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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

+ W.P.(C) 5953/2002

LALIT KUMAR AND ORS Petitioners

Through: Mr. Galib Kabir, Advocate

versus

UOI & ORS. Respondents

Through: Mr.R.V.Sinha, Advocate for R-1

Mr. R.N. Singh, Advocate with

Mr. Balkishan, Advocate for R-15, 19 and 36.

Mr. S.C. Saxena, Advocate for R-27.

CORAM:

HON'BLE MS. JUSTICE HIMA KOHLI

HON'BLE MS. JUSTICE DEEPA SHARMA

ORDER

% **21.08.2017**

1. The petitioners are aggrieved by the dismissal of a joint petition filed by them and fourteen others before the Central Administrative Tribunal(hereinafter referred as '**the Tribunal**'), which was dismissed vide judgment dated 27.11.2001.

2. The factual matrix of the case is as follows. The petitioners herein were directly recruited in Grade IV of the Indian Economic Service (in short, '**IES**') in the year 1995-96. Aggrieved by the office order dated 20.11.1997 issued by the IES Division, Department of Economic Affairs, Ministry of Finance, Government of India, posting/transferring Grade IV officers of IES in the order of their seniority to different Departments with immediate effect and notionally, as per column 4 of the said order, the petitioners had approached the Tribunal raising a grievance that 90 promotee

officers to Grade IV of the IES had been wrongly placed above the petitioners in seniority, by granting them an antedated deemed seniority.

3. The Indian Economic Service Rules, 1961 (hereinafter referred to as '**the Rules**') that have been framed under Article 309 of the Constitution of India, governs the IES cadre. Rule 8(1)(a) of the Rules prescribes recruitment to Grade IV of IES from two streams, 60% through direct recruitment and 40% through promotion from amongst the feeder cadre. The petitioners herein are direct recruits whereas the private respondents No.2 to 55 are promotes from the feeder cadre. Direct recruitments were being made to the IES cadre ever since the year 1968. However, the promotee quota was not filled up for a very long time. As a result, the aggrieved employees, who were promotes, moved the court claiming entitlement to be promoted to Grade IV on the ground that they had been officiating on a continuous *ad hoc* basis for a long time, but had not been regularized in the said Grade IV. Vide judgment rendered by the Supreme Court in the case of Narendra Chadha vs. Union of India, reported as **AIR 1986 SC 638**, the said promotees were regularized in Grade IV of the IES. Subsequently, in the case of B.S. Kapila vs. Union of India, other similarly placed officers, who were also officiating against posts in Grade IV of the IES, had moved the Court and were given similar relief.

4. It is an undisputed position that from the year 1990 onwards, the respondent No.1 did not convene any DPC for filling up the promotee quota and the DPC was finally held only in the year 1997, that was presided over by the UPSC. All the 90 promotees, who were inducted into Grade IV of the IES on the basis of ad hoc promotions, were confirmed on the said post in terms of the office order dated 20.09.1997 and their deemed dates of

seniority were declared as the dates from which they had started functioning on the said post on an ad hoc basis.

5. The petitioners herein laid a challenge to the deemed dates of seniority in respect of the respondents No. 2 to 55 before the Tribunal, claiming *inter alia*, that being direct recruits to Grade IV of the IES, they were put to a disadvantage, as they had become junior to the 90 officers promoted to Grade IV of the IES in the year 1997, by virtue of their deemed dates of seniority, in the years 1991-94. However, the said plea did not find favour with the Tribunal, which agreed with the submission made by the respondent No.1/UOI that Rule 9D of the Rules makes a special provision in case of any undue hardship and injustice and held that the said provision had been rightly invoked in favour of the 90 promotees. Rule 9D is reproduced hereinbelow for ready reference:-

“9D. Special provision in case of undue hardship or injustice

When the Controlling Authority is of the opinion that the determination of seniority of any officer in accordance with these rules would cause or likely to cause undue hardship in any particular case, then the controlling authority may in consultation with the Commission and for reasons to be recorded in writing determine the seniority in a just and equitable manner.”

