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

Judgment reserved on: 27.09.2022

% **Judgment delivered on: 17.11.2022**

+ **W.P.(C) 9715/2009**

S.P. SINGH AND ORS. Petitioners

Through: None.

versus

UOI & ORS. Respondents

Through: Mr. Padma Kumar S., Advocate for
Respondents No.3, 64 & 82.

**CORAM:
HON'BLE THE CHIEF JUSTICE
HON'BLE MR. JUSTICE SUBRAMONIUM PRASAD**

J U D G M E N T

SATISH CHANDRA SHARMA, C.J.

1. The present writ petition is arising out of order dated 07.07.2008 passed in O.A. No. 1063/2007 by the Central Administrative Tribunal, Principal Bench, New Delhi. The Petitioners have prayed for quashment of seniority list dated 18.09.2006/ 23.11.2006 of the Assistants. The facts of the case reveal that the substantive vacancies for the post of Assistant in the Armed Forces Headquarters (hereinafter referred as "the Department") were meant to be filled by two categories of appointees namely — direct recruits (Also referred as "DRs") and departmental promotees (Also referred as

"DPs"). While preparing the seniority list of assistants in the department, the direct recruits were considered to be substantively appointed from the date of their initial appointment, whereas the departmental promotees were deemed to be substantively appointed only from the date of their confirmation after clearing the probation period, and not from the date of their initial appointment/promotion. Thus, for the purpose of calculating their relative seniority, the departmental promotees were denied the benefit of serving the probation period. The *lis* before us has been brought by the aggrieved departmental promotees alleging discrimination and denial of parity, owing to non-consideration of their service during the probation period, while fixing *inter-se* seniority of assistants.

2. Let us briefly traverse through the facts of the case. The Armed Forces Headquarters Civil Service Rules, 1968 (Hereinafter referred to as "the recruitment rules") provide for 50% of the substantive posts of Assistant to be filled by direct recruits through a competitive examination and the remaining 50% by departmental promotees. The *inter-se* or relative seniority of the assistants appointed as above is fixed on rotational basis between the direct recruits and departmental promotees, keeping in view the respective quota of vacancies reserved for them. In light of the erstwhile recruitment rules, the department published a seniority list of assistants on 09.12.2002. This list treated the date of confirmation, after the completion of probation period, as the date of appointment for both the categories of assistants. Aggrieved thereby, the direct recruits challenged the list in O.A. 347/2003. Before the Tribunal, the direct recruits sought the fixation of seniority in accordance with the amended rules to the effect that the directly

recruited assistants in an year must be placed above the departmental promotees, promoted as temporary assistants in that year. Notably, the petitioners in this case were appointed against the substantive vacancies reserved for the direct recruits, as permissible under the rules. The Tribunal vide order dated 20.03.2006 ruled in favour of the applicants/direct recruits and directed the department to publish a fresh seniority list.

3. In compliance of the aforesaid order passed by the Tribunal in O.A. 347/2003, the respondents published a fresh seniority list on 18.09.2006, wherein the seniority of the direct recruits was fixed from the date of initial appointment, whereas the seniority of the departmental promotees was fixed from the date of confirmation. The respondents invited representations, if any, against the above seniority list. The petitioners herein submitted their representations, however, the same were rejected and the seniority list dated 18.09.2006 stood confirmed on 23.11.2006. The petitioners challenged the above seniority list before the Tribunal in O.A. 1063/2007. Noting that the seniority list was prepared in accordance with the rules and in compliance of the Tribunal's order in O.A. 347/2003, the Tribunal dismissed the application vide order dated 07.07.2008 (the impugned order).

4. While dismissing the O.A., the Tribunal observed that the issue involved in the case had already been decided by the Tribunal in O.A. 347/2003, and a fresh consideration of the same issue by the same forum would be prohibited by *res judicata*. In view of the petitioners' contention that they were not made parties to the previous case, the Tribunal noted that the association representing the promotees was impleaded as a party in the case and thus, their concerns were duly considered by the Tribunal while

passing the order. Nevertheless, the Tribunal, in the impugned order, expressed complete agreement with the previous order in O.A. 347/2003, and observed, on merits, that an appointment may be temporary even if the vacancy is substantive. It further observed that as per rules, the departmental promotees are appointed temporarily against substantive vacancies and their appointment becomes substantive only upon confirmation after serving the probation period. Thus, the Tribunal concluded that the date of confirmation would be the relevant date for fixation of seniority of promotees and not the date of initial appointment/promotion. Contrarily, for the direct recruits, the Tribunal held that their appointment was substantive from the date of appointment itself.

