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SHEIKH ABDUL RASHID & ORS.

v.

STATE OF J & K & ORS.

DECEMBER 5, 2007

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[S.B. SINHA AND J.M. PANCHAL, JJ.]

Service Law—Seniority—Inter se seniority—Between promotees and direct recruits—Retrospective promotion of promotees—By an executive order—With effect from the date of preparation of Promotion List—Ignoring direct recruits, appointed prior to the promotees—Propriety of—Held: The order granting retrospective promotion is bad in law—Entry in promotion list, by itself would not confer right to be promoted from that date—The order was in derogation of the statutory Rules—However, monetary benefits granted to the promotees, not to be recovered—Jammu and Kashmir (Classification, Control and Appeal) Rules, 1956—r. 24—Jammu and Kashmir Police Manual—Regulations 382, 384, 390, 392 and 398—Jammu and Kashmir Police (Gazetted) Service Recruitment Rules, 1984—rr. 5, 14 and 20—Constitution of India, 1950—Article 142.

Administrative Law—Executive order—Validity of—Held: Such order is valid only when it is issued in consonance of statutory rules.

The names of private respondents were entered in promotion List E on 25.4.1978 for the post of Sub-Inspector. They were promoted on officiating basis on 19.5.1979. By a Notification dated 1.8.1985, State directed their regular promotion w.e.f. the date of preparation of Promotion List. The same was subsequently cancelled, but by another order dated 3.12.1985, promotions were directed to be granted with retrospective effect from the date of Promotion List. Appellants, who had joined on the post as direct recruits before the promotion of the respondents on officiating basis, filed Writ Petition. Single Judge of High Court allowed the same holding that the appellants were senior to the respondents; and that

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concept of retrospective promotion having not been contemplated under the Rules, the manner in which promotion was effected, was illegal. Division Bench accepted the finding of Single Judge, but on equitable considerations held the petition infructuous in view of the fact that the respondents had already been promoted to the post of Deputy Superintendent of Police which was governed by another set of rules. Hence the present appeals. A B

Allowing the appeals, the Court

HELD: 1. The order dated 3.12.1985, promoting the respondents with retrospective effect is *ex facie* bad in law. Not only no retrospective promotion could be granted as has been held by both the Single Judge as also the Division Bench, entry in List E, having regard to Regulation 390 of the Jammu and Kashmir Police Manual *per se* did not confer any right upon the respondents to be promoted from that date. [Para 14] [947-C] C D

2. No executive order could be issued in derogation of the statutory rules far less a legislative act. Jammu and Kashmir (Classification, Control and Appeal) Rules, 1956 being statutory in nature and having been framed under Jammu and Kashmir Civil Servants Removal of Doubts and Declaration of Rights Ordinance, 1956 have statutory force, the executive order in question was required to be issued in consonance and not in derogation thereof. [Para 15] [947-D] E

3. Although the statute provides for grant of officiating promotion, but the same is not conducive in the sense that even after getting officiating promotion, one may be reverted to the original post held by him. The Rules having been provided for officiating promotion, Single Judge was correct in taking that factor also into consideration for the purpose of determining the validity of the order impugned before the High Court. The order even otherwise appears to be *mala fide* having been passed for unauthorised purpose. If the order dated 3.12.1985 is read with the earlier one being dated 1.08.1985, the intention of the Government to favour the private respondents herein becomes explicit. It is not expected of a F G H

A government to brazenly favour one set of employees so as to defeat the *bona fide* claim of the other. [Para 20] [948-D-F]

4. However, in exercise of discretionary jurisdiction under Article 142 of the Constitution of India, it is directed that despite this order, if any monetary benefit has been conferred upon the private respondents, the same may not be recovered.

[Para 21] [948-G-H]

State of Bihar and Ors. v. Akhouri Sachindra Nath and Ors., [1991] Supp 1 SCC 334; *Kaushal Kishore Singh v. Dy. Director of Education and Ors.*, [2002] 9 SCC 634; and *State of Uttaranchal and Anr. v. Dinesh Kumar Sharma*, [2007] 1 SCC 683, relied on.

CIVIL APPELLATE JURISDICTION : Civil Appeal Nos. 5632-35 of 2007.