6. Learned counsel for the petitioners submits that the Tribunal had erred in holding that the respondent No.1/UOI was entitled to invoke the provisions of Rule 9D on the ground that application of the said Rule had caused grave miscarriage of justice to the petitioners; that the said Rule is perverse; that no reasons have been recorded by the Competent Authority to justify invocation of Rule 9D and in any case, invocation of Rule 9D has resulted in upsetting the seniority of the petitioners.

7. Per contra, Mr. R.V.Sinha, learned counsel for the respondent No.1 supports the impugned judgment and explains that Rule 9D was invoked in the present case for the reason that no DPC was held by the Department in the case of the promotees/respondents No. 2 to 55, ever since the year 1991 and they had to suffer for no fault of theirs, when their deemed date of seniority had fallen between the years 1991-94. Therefore, in the larger public interest of protecting the posts from being abolished and removing the justifiable grievance raised by the promotees, Rule 9D had to be invoked. He submits that the facts of the present case had justified invocation of Rule 9D and in any case, promoting the respondents did not cause any disadvantage to the petitioners, who were not even borne on the cadre till the year 1996, when they were appointed initially on probation and confirmed two years down the line, in the year 1998.

8. The reason for rejecting the petitioners' case has been summarized in paras 19 to 20 of the impugned judgment, which are reproduced hereinbelow for ready reference :-

“19. In so far as the ruling relied upon by the applicants' counsel and referred to in Para 7 above are concerned, none of them deal with a situation like the present one where there is a specific provision similar to Rule 9D IES Rules, empowering the Controlling Authority to determine the seniority in a manner which it considers just and equitable when it is satisfied that determination of seniority in accordance with rules was likely to cause undue hardship. These Rules have been framed under Article 309 of the Constitution of India and if, pursuant to aforesaid Rule 9D, respondents, upon being satisfied that fixation of seniority of the promotees in accordance with rules would cause them undue hardship, have sought to fix their seniority in a just and equitable manner by granting them seniority from a retrospective date, their action cannot be faulted

on that account, and the rulings relied upon by applicants' counsel do not advance applicants' claim.

20. In this connection, the submissions on behalf of private respondents cannot be lightly disregarded that they were in the feeder grades of IES Grade IV since early nineteen eighties (generally between 1978 to 1983), and as per published Recruitment Rules, became eligible for promotion to IES Grade IV upon completion of four years service i.e. between 1982 to 1988, and even if as per stand of official respondents, seven years' service in the feeder grade was required for eligibility for promotion to IES Grade IV as per Recruitment Rules, they became eligible for consideration for promotion to IES Grade II between 1986 and 1990. Hence if because of non-holding of DPC by official respondents between 1990 to 1997 for non good reasons, they could not be considered for promotion, they cannot be allowed to suffer. Furthermore, several private respondents were promoted to IES Grade IV on ad hoc basis from 1994 onwards, while applicants were not even born into the IES, and joined that service as direct recruits only in 1995-96."

9. As can be seen from the above, admittedly, the respondents No. 2 to 55 were in the feeder cadre of IES, Grade IV since the early 1980's (between the years 1978 to 1983) and they had become eligible for promotion to Grade IV upon completion of four years of service between the years 1982 to 1988. As per the Recruitment Rules, seven years service is required in the feeder cadre for being eligible to promotion to Grade IV. However, due to the failure on the part of the administration to hold the DPC between the years 1990 to 1997, though they were eligible, the respondents were not considered for promotion. Instead, they were promoted to Grade IV on an ad hoc basis from the year 1994 onwards, when the petitioners herein were nowhere in the picture.

