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

+ **W.P.(C) 12096/2016 & CM Nos.47758-59/2016**

Date of Decision : 4th January, 2017

AMIT ARORA

..... Petitioner

Through: Mr. Rajat Aneja, Advocate

versus

HIGH COURT OF DELHI THROUGH ITS REGISTRAR

GENERAL & ORS

..... Respondents

Through: Mr. Vikram Pradeep, Advocate

CORAM:

HON'BLE MR. JUSTICE SANJIV KHANNA

HON'BLE MR. JUSTICE CHANDER SHEKHAR

SANJIV KHANNA, J. (ORAL)

We have heard learned counsel for the petitioner – Amit Arora- in this writ petition, which relates to *inter se* seniority dispute of the petitioner with respondent Nos.2 to 5, namely, Monika Wadhwa, Shiv Kumar, Nirmala Tiwari and Sunita Rawat as Senior Personal Assistant ('SPA').

2. The petitioner is a promotee officer, who was appointed to the said post vide Notification dated 5.6.2006, against 25% departmental quota. Respondent Nos.2 to 5 were appointed as SPA through direct recruitment under the 75% quota on 28.7.2006. The *inter se* seniority between the direct recruits and the promotees was then governed by Rule 5A of the Delhi High Court Staff (Seniority) Rules, 1971 ('Rules'), which reads as under:

“5A. The inter se seniority of direct recruits vis-a-vis promotees shall be determined in order of rotation of vacancies between the direct recruits and promotees based on the quota of vacancies reserved for both categories provided that the first vacancy will be filled by a promotee and the next three vacancies by direct recruits and so on and so forth.

Provided further that the slot reserved for a direct recruit in the seniority list shall not be assigned to promotee even if there is delay in recruitment process and appointment of a direct recruit against their quota of 75%.”

As per Rule 5 A, the *inter se* seniority between the direct recruits and the promotees was to be determined by rotation of vacancies between the direct recruits and the promotees, based on the quota of vacancies reserved for both the categories. The first vacancy was to be filled-up by a promotee and the next three vacancies by direct recruits and so forth.

3. In view of Rule 5A, it is an accepted and admitted position that the petitioner would be junior to respondent Nos.2 to 5.

4. The petitioner, however, claims that Rule 5A was made inapplicable to the post of SPA w.e.f. 21.11.2007. As per the petitioner after Rule 5A was made inapplicable to SPAs, the *inter se* seniority of the petitioner and respondent Nos.2 to 5 would be governed by Rule 3, i.e., on the basis of the date of confirmation. Rule 3 reads as under:

“Inter se seniority of confirmed employees in any category of the High Court Staff shall be determined on the basis of the date of confirmation.”

The petitioner, it is urged, was confirmed as an SPA on successful completion of probation vide Notification dated 8.9.2010 w.e.f. 25.7.2007, whereas respondent Nos. 2 to 5 were confirmed vide order dated 7.1.2012 w.e.f. 23.12.2011. Thus, on the dates of confirmation of the petitioner and respondent Nos. 2 to 5 Rule 3 was applicable and therefore, the petitioner would be senior to respondent Nos.2 to 5.

5. We have considered the contention raised by the petitioner but do not find any merit in the same. It is an accepted and admitted position that Rule 5A was in operation and was applicable on the dates when the petitioner was appointed on 5.6.2006 and respondent Nos.2 to 5 were appointed on 28.7.2006. The said Rule was made inapplicable to the post of SPA's subsequently w.e.f. 21.11.2007. The seniority position *inter se* the petitioner and respondent Nos.2 to 5 would be governed by the rule position as applicable on the date when they were appointed, i.e., in terms of Rule 5A. This is the mandate and ratio of the decision dated 21.10.2016 in WP(C) No.2836/2010 titled ***V.K. Mittal & Ors. v. Registrar General, High Court of Delhi & Ors..***

6. Learned counsel for the petitioner submits ***V.K. Mittal & Ors. (supra)*** is distinguishable and inapplicable to the present factual matrix for Rule 5A had remained applicable to the post of Private Secretary ('PS') till 8.4.2009 and in case of ***V.K. Mittal & Ors. (supra)***, the parties were confirmed as PS prior to the said date. *Albeit* in the present case, the petitioner was confirmed on 25.07.2007 and the respondent nos. 2 to 5 were confirmed on 23.12.2011. We would not accept this argument. The ratio in ***V.K. Mittal & Ors. (supra)*** is that Rule 5A would apply as the said provision was applicable on the date of appointment. An additional reason given by the Court in ***V.K. Mittal's case (supra)*** was that even on the date of confirmation at the post of P.S., Rule 5A was applicable. The core reason and ground given in the case of ***V.K. Mittal & Ors. (supra)*** was that the seniority position would be governed by the Rule position as it existed on the date when the parties were appointed and the said criteria would be determinative and apply.

