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

+ W.P.(C) 10649/2017 & C.M. No. 43615/2017 (stay)

ASHUTOSH GAUTAM

..... Petitioner

Through: Mr. M.K. Bhardwaj, Advocate.

versus

JITENDER KHANNA AND ANR.

..... Respondents

Through: Respondent No.1 in person.

Mr. Rajeev Kumar Sharma, Advocate for R-2.

CORAM:

HON'BLE MS. JUSTICE HIMA KOHLI

HON'BLE MS. JUSTICE REKHA PALLI

ORDER

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18.01.2018

1. The petitioner, who was working on the post of an Assistant Legal Advisor (hereinafter referred to as '**the ALA**') with the respondent No.2/ICAR, has challenged the judgment dated 31.10.2017 passed by the Central Administrative Tribunal, Principal Bench, New Delhi, in an Original Application filed by the respondent No.1, for seeking quashment of the Memorandum dated 24.8.2016 whereby, the respondent No.2/ICAR had rejected his application objecting to the provisional seniority list prepared in the grade of the ALA, as circulated on 14.11.2014 on the ground that his name had wrongly been placed below that of the petitioner, at Sr. No.2.

2. The undisputed facts of the case as elicited from the records are that in year 2009, the respondent No.2/ICAR had invited applications for filling up two posts of ALA on deputation/direct recruitment. Amongst others, the

petitioner and the respondent No.1 had applied for the said posts. The interview of the candidates was held on 21.10.2009. The Selection Committee held a meeting on the same date and recommended two names for appointment, one name was of the petitioner herein at Sr. No.2 and the other was that of the respondent No.1, at Sr. No.1. Further, the names of two other candidates, who were selected, were placed in the reserve list. The minutes of the Selection Committee reproduced in para 2 of the impugned order read as under:-

2.1 *“Proceedings of the meeting of the Selection Committee constituted for filling up the posts of Assistant Legal Adviser at ICAR Hqrs. held on 21.10.2009.*

PRESENT

- | | |
|---|------------------|
| 1. Shri A. K. Upadhyay, Secretary, ICAR | Chairman |
| 2. Shri K. K. Bajpai, Director (P), ICAR | Member |
| 3. Shri M. K. Sharma, Additional Legal Adviser
<i>Deptt. Of Legal Affairs, Min. of Law & Justice</i> | Member |
| 4. Ms. Manju Bage, Under Secretary, ICAR | Member |
| 5. Shri P. K. Bage, Under Secretary, ICAR | Member |
| 6. Shri K. N. Choudhary, Under Secretary (A) | Member Secretary |

The Committee noted that for two unreserved vacancies in the grade of Assistant Legal Adviser in the Pay Band-2, Rs.9300-34800 with corresponding Grade Pay of Rs.4600/- to be filled by Direct Recruitment/Deputation method, 25 candidates were shortlisted on the basis of detailed scrutiny of applications received.

Out of 25 shortlisted candidates, 20 candidates were present. At the outset the applicants were given a small exercise of drafting an appeal and stay petition. Thereafter, 19 candidates were interviewed. One candidate did not stay back for the interview. On the basis of their academic records, past experience, drafting ability and interview the Selection Committee recommends the name of the following candidates for appointment against the post of Assistant Legal Adviser:

Select List

1. Jitender Khanna
2. Ashutosh Gautam

A meeting of the Selection Committee constituted for filling up the two posts of Assistant Legal Adviser in ICAR in PB-2 Rs.9300-34800 with corresponding Grade Pay of Rs.4600/- on deputation/Direct Recruitment method was held on 21.10.2009. All applications have been received for appointment on Direct Recruitment basis. The proceedings of the meeting are placed at flag 'X'. The Committee has recommended the name of the following candidates for appointment against the post of Assistant Legal Adviser:

Select List

1. Sh. Jitender Khanna S/o Sh. B.S. Khanna
2. Sh. Ashutosh Gautam S/o Sh. Ramkripal Singh

Reserve List:

1. Mrs. Anjana Mistry W/o Sh. Chitra Mistry
2. Mrs. Ritu Chaudhary W/o Sh. Gopal Krishan

(This list would be operative only in case the candidates in select list do not accept the offer for the post)

Approval of Secretary, ICAR is solicited to the recommendations of the selection committee and for the appointment of the following against the post of Assistant Legal Adviser:

1. Sh. Jitender Khanna S/o Sh. B.S. Khanna
2. Sh. Ashutosh Gautam S/o Sh. Ramkripal Singh”

3. The competent authority accepted the recommendations of the Selection Committee wherein, the name of the respondent No. 1 was shown at Sr. No.1 and that of the petitioner, at Sr. No.2. Vide Memorandum dated 23.10.2009, an offer of appointment was made to the petitioner and the respondent No.1. The selected candidates were asked to convey their

acceptance within 20 days, failing which, it was made clear that the offer would be considered as automatically cancelled. Further, in para 5 of the offer of appointment, it was stipulated that the said appointment would be subject to the satisfactory verification of the character and antecedents of the selected candidates. In para 6 of the offer of appointment, it was stated that the same was subject to the candidates being declared as medically fit for service.

4. Vide letter dated 04.11.2009, the respondent No.1 accepted the offer of appointment within the stipulated time and filled up the requisite form for a medical examination. But he was not asked to join duty for some time due to a delay in the police verification. In the meantime, on completion of all requisite formalities, the petitioner had joined the respondent No.2/ICAR on 01.2.2010. On 22.4.2010, the respondent No.2/ICAR issued a Memorandum offering an appointment to the respondent No.1, who was required to join within 15 days from the date of issuance of the Memorandum. However, the respondent No.1 asked for extension of time to join service vide letters dated 29.4.2010, 17.5.2010, 23.6.2010, which were allowed by the respondent No.2/ICAR, till he finally joined on 08.7.2010.

5. Vide office order dated 7.3.2014, the services of both the petitioner and the respondent No.1 were confirmed by the respondent No. 2/ICAR. In the confirmation order, the name of the respondent No.1 was shown at Sr. No.1 and that of the petitioner at Sr. No.2. The date of confirmation of the respondent No.1 was reflected as 02.7.2012 and that of the petitioner as 31.1.2012. Vide circular dated 14.11.2014, a provisional seniority list in respect of the post of the ALA was circulated by the respondent No.2/ICAR and objections were invited within two weeks. In the said provisional

seniority list, the name of the petitioner was shown at Sr. No.1 and that of the respondent No.1 at Sr. No.2.

6. Aggrieved by the said provisional seniority list, the respondent No.1 submitted his objections on 26.11.2014 claiming seniority over the petitioner on the basis of his ranking in the Select List. This was followed by several representations submitted by the respondent No.1, including the representations dated 26.11.2014, 31.12.2015, 12.2.2016, 09.05.2016 and 26.7.2016. Finally, vide Memorandum dated 24.8.2016, the respondent No.2/ICAR gave the following grounds to reject the representations of the respondent No.1:-

“It has been decided, with the approval of the competent authority, that his request cannot be acceded to in the light of following facts:

1. The offer of appointment was issued to both the candidates on October 23, 2009 and the formalities like medical examination and verification of antecedents were to be completed.

2. Both the candidates accepted the offer of appointment within prescribed period and after initial formalities Shri Gautam joined on 1.2.2010 and Shri Khanna joined on 08.07.2010.

3. In the absence of any mention of “order of merit” in the selection list and therefore, applying the principle of seniority, the name of Shri Gautam has correctly been placed at Sl. No.1 in the provisional Seniority List of ALA upto 31.12.2013 circulated vide NO.F.6(9)/2014-Estt.I dated 14th November, 2014.

His representations are disposed off accordingly.”

7. Aggrieved by the aforesaid decision taken by the respondent No.2/ICAR, the respondent No.1 approached the Tribunal by filing O.A. No. 3450/2016. On completion of pleadings, the following two questions were framed for determination:-

“(i) whether the recommendations made by the Selection Committee on 21.10.2009 for select list and reserved list are in the order of merit or merely a panel communicating the names of the recommendees and

(ii) whether the seniority list in the present case is to be fixed on the basis of merit in selection or from the date of joining.”