10. This being the position, there is no merit in the plea of the petitioners that they had been pushed down by the respondents/promotees, for the simple reason that they being direct recruits, came to be borne in the service only from the date on which they had been appointed, which was in the year 1996. The aforesaid view is fortified by the judgment of the Supreme Court in the case of Suraj Prakash Gupta and Ors. vs. State of J&K and Ors. reported as (2000) 7 SCC 561, referred to by learned counsel for the respondent No.1. In the said case, on examining the power of the employer to relax the recruitment rules and regularize the ad hoc/stopgap promotees in the Electrical Wing of the J&K Government, the Supreme Court had held that adhoc/stopgap service of promotees cannot be treated as non-est merely because the PSC was not consulted in respect of continuance of their service beyond six months. Referring to Rule 23 of the J&K (CCA) Rules, 1956, which empowered such services to be regularised and rectified with retrospective effect from the date of occurrence of a clear vacancy in the promotion quota, subject to eligibility, fitness and other relevant factors, the Supreme Court observed that there is no 'rota' rule applicable in the said case and the 'quota' rule had not broken down.

11. We may profitably refer to paras 79, 80 and 81 of the captioned judgment, where the claim of the direct recruits therein who were seeking appointment from the date of vacancy in the quota, before their selection has been dealt with as follows :-

“79. Summarising the position, we therefore hold that the ad hoc/slop gap service of the promotees cannot be treated as non-est merely because P.S.C. was not consulted in respect of continuance of the ad hoc/stopgap service beyond six months. Such service is capable of being regularised under Rule 23 of the J&K (CCA) Rules, 1956 and

rectified with retrospective effect from the date of occurrence of a clear vacancy in the promotion quota, subject to eligibility, fitness and other relevant factors. There is no “rota” rule applicable. The “quota” rule has not broken down. Excess promotees occupying direct recruitment posts have to be pushed down and adjusted in later vacancies within their quota, after due regularisation. Such service outside promotee quota cannot count for seniority. **Service of promotees which is regularised with retrospective effect from date of vacancies within quota counts for seniority.** However, any part of such ad hoc/stopgap or even regular service rendered while occupying the direct recruitment quota cannot be counted. **Seniority of promotees or transferees is to be fixed as per quota and from date of commencement of probation/regular appointment as stated above. Seniority of direct recruit is from the date of substantive appointment. Seniority has to be worked out between direct recruits or promotees for each year.** We decide Point 3 accordingly.

80. We have next to refer to one other contention raised by the respondent direct recruits. They claimed that the direct recruitment appointment can be ante-dated from the date of occurrence of a vacancy in the direct recruitment quota, even if on that date the said person was not directly recruited. It was submitted that if the promotees occupied the quota belonging to direct recruits they had to be pushed down, whenever direct recruitment was made. Once they were so pushed down, even if the direct recruit came later, he should be put in the direct recruit slot from the date on which such a slot was available under direct recruitment quota.

81. This contention, in our view, cannot be accepted. **The reason as to why this argument is wrong is that in Service Jurisprudence, a direct recruit can claim seniority only from the date of his regular appointment. He cannot claim seniority from a date when he was not borne in the service.** This principle is well settled. In N.K. Chauhan v. State of Gujarat, [1977] 1 SCC 308 (at p.321) Krishna Iyer, J. stated :

“Later direct recruit cannot claim deemed dates of appointment for seniority with effect from the time when

direct recruitment vacancy arose. Seniority will depend upon length of service."

Again, in A. Janardhana v. Union of India, [1983] 2 SCR 936, it was held that a later direct recruit cannot claim seniority from a date before his birth in the service or when he was in school or college. Similarly it was pointed out in A.N. Pathak v. Secretary to the Government, [1987] Suppl. SCC 763 (at p.767) that slots cannot be kept reserved for the direct recruits for retrospective appointments." (emphasis added)

12. The aforesaid judgment applies on all fours to the facts of the case at hand. When the petitioners herein were not even borne in the service on the date when the promotee respondents No.2 to 55 became eligible for promotion in Grade IV, there is no question of their being put to any disadvantage or their seniority being adversely affected.

13. Accordingly, the impugned judgment is upheld and the present petition is dismissed as being devoid of merits, with no orders as to costs.

HIMA KOHLI, J

DEEPA SHARMA, J

AUGUST 21, 2017

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