5. The petitioners have impugned the above order stating that the Tribunal has adopted an erroneous interpretation of the recruitment rules which has resulted in discrimination against the departmental promotees. It is submitted that for confirmation of appointment, the recruitment rules mandate a probation period for both the categories of assistants and thus, denial of benefit of service rendered during the probation period to one class of employees, while granting the same to another class, is discriminatory in the eyes of law. The petitioners have also submitted that they were not made a party in O.A. 347/2003 and the order, fixing the seniority of direct recruits above the departmental promotees, was passed without hearing the latter and thus, violated the principles of natural justice.

6. *Per contra*, the respondents have submitted that the seniority of departmental promotees has to be evaluated upon their substantive appointment against substantive vacancies in their own quota. It is submitted

that it is only upon such substantive appointment that the promotees are to be rotated with the direct recruits for ascertainment of their *inter-se* seniority. The respondents have further submitted that the direct recruitment is done against substantive vacancies from the very inception and the subsequent probation period is merely a formal process for confirmation. On the other hand, the promotees are promoted against all the vacancies temporarily, sometimes even against the vacancies falling in the 50% quota of direct recruits, and upon serving the probation period, their appointment becomes substantive against substantive vacancies of their own quota. It is submitted that the recruitment rules may provide for temporary fulfilment of direct recruits' vacancies by departmental promotees (when sufficient number of direct recruits could not be appointed in an year), however, the same would not amount to consideration of their seniority from the date of initial appointment as the initial appointment itself was not against substantive vacancies. Moreover, doing so would disturb the quota rule. It is submitted that such cross appointments are only temporary in nature and ultimately, the substantive appointment of the departmental promotees takes place in their own quota and not in the quota of direct recruits.

7. The respondents have further submitted that the relative seniority of assistants is being decided in accordance with the recruitment rules and in absence of a challenge to the *vires* of rules, the court must give effect to the rules.

8. We have considered the rival submissions at length and have perused the record.

9. The dispute and concerns involved in the case have a chequered history. The impugned order notes that the cause of the petitioners has already been decided by the Tribunal in O.A. 347/2003. However, despite noting the same, the Tribunal (in impugned order) has examined and determined the matter afresh on merits. Thus, without going into the technicalities raised by the respondents, we proceed to decide this petition in light of the determination made by the Tribunal in the impugned order.

10. Whether, in ascertaining the relative seniority of departmental promotees and direct recruits, the benefit of service during the probation period is to be reckoned or not is the primary issue involved in the case. In service jurisprudence, the conditions of service of an employee are to be ascertained in the light of rules and regulations applicable to the particular service. Thus, it is important to analyse the recruitment rules, as applicable in the present case. For clarity of thought, we shall proceed in a sequential manner by discussing the position of law relating to appointments, probation and seniority, in this order.

11. The recruitment rules provide for two forms of vacancies and correspondingly, two forms of appointments. As Rule 2 signifies, the Assistant grade may comprise of substantive vacancies and temporary vacancies. Substantive vacancies form part of the sanctioned quota of vacancies for any grade. Temporary vacancies refer to those vacancies which can be filled for temporary or officiating purposes only. Such temporary vacancies could arise due to various factors including, but not limited to, the exigencies of service. Corresponding to these vacancies, two forms of appointments can be made, namely — substantive appointment and

temporary appointment. Clause (1) of Rule 2 provides that an officer appointed substantively against a substantive vacancy becomes a permanent officer. Referring to temporary officers, clause (p) provides that a person holding temporary or officiating appointment in any grade would be termed as a temporary officer. Notably, Rule 12 provides that temporary appointments can be made against a substantive vacancy. It signifies that the nature of vacancy does not determine the nature of appointment against such vacancy. Moreover, it is pertinent to note at the very outset that vacancy and appointment are two distinct concepts. A temporary appointment is not necessarily made against a temporary vacancy.