8. On going through the factual position, the Tribunal noted that both the candidates, i.e., the petitioner and the respondent No.1 had appeared in the same selection process in respect whereof the Selection Committee had made a recommendation on 21.10.2009. Both the candidates were issued offer of appointment on the same date, i.e., on 23.10.2009. Since all formalities of his character and antecedents verification had been completed earlier, the petitioner could join the respondent No.2/ICAR on 01.2.2010. However, on account of delay in completion of the formalities of police verification, the letter of appointment was issued to the respondent No.1 only on 22.4.2010. It is a different matter that he sought extensions from time to time for joining, which requests were duly allowed and he had finally joined on the subject post on 08.7.2010, well within the extended time.

9. In the initial note prepared by the respondent No.2/ICAR for declaring the seniority list, the respondent No.1 was treated as senior to the petitioner on the basis of the Select List dated 21.10.2009 wherein, he was

shown at Sr. No.1. The Selection Committee had also recommended two candidates on the same day, who were kept in the reserve list. The Select List that refers to the names of the respondent No.1 and the petitioner in that order, reflects that it was prepared on the basis of the academic records, past experience, drafting ability and performance of the candidates in the interview. The said Select List was not challenged by any of the parties. However, disputes arose only when the provisional seniority list dated 14.11.2014 was displayed by the respondent No.2/ICAR wherein, the petitioner's name was reflected at Sr. No.1 and that of the respondent No.1, at Sr. No.2. When the respondent No.1 submitted his objections thereto on 17.11.2014, the then Secretary of the respondent No.2/ICAR made an observation that in the absence of any indication in the proceedings of the Selection Committee that the two names had been placed in the order of merit, the matter needed examination by looking at the relevant papers for determining the *inter se* seniority of the two ALA. On 11.10.2014, the Secretary, ICAR decided that the matter relating to seniority was reflected in the provisional seniority list dated 14.11.2014, which was later on declared as final vide circular dated 24.8.2016.

10. After going through the rule position, the Tribunal observed that seniority in the respondent No.2/ICAR is regulated by Rule 16 of the Central Secretariat Service Rules, 2009 (hereinafter referred to as “**the CSS Rules**”), which reads as under:-

“16. Seniority.- (1) The relative seniority of members of the Service appointed to any Grade before the appointed day shall be regulated by their relative seniority as determined before the said date:

Provided that, if the seniority of any such officer had not been specifically determined before the said date, it shall be as determined by the Department of Personnel and Training in the Ministry of Personnel, Public Grievances and Pensions.

(2) The seniority of persons appointed to any Grade after the appointed day shall be determined as follows, namely:-

.....

II. Assistant's Grade:-

.....

(b) Persons appointed regularly to a Grade from the Select List for the Grade shall be ranked inter-se according to the order in which they are so appointed;

(c) The relative seniority of direct recruits to a Grade and persons regularly appointed to the Grade from the Select List for the Grade shall be regularised in accordance with the provisions of Regulations made in this behalf by the Department of Personnel and Training in the Ministry of Personnel, Public Grievances and Pensions.”

11. The stand of the respondent No.2/ICAR was that for matters relating to service conditions and financial transactions, the rules and orders issued by the Govt. of India from time to time apply *mutatis mutandis* to the employees of the ICAR and instructions relating to fixation of seniority framed by the DoPT equally applies to employees in equal grade pay. Counsel for the respondent No.2/ICAR had referred to O.M. dated 11.11.2010 issued by the DoPT, which deals with relative seniority of all the direct recruits and reads as under:-

“2.1 SENIORITY OF DIRECT RECRUITS

The relative seniority of all direct recruits is determined by the order of merit in which they are selected for such

appointment on the recommendations of the U.P.S.C. or other selecting authority, persons appointed as a result of an earlier selection being senior to those appointed as a result of subsequent selection. The relative seniority that used to be determined earlier according to the date of confirmation and not the original order of merit, (in case where confirmation was in an order different from the order of merit indicated at the time of their appointment), in accordance with the general principles of seniority, has been discontinued w.e.f. 4.11.1992 (OM N.20011/5/90-Estt. (D) dated 4.11.1992). The general principles of seniority therefore stands modified to that extent.

