Appeal No. 7849 of 2009.

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From the Judgment and Order dated 04.12.2006 of the High Court of Kerala at Ernakulam in W. A. No. 1374 of 2006.

WITH

C. A. No. 7913 of 2009.

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Dhruv Mehta, Jaideep Gupta, Sr. Advs., A. Raghunath, Kodoth Sreedharan Nair, G. Prakash, Nishe Rajen Shonker, K. Joy, Abdul Kabeer, Subramonium Prasad, Renjith B. Marar, Lakshmi N. Kaimal, Lakshmeesh B. Kamath, Ms. Vasudha Gupta, Kodoth Sreedharn Nair, Vipin Nair, P. B. Suresh, Abhay Pratap Singh, Advs. for the appearing parties.

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The Judgment of the Court was delivered by

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KURIAN, J. 1. Advice, effective date of advice, appointment, joining, seniority and their interplay constitute the subject of discussion in this case.

2. I.A. No.1/2008, in C.A. No.7913/2009, is allowed.

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3. Under Rule 27 of Kerala State and Subordinate Service Rules, 1958 (hereinafter called 'the General Rules) seniority is to be determined on the basis of the effective date of advice. The Rule reads as follows:-

“27. Seniority.- (a) Seniority of a person in a service, class, category or grade shall, unless he has been reduced to a lower rank as punishment, be determined by the date of the order of his first appointment to such service, class, category or grade.

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Explanation:- For the purposes of this sub-rule, “appointment” shall not include appointment under rule 9 or appointment by promotion under rule 31.

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(b) xxx xxx xxx

(c) Notwithstanding anything contained in clauses (a) and (b) above, the seniority of a person appointed to a class, category or grade in a service on the advice of the Commission shall, unless he has been reduced to a lower rank as punishment, be determined by the date of first effective advice made for his appointment to such class, category or grade and when two or more persons are included in the same list of candidates advised, their relative seniority shall be fixed according to the order in which their names are arranged in the advice list.

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xxx xxx xxx”

4. Advice and appointment are two different events. Advice is

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A based on the list prepared by the Public Service Commission on the basis of comparative merit in the selection and on the basis of principles of communal rotation. Appointment is made pursuant to the advice. One who is close to the place may join immediately. On the other hand, one may require a few days to travel to join the post, depending on the distance. One may join even a few days after the date of advice. There may also be situations of delay on the part of the appointing authority in issuing orders of appointment. It is in that context that the Rule specifically provides that the seniority will depend on the date of advice and not on the date of appointment or date of joining.

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C 5. T. Raju (Respondent No.6 in in C.A. No.7849/2009 and Respondent No.1 in C.A. No.7913/2009) approached the High Court of Kerala in O.P. No.18040/1996 with a grievance that he was entitled to be advised from the rank list published on 12.06.1992, on his position at No.86 under the reserved quota for Ezhava. His contention was upheld by the High Court by judgment dated 17.01.2001. The operative portion of the judgment reads as follows:-

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E “In the circumstances, I am of the view that the proper order to be passed is to direct the 2nd respondent to revise the advise list including Mohanan, holder of Rank No.7, in the merit quota and to advise the petitioner including him in the appropriate Ezhava turn against the next advisable vacancy for the post of Excise Inspector. I direct accordingly. The seniority and service conditions of the 83 candidates already advised and appointed shall not, however, be disturbed. As and when advice is received, the 1st respondent shall provide appointment to the petitioner in the next available vacancy.”

F (Emphasis supplied)

G 6. The Kerala Public Service Commission filed Writ Appeal No.2110 of 2001, which was decided by judgment dated 13.11.2002. The appeal was dismissed holding that “learned Single Judge was very careful to see that seniority is not affected as it was directed that the petitioner shall be accommodated without affecting the seniority of persons already advised and without disturbing the appointments already made. In the above circumstances, no interference is required”.