12. Rule 12 operates as an enabling provision as it enables the department to make temporary appointments against substantive vacancies. Thus understood, appointments can be made in the following ways —

first, substantive appointment against substantive vacancy;

second, temporary appointment against substantive vacancy;

third, temporary appointment against temporary vacancy;

13. Having understood the forms of appointment, we may now advert to the sources of appointment. The substantive appointments in the assistant grade can be made from two sources — by direct recruitment through a competitive examination, and by promotion of Upper Division Clerks (UDCs) working in the department. The rules prescribe a quota system for appointing assistants from the two streams. As per the quota system, 50% seats are to be filled by the direct recruits and 50% seats are to be filled by the departmental promotees. It must be noted that the designated vacancies falling in both the quotas are substantive vacancies.

14. We may now understand the manner of substantive appointment against substantive vacancies for both these classes of employees i.e. direct recruits and departmental promotees. Clause (f) of Rule 2 defines a "direct recruit" as:

"(f) "direct recruit" means a person recruited on the basis of a competitive examination held by the Commission;"

Rule 13(1) provides that every direct recruit shall initially be appointed on probation and the period of probation shall be two years from the date of appointment. Rule 13(2) provides that every person other than a direct recruit (promotee), when first appointed to the grade of assistant, shall also be on probation for a period of two years from the date of appointment. Thus, Rule 13 makes no distinction between the direct recruits and departmental promotees in matter of probation, immediately after initial appointment or promotion, as the case may be. Rule 13(3) mandates that the period of probation, for both the classes of employees, can be curtailed or extended, as deemed fit by the department. Rule 14 provides for "confirmation" of probationers. It provides that once the probationers successfully complete the probation period to the satisfaction of the appointing authority, they become eligible for confirmation. Notably, the Rule further provides that until a probationer is confirmed under this rule, he shall continue to have the status of a probationer. The relevant extract of Rule 14 reads thus:

"14. Until a probationer is confirmed under this rule or is discharged or reverted under Rule 15, he shall continue to have the status of a probationer."

Thus, confirmation is a pre-requisite for permanent absorption. Rule 15 supplements the aforesaid position of law and provides for the discharge or reversion of probationers. It is a consequential provision which provides for the consequence, in case a probationer is found to be unfit for service on the basis of her performance or conduct. For probationers not having a lien on any post in the government i.e. direct recruits, the rules contemplate the action of "discharge" from service. For probationers having a lien on any post in the government, the action contemplated is of "reversion" to the previous post in the department. Clause (3) of Rule 15 makes it clear that if any probationer, irrespective of being a direct recruit or promotee, is found to be ineligible for confirmation in accordance with Rule 14, he may be discharged or reverted to the previous post, as the case may be.

15. At this point, we may also refer to clause (b) of Third Schedule dealing with the "substantive vacancies" in the assistant grade. It deals with the substantive appointment of departmental promotees against substantive vacancies. It states thus:

"(b) The remaining substantive vacancies including unfilled vacancies in the direct recruitment quota in any year shall be filled by substantive appointment in the order of seniority of temporary officers of the Grade, who have completed the period of probation satisfactorily, subject to the rejection of the unfit."

The above clause prescribes that if the vacancies falling in the direct recruits' quota remain unfilled, the department may appoint the temporary promotee officers of the assistant grade against the direct recruits' quota, provided they have successfully completed the period of probation. Thus, within the category of departmental promotees, there are two classes —

- i. Departmental promotees appointed as assistants in their own 50% quota;
- ii. Departmental promotees appointed as assistants against the 50% quota prescribed for direct recruits.

Evidently, the two classes of departmental promotees cannot be subjected to the same treatment in law as there is a marked distinction between them. However, to avoid confusion at this point, we are discussing the position of the departmental promotees promoted in their own lawful quota of substantive vacancies. We shall advert later to the position of promotees appointed against the vacancies reserved for direct recruitment.

Promotion Against Substantive Vacancies of Their Own Quota

16. Clause (b), as reproduced above, mandates at-least two requirements for substantive appointments in the departmental promotees quota, namely-officers must be serving as temporary officers in the assistant grade, and they must have completed the period of probation. These conditions are in line with the other conditions stipulated in the Rules 13, 14 and 15, already discussed above.