2.1.1 Clarification : Appointment from the Reserve panel at a later date:

The inter se seniority of candidates nominated from reserve panel will be fixed as per consolidated merit given by UPSC/SSC/ Recruiting agency. However, instructions circulated vide this Department's **O.M. No.41019/18/97-Estt.(B) Dated 13th June 2000** should be strictly followed in operating or requesting for nominations from the reserve panel."

12. The Tribunal observed that on conjoint reading of the CSS Rules read with O.M. dated 11.11.2010 issued by the DoPT, the relative seniority of direct recruits must be determined by the order of merit in which they are selected for such appointment on the recommendations of the Selection Committee. Taking note of the fact that in this case, the Selection Committee vide its Select List dated 21.10.2009, had recommended two candidates for appointment and further, two other candidates were placed in the reserve list, the Tribunal concluded that there was no occasion to have any doubt that the said Select List was not according to merit.

13. Further, the attempt of the then Secretary of the respondent No.2/ICAR, who had tried to create a confusion solely with the objective of somehow helping the petitioner herein and ultimately did succeed in doing so by deciding that the Select List had not been drawn on merits, was deprecated by the Tribunal in strong words. On minutely examining the noting files of the Department on the above aspect, as initiated by the Establishment Section of the ICAR, from the date when the controversy had arisen, right upto 24.8.2016 when the impugned order came to be passed, the Tribunal commented adversely upon the inappropriate personal interest that was taken in the matter by the then Secretary, ICAR and was of the view that he had time and again tried to meddle with the Select List and he did not want the seniority to be settled in accordance with the rule position, to the point that he had recommended that the opinion of the UPSC members of the Selection Committee, who had already finalized the Select List, be obtained and that too, after they had superannuated.

14. For fortifying the view taken by it, the Tribunal had relied on the decisions of the Supreme Court in the cases of Chancellor and Another vs. Dr. Bijayananda Kar and Others, reported as (1994) 1 SCC 169 and Dr. Kripa Ram Mathur vs. State of U.P. and Ors. reported as (2001) 9 SCC, wherein it was observed that the function of the Selection Committee comes to an end when the process of selection is completed and the proceedings are drawn and that the presumption of genuineness of the official acts done in the due course of performance of duty must apply when all the parties accepted the decision of determination of merits and ranking over a number of years.

15. The Tribunal also cited the decision of the Supreme Court in the case of Chairman, Puri Gramya Bank and Anr. vs. Ananda Chandra Das and Ors., reported as **(1994) 6 SCC 301**, where the dispute was with regard to the seniority of the respondents and others therein and their *inter se* ranking. In the said case, reiterating the settled law, the Supreme Court declared that if more than one candidates are selected to the subject post, then the seniority is as per the ranking of direct recruits, subject to adjustment of the candidates selected, on applying the rule of reservation and the roster and that simply because one candidate had reported to duty of account of fortuitous circumstances, would not alter the ranking given by the Selection Board. A similar view was expressed in the cases of Suresh Chandra Jha vs. State of Bihar, reported as **2007 (3) SLR 227 (SC)** and D.P. Das vs. Union of India, reported **(2011) 8 SCC 115**.

16. The Tribunal thus concluded that seniority had to be determined in accordance with the statutory Rules read with O.M. dated 6.6.1978, reproduced in para 18 of the impugned judgment that states that the candidates, who joined within the extended period of time, will have their seniority fixed under the seniority Rules applicable to the service/post concerned, without any depression of seniority. Based on the factual position and the extant Rules, the Tribunal answered question No.1 by holding that the Select List prepared by the Selection Committee on 21.10.2009, is the merit list.