7. In ***B.S. Yadav v. State of Haryana, 1980 Supp SCC 524***, the Constitution Bench had examined a similar controversy. Rule 12 relating to *inter se* seniority between the direct recruits and promotees of the Punjab Superior Judicial Services, prior to 31.12.1976, had stipulated the criteria of date of confirmation and post amendment, the criteria was the length of

continuous service on the post irrespective of the date of confirmation. Referring to the Rule position, the Supreme Court held that appointments and promotions made after 31.12.1976 would be governed by the amended provisions and appointments/ promotions before the said date would be determined on the criteria of the date of confirmation. Thus, the date of appointment to service was relevant.

8. It is not the case of the petitioner that any retrospective effect has been given to Rule 3. Rule 5A was made inapplicable to the post of SPAs only w.e.f. 21.11.2007, which is after the appointment of the petitioner and respondent Nos.2 to 5 as SPAs.

9. Learned counsel for the petitioner has referred to ***Prafulla Kumar Swain v. Prakash Chandra Misra & Ors.***, JT 1993(1) SC 360. This was a case of seniority dispute between the promotees and direct recruits belonging to Orissa State Forest Service Class-II. The question which arose was whether the respondent therein was to be assigned seniority from the year of recruitment, i.e., 1979 or from the year of appointment, i.e., 1981. Reference was made to Orissa Forest Service Class II Recruitment Rules, 1959 and with reference to the extant rule position, it was held:-

“27. Regulation 12 is important for our purposes. Under that Regulation the finally selected candidates are required to

undergo two years training. During the period of pendency a consolidated monthly allowance of Rs. 150 as stipend is paid. Under clause (b) of that Regulation he is required to execute a bond provided for in Appendix A. Regulation 12(c) in unmistakable terms says the period of training will not count as service under Government. Such service will count only from the date of appointment to the service after successful completion of the course of training. (Emphasis supplied).

We must give full meaning and effect to this Regulation.”

The aforesaid decision would not assist and help the petitioner Rule 5A was applicable when the petitioner and respondent nos. 2 to 5 were appointed as SPAs. The said Rule referred to ‘appointment’ and not recruitment or confirmation as the basis. The seniority position must therefore be fixed in terms of the said Rule. In **B.S. Yadav** (supra), the Constitution Bench, in Paragraphs 67 and 68 of the judgment, as reported in SCC, has observed that application of rota system at the stage of confirmation was beset with practical difficulties, for quota gets fixed at the stage of recruitment/appointment and in this context held that the rules of the Punjab Superior Judicial Service relating to confirmation/seniority were contrary to the basic Constitutional concepts governing judicial service. It was accordingly held in Paragraph 71 that the ratio applied at the stage of recruitment/appointment in view of the language of the Rule cannot be

applied at the stage of confirmation. In ***Direct Recruits Class II Engineering Officers' Association v. State of Maharashtra and Ors.*** (1990) 2 SCC 715 it has been observed that seniority cannot be determined on the sole test of confirmation, for confirmation is one of the inglorious uncertainties of Government service, depending neither on efficiency of the incumbent, nor on the availability of substantial vacancies. The principle for deciding *inter se* seniority has to conform to the principle of quality spelt out in Articles 14 and 16.

10. The Supreme Court in ***Union of India v. N.R. Parmar***, (2012) 13 SCC 340, which decision refers to OMs dated 7.2.1986, 3.7.1986 and 3.3.2008, has held:-

“31.2 It is not necessary, that the direct recruits for vacancies of a particular recruitment year, should join within the recruitment year (during which the vacancies had arisen) itself. As such, the date of joining would not be a relevant factor for determining seniority of direct recruits. It would suffice if action has been initiated for direct recruit vacancies, within the recruitment year in which the vacancies had become available. This is so, because delay in administrative action, it was felt, could not deprive an individual of his due seniority. As such, initiation of action for recruitment within the recruitment year would be sufficient to assign seniority to the concerned appointees in terms of the

"rotation of quotas" principle, so as to arrange them with other appointees (from the alternative source), for vacancies of the same recruitment year."

11. Learned counsel for the petitioner submits that Rule 5A should be treated as invalid, in view of the decision of the Supreme Court in ***B.S. Mathur v. Union of India*** (2008) 10 SCC 271. We do not find any merit in the said contention. In ***B.S. Mathur*** (supra), the issue was whether rota-quota had broken down. With reference to the factual matrix, as it existed, the Supreme Court agreed that the rota-quota had broken down, in the said service. The contention of the petitioner that rota-quota has broken down in the cadre of SPA is farcical and fallacious. The contention is that if the date of confirmation is taken as the basis, then it should be assumed that rota-quota rule had broken down. The petitioner and respondent nos. 2 to 5 were appointed in the same year, i.e. 2006. They had not earlier officiated as SPAs. Rota-quota has not broken down. The submission has no merit.

12. With the above observations, the writ petition is dismissed. CM Nos.47758-59/2016 are also dismissed.

SANJIV KHANNA, J

CHANDER SHEKHAR, J

JANUARY 04, 2017/tp