17. The position of law that emerges from the above analysis is that the direct recruits and departmental promotees are subjected to a uniform process of confirmation after initial appointment. Upon initial appointment, both the categories of Assistants function as probationers for a period of two years, which may be extended depending on the circumstances. Moreover, the substantive appointment of both the categories of probationers is subject to confirmation upon the successful completion of probation. The recruitment rules, as discussed above, lay down a uniform set of

circumstances wherein the probationers could be denied confirmation and as a consequence, discharged from the service (direct recruits) or reverted to the previous post (promotees). For both direct recruits and departmental promotees, the initial appointment, though made against substantive vacancies, is of a temporary nature. However, on being confirmed by the department upon the successful completion of probation, the temporary appointment becomes substantive appointment. The recruitment rules clearly provide for temporary appointments against substantive vacancies and the scheme of probation followed by confirmation is in tune with the same.

18. The legal position, therefore, can be summed up in the following points:

- i. Substantive vacancies are distributed equally between the direct recruits and departmental promotees;
- ii. Initial appointment in both the classes of vacancies is temporary or on probation. The recruitment rules enable the department to make temporary appointments against substantive vacancies.
- iii. Irrespective of the source of appointment, all officers appointed in the assistant grade have to undergo a probation for two years;
- iv. Initial appointment does not guarantee substantive appointment;
- v. For substantive appointment, the period of probation must be followed by confirmation;

- vi. The department has the right to discharge or revert any appointee if probation is not completed successfully;
- vii. The period of probation is not a mere formality and binds both direct recruits and departmental promotees to its mandate.

19. The Tribunal's observation that the appointment of direct recruits is substantive from the date of original appointment itself is unsupported by the scheme envisaged in the recruitment rules. The rules explicitly reserve an option for the department in matters of confirmation of the probationers. If the probationers fail to meet the standards of performance or conduct or found to be unfit for service, as stated in the rules, they may be discharged or reverted. Thus, the probationers, irrespective of whether they happen to be direct recruits or promotees, do not have an inherent claim over substantive appointment in the grade to which their initial appointment is made. Had the appointment been a substantive appointment from the initial date itself, the entire gamut of rules relating to probation, particularly those providing for non-confirmation, discharge or reversion, would be rendered otiose. To buttress, we may usefully refer to the dictum of the Supreme Court in ***Baleshwar Dass v. State of U.P.***, (1980) 4 SCC 226, wherein the Court held that a post held during the probation period cannot be termed as a post held in substantive capacity. No doubt, the capacity becomes substantive after confirmation. The Court in ***Baleshwar Dass*** (supra) expounded the meaning of "substantive capacity" as follows:

"31. ... To approximate to the official diction used in this connection, we may well say that a person is said to hold a post in a substantive capacity when he holds it for an indefinite period especially of long duration in

contradistinction to a person who holds it for a definite or temporary period or holds it on probation subject to confirmation."

Thus, it cannot be stated that a post held on "probation subject to confirmation" is being held in a substantive capacity.

20. In light of the above scheme, it is beyond doubt that confirmation is a prerequisite for substantive appointment, however, what needs to be examined is whether the calculation of the period of continuous officiation in the assistant grade (promotion grade), for fixation of seniority, would also be dependent upon the event of confirmation.

21. In service jurisprudence, confirmation and promotion are two distinct concepts. Promotion refers to the upgradation of an employee to a higher post in the service, whereas confirmation refers to the successful completion of the probation period or ad-hoc period to be mandatorily served by an appointee after appointment. The provision for confirmation forms part of the recruitment rules for a specific reason. It is intended to enable the department to exercise an oversight on the promotee's conduct so as to ensure that the promotee is fit for the grade. Conceptually, confirmation does not initiate the promotion, instead, it merely puts a stamp of permanent approval on the said promotion. Once the appointment/promotion is confirmed, the service rendered by the promotee as a probationer must be taken into account for calculating the period of continuous officiation for the fixation of seniority. We may now refer to the decision of the Supreme Court in ***Baleshwar Dass*** (supra), wherein the Court was dealing with a seniority dispute between three classes of engineers. The rules, as applicable in that case, provided for the seniority to be ascertained from the date of

substantive appointment. In this backdrop, the Supreme Court observed that the capacity of an appointee becomes substantive after the due completion of probation period, however, once the appointment becomes substantive, the incumbents can be stated to be holding the posts in substantive capacities from the inception and the entire officiating service can be considered for ascertainment of seniority. The relevant para reads thus:

*"33. The Government will ascertain from this angle whether the capacity in which posts have been held was substantive or temporary. If it is not, the further point to notice is as to whether the appointments are regular and not in violation of any rule, whether the Public Service Commission's approval has been obtained and whether probation, medical fitness etc., are complete. **Once these formalities are complete, the incumbents can be taken as holding posts in substantive capacities and the entire officiating service can be considered for seniority.** For other purposes they may remain temporary."*
(emphasis supplied)

The Court concluded that if upon completion of probation period or other formalities, no infirmities are found and confirmation is set to take place, then the entire officiating service, even before confirmation, must be relevant for the calculation of seniority. Para 35 reads thus:

"35. The normal rule consistent with equity is that officiating service, even before confirmation in service has relevancy to seniority if eventually no infirmities in the way of confirmation exist. We see nothing in the scheme of the Rules contrary to that principle. Therefore, the point from which Service has to be counted is the commencement of the officiating service of the Assistant Engineers who might not have secured permanent appointments in the beginning and in that sense may still be temporary, but who, for all other purposes, have been regularised and are fit to be absorbed into

permanent posts as and when they are vacant." (emphasis supplied)

22. Once the rules are viewed from a bird's eye view in light of the practicalities of administration, it can be observed that subjecting seniority to the pre- condition of confirmation is fraught with dangers. A provision which mandates a probation period followed by confirmation has to be viewed with circumspection. We say so because confirmation brings an element of uncertainty and often becomes a tool of arbitrariness in the hands of the department. In ***S.B. Patwardhan v. State of Maharashtra***, (1977) 3SCC 399, Hon'ble Supreme Court was, in light of the recruitment rules governing Deputy Engineers in Gujarat and Maharashtra, dealing with a similar dispute wherein the recruitment rules mandated different standards for direct recruits and promotees. The Court observed thus:

"28. ...The wording of the Resolution leaves no doubt that the Government of Bombay applied two different standards for fixing inter se seniority of direct recruits and promotees appointed as Deputy Engineers. The former were entitled to reckon their seniority with effect from the date of their initial appointment on probation while the seniority of the latter had to be determined with reference to the date of their promotion to substantive vacancies, subject to the further qualification that there was no break in their service prior to their confirmation in those vacancies. Thus, for purposes of seniority, the promotees had to depend firstly on the availability of substantive vacancies and secondly on the arbitrary discretion of the Government to confirm or not to confirm them in those vacancies. The fact that a substantive vacancy had arisen and was available did not, proprio vigore, confer any right on the promotee to be confirmed in that vacancy. The 1941 Rules contained the real germ of discrimination because the promotees had to depend upon the unguided pleasure of the Government for orders of

confirmation. In the pre-Constitution era, such hostile treatment had to be suffered silently as a necessary incident of government service.” (emphasis supplied)

Importantly, the Court explicitly noted the dangers associated with a confirmation clause in the following words:

"39.Confirmation is one of the inglorious uncertainties of government service depending neither on efficiency of the incumbent nor on the availability of substantive vacancies. A glaring instance widely known in a part of our country is of a distinguished member of the judiciary who was confirmed as a District Judge years after he was confirmed as a Judge of the High Court. It is on the record of these writ petitions that officiating Deputy Engineers were not confirmed even though substantive vacancies were available in which they could have been confirmed. It shows that confirmation does not have to conform to any set rules and whether an employee should be confirmed or not depends on the sweet will and pleasure of the government."

23. In the present case, the recruitment rules do not indicate anything to conclude that the service rendered before confirmation on a substantive post would hold no relevance for the fixation of seniority. Thus, in light of the above discussion, the requirement of confirmation may not be understood to render the service during probation period as otiose.