17. The answer given by the Tribunal to question No.2 was that the relative seniority of the candidates must be determined on the basis of their merit in the Select List, notwithstanding the different dates on which they had joined. As a result, the order dated 24.8.2016 passed by the respondent

No.2/ICAR was quashed and set aside along with the impugned seniority list and ICAR was directed to issue a fresh seniority list, ranking the respondent No.1 as senior to the petitioner, within a period of one month.

18. Aggrieved by the aforesaid decision, the petitioner (respondent No.2 in the O.A.) has filed by the present petition.

19. Mr. M.K. Bhardwaj, learned counsel for the petitioner has argued that the Tribunal erred in concluding that the proceedings of the meeting of the Selection Committee held on 21.10.2009 wherein, the Select List was prepared mentioning the name of the respondent No.1 at Sr. No.1 and that of the petitioner, at Sr. No.2 could not be treated as the order of merit of the select candidates since there were no prescribed marks for the interview and neither of the selected candidates had been graded; that the Tribunal overlooked the fact that the competent authority had decided the matter of seniority after giving a personal hearing to both the parties and on passing a speaking order dated 24.8.2016, which did not deserve any interference; that simply because the name of the respondent No.1 was placed at Sr. No.1 in the proceedings of the Selection Committee as recorded on 24.10.2009, cannot be a ground to presume that he had a higher merit than the petitioner; that the Tribunal failed to appreciate the fact that the date of joining ought to have been treated as a criteria for assigning seniority, in the absence of any specific rule and the petitioner having joined prior to the respondent No.1, his length of service was rightly taken as a criteria by the respondent No.2/ICAR for declaring him senior to the respondent No.1 and that the Tribunal had failed to appreciate that *inter se* seniority of the employees is to be decided on the basis of merit and in the absence of merit, it can be decided on the basis of the date of joining service.

20. We have carefully considered the submissions made by learned counsels for the petitioner and the respondent No.1, who appears in person. We have also gone through the impugned judgment and the pleadings before the Tribunal. It may be noted at the outset that the proceedings of the meeting of the Selection Committee for the subject post were held on 21.10.2009 and only two names were recommended for appointment to the post of ALA, after considering their academic records, past experience, drafting ability and performance in the interview. This fact is duly reflected from the proceedings of the Selection Committee drawn on 21.10.2009. Only thereafter was a Select List drawn wherein, the name of the respondent No.1 was recorded above that of the petitioner. On the very same date, the Committee had recommended the names of two other candidates in the reserve list, in the event, candidates in the Select List did not accept the offer for the subject post.

21. Once the Select List and reserve list were drawn and approved by the competent authority, then an opportunity was available to all the candidates including the ones who had been selected, to lay a challenge to the names recorded therein or the order of merit in which the said names were reflected. Admittedly, no such challenge was laid by any of the 25 shortlisted candidates or by those placed in the reserve list much less by the petitioner before us. Once the names of the respondent No.1 and petitioner were placed sequentially in the Select List, in the order of merit, there could be no doubt or ambiguity about their *inter se* seniority. Similarly, after the Select List was determined, two more candidates were shortlisted and their names were placed in the reserve list. The presumption is that the names of the candidates in the reserve list also reflected their order of merit.

22. This being the position, no cloud could have been cast over the recommendations made by the Selection Committee. That is exactly what the Establishment Section of the respondent No.2/ICAR understood when it initiated a file to circulate the provisional seniority list of the ALA's in the order in which the said names had been recommended by the Selection Committee. It was only then that the Secretary, ICAR had raised two issues, one pertaining to the post of the Law Officer and the other pertaining to the seniority of the ALA's. The latter issue, which is the subject matter of consideration before us, is the seniority issue. The notings in the files of ICAR, dated 07.10.2014 and approved by the Dy. Secretary (Admn.) clearly stated the correct legal position that "*However, since the candidates have been arranged in the order 1 and 2, we may consider them to be in merit for all purposes*". Surprisingly, the Secretary, ICAR disagreed with the above and observed that merely because the names of the selected candidates, had been placed in a particular seriatim, will not be a ground for determining their relative seniority as such and the earlier candidate has to be treated as senior.