H 7. Mr. Jaideep Gupta, learned senior counsel, however, has invited our reference to the observation made by the Division Bench after the dismissal, which reads as follows:-

“Since the petitioner was waiting for judgment in the writ petition filed as early as in 1996 and judgment was pronounced by the learned Judge on 17th January, 2001, the judgment shall be implemented within three months from the date of receipt of a copy of this judgment.” A

(Emphasis supplied) B

8. Mr. Jaideep Gupta, learned senior counsel appearing for the State, Mr. Dhruv Mehta, learned senior counsel and Mr. Kodoth Sreedharan Nair, learned counsel appearing for the intervenor, submit that the actual date of advice for the appointment should be taken as the date for all purposes including determination of seniority since the Division Bench granted three months’ time from the date of receipt of a copy of the judgment for implementation of the judgment. In other words, in the instant case, the actual appointment is based on the advice given to T. Raju on 16.01.2003 and, therefore, the appointment based on that advice alone should be counted for the purpose of seniority, is the submission. C D

9. We are afraid, the contentions raised by the respondents cannot be appreciated. There is a lot of difference, as we have already referred to above, between advice and appointment and also there is a lot of difference between the effective date of advice and actual date of appointment. In the case of T. Raju, the judgment dated 17.01.2001, as confirmed by the Division Bench in the judgment dated 13.11.2002 has become final. The High Court was very clear in its mind that T. Raju should have been advised at least after the last advice as on the date of the judgment and that is why the Court very guardedly used the expression ‘advisable vacancy’. The Division Bench has rightly observed, that the Single Judge did not want to disturb the seniority of all those candidates advised and appointed by the date of judgment dated 17.01.2001. The time granted by the Division Bench of the High Court is for the implementation of the judgment dated 13.11.2002. It has to be seen that the writ appeal was actually dismissed, meaning thereby that the benefit granted to T. Raju to have his appointment based on the next advisable vacancy after the judgment was not disturbed. More importantly, it has to be seen that the non disturbance to seniority on account of appointment of T. Raju was only to those 83 candidates appointed prior to 17.01.2001 and not to others. In other words, T. Raju E F G

A was entitled to take a position below the 83rd candidate for the purposes of seniority, of course, having regard to the next advisable vacancy, which is the effective advice.

10. In the affidavit dated 11.09.2017 filed before this Court, it is very clearly stated that “Shri G. Madhu, immediate senior to the petitioner who was advised on 05.01.1998 got appointment in the cadre of Excise Inspector only on 01.03.1999”. It is further stated in the affidavit that “when the direct recruit vacancy arose in the Cadre after 7.11.1996 (i.e. last advise from 1992 Select List), the first vacancy for the direct recruits arose on 01.04.1999”

C 11. That being the factual position, on implementation of the judgment dated 17.01.2001, T. Raju is entitled to get the advice after the last advice from the 1992 list i.e. 05.01.1998. That is the effectively advisable vacancy as far as T. Raju is concerned in terms of the judgment, as confirmed by the Division Bench as well by judgment dated 13.11.2002.

D 12. Therefore, T. Raju is entitled to his seniority based on the effective date of advice in the next advisable vacancy namely, 01.04.1999. The seniority of T. Raju shall be re-fixed, treating the date of advice for appointment as Excise Inspector as 01.04.1999.

E 13. We make it clear that on such revision of seniority, the monetary benefits available to T. Raju would only be notional.

F 14. We further make it clear that on the basis of the implementation of this judgment, if any candidate is to be reverted, the reversion shall be deferred till T. Raju retires from service, particularly since we are informed that the period of service available to T. Raju is only eight months.

G 15. On the basis of the revision of seniority, as above, T. Raju shall be given the appropriate appointments and promotions within a period of one month from today. For all purposes T. Raju, shall be treated to be in the promoted positions after the expiry of one month from today.

16. We make it clear that the benefits, as above, are granted only in the peculiar facts of this case.

17. In view of the above, appeals filed by the State (C.A. No.7913/2009) and K.R. Babu (C.A. No.7849/2009) are dismissed.

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18. Pending applications, if any, shall stand disposed of.

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19. There shall be no orders as to costs.

Nidhi Jain

Appeals dismissed.