24. The Tribunal, in O.A. 347/2003 and then in O.A. 1063/2007 (impugned order), held that upon confirmation, the direct recruits shall get benefit of the service rendered during the period before confirmation and it shall be counted for the fixation of seniority. We are in agreement with this view, as it is in consonance with our discussion above. However, the Tribunal wrongly observed that the same principle would not apply to the departmental promotees as they are appointed as temporary officers and

their substantive appointment would take effect only from the date of confirmation and not from the original date of promotion. Effectively, it means that the direct recruits would get the benefit of service rendered during the probation period for the calculation of seniority, while the same benefit would not accrue to the departmental promotees.

25. Upon a detailed examination of the scheme embedded in the recruitment rules, we disagree with the above conclusion in the impugned order. The rules do not place direct recruits and departmental promotees at different pedestals when they are appointed as assistants in their respective 50% quotas. The vacancies falling in both the quotas are substantive vacancies earmarked for them and the modalities of appointment for both the classes are dealt in the same rule and in the same manner. The assistants coming from both the streams are initially appointed on probation or temporarily (as stated in the Third Schedule) against substantive vacancies.

26. Upon confirmation, the appointment becomes substantive for both the classes of assistants and is deemed to take effect from the date of original appointment, only for the calculation of seniority. This relation back applies for the simple reason that the original appointment was made against substantive vacancies in a fixed quota and therefore, substantive appointment or confirmation would relate back to the original date of appointment for both the categories of assistants. As we have already discussed the legal position in detail, we say no more.

27. In the impugned order, the event of confirmation leads to two different consequences. It places the departmental promotees in a vulnerable spot despite being appointed against vacancies falling in their own quota.

The event of confirmation, to say the least, is an uncertain event, and could very well result into a situation wherein the promotees are left hoping for their turn, while the newly appointed direct recruits keep pushing them down the seniority list year by year. The scheme envisaged in the impugned order is unsustainable and violates the basic parameters of fair and equitable treatment in an administrative setup. No doubt, the departmental promotees and direct recruits come from two different streams, however, once they are appointed against substantive vacancies in their respective quotas in a grade, they are similarly placed and the same is discernible from the recruitment rules, which make no distinction in their respective journeys from the stage of appointment to the stage of confirmation.

28. Clause (k) of Rule 2 also supports the aforesaid view. It defines "long-term appointment" as:

"(k) 'long-term appointment' means appointment for an indefinite period as distinguished from purely temporary or ad-hoc appointment, like appointment against a leave or other local vacancy of a specified duration;"

In light of this definition, the promotees appointed against substantive vacancies of their quota cannot be termed as purely temporary or ad-hoc appointment which, as the meaning unfolds, refer to *"appointment against a leave"* or *"other local vacancy of a specified duration"*. A substantive vacancy is not a local vacancy or a vacancy of a specified duration. It is a permanent vacancy, to be filled by a designated class of employees from a pre-defined pool. The appointment against a substantive vacancy is a long-term appointment, provided the conditions of probation are successfully met.

29. To elucidate further, we may usefully refer to the decision of the Tribunal in *M.G. Bansal v. Union of India*, (T.A. No. 356/1985), which, having been affirmed and applied by the Supreme Court at various instances, has attained finality. In *M.G. Bansal* (supra), the Court was dealing with a classic relative seniority dispute between direct recruits and departmental promotees in the ACSO grade in light of the same recruitment rules i.e. AFHQ, 1968 Rules. The decision has also been reaffirmed and applied by the Supreme Court in *AFHQ/ISOs SOs (DP) Assn. v. Union of India*, (2008) 3 SCC 331. In this case as well, the Court was dealing with an inter-seniority dispute involving direct recruits and departmental promotees in light of the 1968 Rules. Notably, the rules governing the appointees in ACSO grade are *pari materia* to the rules governing the appointees in the Assistant grade. Thus, the interpretation placed by the Tribunal in *M.G. Bansal* (supra), as affirmed by, the Supreme Court in subsequent cases, is of guiding value. In *M.G. Bansal* (supra), the Tribunal, vide order dated 22.11.1992, held that the relative seniority of direct recruits and promotees must be ascertained by the length of continuous officiation in the promotion cadre i.e. length of continuous officiation in the Assistant grade.

“.....