23. On the above observations being made by the Secretary, ICAR, a provisional seniority list dated 14.11.2014 was issued by placing the name of the petitioner at rank 1 and that of the respondent No.1, at rank 2. When the respondent No.1 submitted his objections to being relegated to rank 2 in the provisional seniority list at the instance of the Secretary of ICAR, the file kept moving back and forth to the point that at one stage, on the suggestion of the Secretary, ICAR, the department had approached the Member Secretary of the Selection Committee that was constituted for filling up the post of ALA, who was responsible for preparing the minutes of the meeting

held on 21.10.2009, for giving his view. The said gentleman clearly stated that the Select List and reserve list were prepared in the order of merit. Not satisfied with the opinion received, the Secretary, ICAR did not finalise the *inter se* seniority of the petitioner and the respondent No.1. This was despite the fact that the Director General, ICAR had approved the proposal for fixing of the *inter se* seniority, by placing the respondent No.1 above the petitioner. The matter was kept pending and on 30.3.2016, at the instance of the Secretary, the DG, ICAR had authorised him to hear to the contesting parties and pass a speaking order for fixing their seniority.

24. After hearing both the parties, contrary to all settled norms, vide order dated 08.4.2016, the Secretary, ICAR decided to obtain the view of the remaining members of the Selection Committee, in the light of the view expressed by the Member Secretary of the Selection Committee, who had clearly stated that the Select List and the reserve list were prepared in the order of merit. The said exercise was also undertaken by the respondent No.2/ICAR at the insistence of the Secretary, ICAR and on being approached, a majority of the erstwhile Members of the Committee had clarified that the Select list had been prepared in the order of merit. At that stage, a proposal was also made to obtain legal opinion but subsequently on 09.8.2016, the department put up a note to the effect that “*in the absence of order of merit in the Selection Committee of ALAs drawn on 21.10.2009, so as to determine their inter se seniority continuously length of service in a particular grade may be treated as a criteria and since the petitioner herein had joined the respondent No.2 /ICAR, he may be placed on top of the seniority list*”. It is this absurd decision that the Tribunal has set aside by referring to Rule 16(b) of the CSS Rules, 2009 that provides that a person

appointed on a regular post to a Grade from the Select List for the Grade shall be ranked *inter se*, according to the order in which they are so appointed.

25. Having perused the record, we are of the opinion that there was never any ambiguity in the Select List drawn by the Selection Committee on 21.10.2009. The Selection Committee had considered the relative merits and demerits of the short listed candidates and had recommended a Select List, wherein it had ranked the respondent No.1 as senior to the petitioner in the order of merit. We are in absolute agreement with the Tribunal that on a conjoint reading of the CSS Rules and instructions of the DoPT dated 11.11.2010, the seniority of the petitioner and the respondent No.1 had been determined in the Select List in the order of merit for the subject post.

26. Given the aforesaid legal position, the plea of the petitioner that as he had joined service on 01.2.2010, which was prior to the date when the respondent No.1 had joined on 08.7.2010, which ought to be considered for determining their *inter se* seniority based on the length of service rendered, is found to be devoid of merits. O.M. dated 06.6.1978 leaves no manner of doubt that only because a candidate requests for extension of time to join the service, which is so granted by the employer, his name will not be considered for fixing *inter se* seniority and that the seniority, in such a case where extension of time has been granted for joining service, shall be fixed under the seniority rules applicable to the post concerned to which they are appointed, without any depression of seniority. Therefore, the fact that the petitioner herein had joined service on 01.2.2010, as against the respondent No.1, who had done so on 08.7.2010, would have no significance in so far as fixing their *inter se* seniority for the subject post is concerned.

27. In view of the facts and circumstances of the case referred to hereinabove and the legal position noted, we are of the view that the impugned judgment, which is well reasoned and logical and duly backed by law, does not warrant any interference.

28. Accordingly, the present petition is dismissed *in limine*, along with the pending application, as devoid of merits.

HIMA KOHLI, J

REKHA PALLI, J

JANUARY 18, 2018

ap/rkb