(b) Seniority between direct recruits and promotees regularly appointed/promoted within their respective quota should be determined by the length of the continuous officiation in the grade of ACSOS from their respective appointment to the substantive vacancies under Schedule II within their quota i.e. in the case of promotee ACSOS the length of continuous officiation in the grade will be reckoned from the date when they are promoted in substantive vacancies. (emphasis supplied)

Thus, the inter-se seniority of direct recruits and promotees is to be determined on the basis of the length of continuous officiation in the assistant grade. It is also made clear that in case of promotees, the length of continuous officiation would be calculated from the date of promotion against substantive vacancies. Thus, the Tribunal erred in holding that the seniority of promotee assistants would be calculated from the date of confirmation and not from the date of promotion. The observation of the Tribunal goes in the face of the settled law in this regard and must be reversed. Thus, for the fixation of seniority of departmental promotees, the length of continuous officiation is relevant and it would be calculated from the date of promotion/appointment in the assistant grade for both the classes of assistants, and not from the date of confirmation.

Promotion Against Substantive Vacancies of Direct Recruits' Quota

30. We may now consider the legal position with respect to those departmental promotees who are appointed against the vacancies falling in the 50% quota reserved for direct recruits. Such promotees are not appointed against the substantive vacancies in their own quota. The conditions affecting the seniority of such promotees could not be placed at par with those affecting the promotees appointed in designated quota. In a quota system, wherein appointments are reserved from two different sources, the sanctity of the quota is of paramount importance. If departmental promotees appointed against the substantive vacancies earmarked for the direct recruits' quota are deemed to be substantively appointed from the date of initial appointment, it would lead to a breakdown of the quota rule and would erase the line that segregates the quota. Therefore, the length of continuous

officiation for such promotees cannot be calculated from the date of initial appointment/promotion as the initial appointment was not made against the substantive vacancies of their own lawful quota. This aspect was dealt with clarity in **M.G. Bansal** (supra) case (later affirmed by the Supreme Court), wherein it was held that the utilization of the quota reserved for a source by incumbents not belonging to that source would only give them the right to officiate on those positions. This period of officiation outside their own quota would not be counted for the calculation of seniority. The period of service in the promotion grade would only incorporate the service rendered in their own quota. The relevant directive reads thus:

"(d) The incumbents belonging to one source in excess of their own quota and utilising the quota of the incumbents belonging to another source will only officiate in the promoted post. It is made clear that the direct recruits when inducted as nominees of UPSC, the promotees in the quota of the direct recruits on the basis of Note (2) of Schedule III of the Rules will either be reverted or will be absorbed in the vacancies within their quota of subsequent year. The period of officiation outside their quota of either of the incumbents from other source will not count for their seniority"

In **M.G. Bansal** (supra), on similar lines as above, it was further held that each quota has to be worked out on its own force. Substantive vacancies earmarked for the direct recruits' quota can be filled by the promotees only on a temporary basis and without giving them any benefit of seniority while officiating against such posts. The relevant paras read thus:

"(f) It is further directed that each quota, as referred to in Schedule III of the Rules has to be worked out independently on its own force. Direct recruit quota of ACSOS which is confined to substantive vacancies in the grade can be filled by temporarily appointed Assistants by promotion in the grade of

ACSOS, but without giving them any right of seniority on the basis of continuous officiation on the vacancies earmarked for direct recruits and indent for which has been sent to UPSC for nomination from the civil services examination of a particular year

"(c) To elucidate further, in the case of temporarily appointed promotee ACSOS under Note (2) of Schedule III of the Rules in the direct recruit quota w.e.f. 1969 onwards till 1977 and also thereafter their seniority will be reckoned from the date when they get a berth in the substantive vacancies of their 75% quota as envisaged under Schedule III of the Rules."

Interestingly, on the force of the decision in **M.G. Bansal** (supra) case, the Tribunal, in **AFHQ Civil Service v. Union of India**, (2005) SCC OnLine CAT 332, has also adopted the same interpretation of the 1968 Rules while dealing with an inter-seniority dispute between promote ACSOs and direct recruit ACSOs. In **AFHQ Civil Service** (supra), the Tribunal observed thus:

"29. ...To put it differently, continuous service of a person who is promoted from the feeder cadre to the post of ACSOs temporarily against a vacancy in a substantive post falling within the quota of 75% reserved for DPs and who is subsequently absorbed/appointed in substantive capacity would be counted from the date he had joined in a temporary capacity. Same is the position with the DRs. They are put on probation of two years similar to the two years probation, which preceded the substantive appointment of a DP in clause (a) of III Schedule. The seniorities of the DR would be counted from the date of their joining the service and the commencement of their probation.

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*31....In fact, this Tribunal in its order dated 1.4.2002 had observed that the seniority in the grade of ACSOs was to be prepared as per the directions of the Tribunal in its order dated 20.11.1992 in **M.G. Bansal's case** (supra), which had attained*

finality. The DPs were to get seniority from the date when they were promoted in substantive vacancy of their lawful quota and the DRs from the year in which they joined the service. In para 25, it was observed by the Tribunal that period of officiation outside their quota of either the DRs or the DPs will not count for their seniority. It was stated that if an officer had been promoted within his quota, then it would be the date of his promotion and not the date of confirmation, which would be relevant for the officer's seniority."
(emphasis supplied)

31. Understood in light of the Third Schedule and the decisions applicable to the case, we consider it important, although at the cost of repetition, to summarize the position of law as follows:
- i. When substantive vacancies are filled by appointing the direct recruits or promotees in their respective quotas, the period of continuous officiation shall be counted from the date of initial appointment or promotion, as the case may be, and not from the date of confirmation.
 - ii. When substantive vacancies of the direct recruits' quota are filled by temporary appointment of departmental promotees, who have completed the period of probation, as per clause (b) of the Third Schedule, the confirmation of such promotees would eventually take place in their own quota, as and when substantive vacancies arise in their quota. For the purpose of seniority, the period of service for such promotees would be reckoned only on the basis of the service rendered by them in their own quota. Serving in an officiating capacity in the quota meant for other appointees would not grant any benefit for seniority.
 - iii. The assistants appointed from the two sources against substantive vacancies in their respective quotas would compete with each other for

seniority. They would be rotated with each other as per their respective vacancies, in accordance with the rule.

- iv. The assistants temporarily appointed against the vacancies reserved for other category would not be rotated with those appointed against the substantive vacancies of their lawful quota.

32. Admittedly, in the present case, the petitioners/departmental promotees were appointed against the vacancies earmarked for the direct recruits' quota. In light of our above discussion, such promotees cannot be put at par with the promotees or direct recruits appointed against the substantive vacancies in their respective lawful quota. Thus, the service rendered by such promotees against the vacancies reserved for the direct recruits cannot be taken into account for the calculation of seniority. Although we have disagreed with the view taken by the Tribunal while interpreting the 1968 Rules and have expressed our own view on the substantial questions of law, we concur with the view that the petitioners before us could not be placed at par with the direct recruits as they were not appointed against substantive vacancies in their own quota. The petitioners were not similarly placed with the direct recruits and any claim for similar treatment could not lie. Thus, for the purpose of seniority, the period of service for the petitioners cannot be reckoned from the date of initial appointment, as such appointment was purely temporary in a quota reserved for the other category. Accordingly, we see no reason to disturb the seniority list dated 23.11.2006.

33. Before we part, we feel constrained to note that the present case depicts a classic maze of service law. The rules and regulations forming part

of the service law have been acknowledged, time and again, for their notoriety. They are often characterised by inherent contradictions, inconsistencies and disparities. However, what gets dragged in these inconsistencies are the careers of employees who are supposed to be the actual consumers of service law. Owing to the slow pace of legal battles in a multi-forum adversarial system, the employees either retire or advance in their careers, thereby making it extremely difficult for the courts to effectuate a final relief. The fundamental constitutional principles of equality and fair-play have been kept at bay from the practical application of service jurisprudence. Nothing could be more unfortunate. The rules governing the service conditions of a government servant are to be regarded as "law" for the purpose of Part-III of the Constitution, and those entrusted with the enforcement of such rules must endeavor to uphold the values enshrined in the Constitution.

34. In light of the aforesaid discussion and determination of the substantial issues that arose for our consideration, the petition stands disposed of.

35. Interim applications, if any, shall also stand disposed of. No order as to costs.

(SATISH CHANDRA SHARMA)
CHIEF JUSTICE

(SUBRAMONIUM PRASAD)
JUDGE

NOVEMBER 17, 2022