D From the final Judgment and Order dated 27.7.2005 of the High Court of Jammu & Kahsmir at Srinagar in LPA Nos. 164/2004, 6, 19 and 20/2005.

E Paramjit Singh Patwalia, S.R.Singh, Bimal Roy Jad and Sunita Pandia for the Appellants.

G.M. Kawoosa and N. Ganpathy for the Respondents.

The Judgment of the Court was delivered by

S.B. SINHA, J. 1. Leave granted.

F 2. Vexed question of inter se seniority between the appellants and the private respondents herein is in question in this appeal which arises out of a Judgment and Order dated 27.07.2005 passed by the High Court of Jammu and Kashmir at Srinagar in LPA No. 164 of 2004 and LPA Nos. 6, 19 and 20 of 2005.

G 3. Names of the respondents were entered in the List E on 25.04.1978. They were promoted on officiating basis on 19.05.1979.

H 4. The Government of Jammu and Kashmir, however, on or about 01.08.1985 issued a notification directing their promotion with

retrospective effect ignoring the seniority of the appellants herein *inter alia* A
stating:

“(a) The above mentioned petitioners as well as non-petitioners, who were brought on promotion list ‘E’ vide PHQ order No. 282 of 1978 and 283 of 1978 dated 25.04.1978, barring these who face any moral stigma notwithstanding the fact that they were brought on promotion list ‘E’ and have not so far been promoted as SIs, shall be deemed to have been promoted as SIs for the purpose of their seniority only, w.e.f. the date they were brought on list ‘E’, i.e., 25.04.1978. B

(b) The ASIs who were promoted as SIs, vide Kashmir Police Office Order No. 288 of 1978 dated 05.06.1978 and Jammu Range Police Office order dated 158 of 1978 dated 07.06.1978, w.e.f. 1.6.1978, shall also be deemed to have been promoted as SIs, w.e.f. 24.6.1978 for seniority purposes only and shall figure at appropriate places in the combined seniority list of SIs in order of their seniority.” C D

5. Realising that the said order may be held to be illegal by a court of law, by an order dated 3.12.1985 the same was cancelled. On the same day, however, by an order No. 1263 of 1985, promotions were directed to be granted with retrospective effect from 25.04.1978, i.e., from the date on which the respondents were brought on promotion List E. E

6. Questioning the said order, a writ petition was filed by the appellants herein in the High Court. A learned Single Judge of the said High Court allowed the said writ petition opining: F

“...Unless a person is formally promoted to the post of Sub-Inspector, he cannot press his claim that he has been promoted substantively to the post of Sub-Inspector merely on the ground of having been brought in the panel of eligible candidates in promotion list ‘E’...In such event, the private Respondents, therefore, in terms of the Order dated 25.4.1978, cannot be said to have been promoted to the posts of Sub-Inspectors. They have been only brought on the promotion list and their promotion orders H

A had to be issued by the official – respondents only subject to the fulfillment of the conditions mentioned against each by a separate/ independent order.”

In regard to the question of seniority, it was held:

B “It is not in dispute that the Petitioners in both the writ petitions
 C have been appointed on 25.4.1979 as Sub-Inspectors and their
 D seniority, therefore, has to commence from that date
 E notwithstanding that they have been put on probation for a period
 of three years. Therefore, the non-official respondents including
 respondents 124 to 134, whose names figured in Order No. 141
 of 1980 dated 14.4.1980 issued by DIG of Police, Kashmir, as
 officiating promotions against the vacancies of Inspectors/ Sub-
 Inspectors undergoing practical training, who have been promoted
 after 25th April 1979 cannot claim to rank senior to the Petitioners.
 It, therefore, follows that all those persons/ respondents, who have
 been promoted after 25th April, 1979 (when the Petitioners were
 appointed as direct recruits), have to be termed as junior to the
 petitioners. Under Rules 382 to 399, modes of promotions to the
 higher rank specified therein are provided. The non-obstante clause
 or expression used in Rule 399 further gives a discretion to the
 Inspector General of Police for making substantive promotions to
 the posts of Sub-Inspectors after holding oral/ written test in
 addition to what is provided in other Rules referred supra.”

F So far as the question of inter se seniority between the appellants
 and the private respondents is concerned, unhesitatingly it was opined that
 the appellants are seniors. The learned Single Judge held that the concept
 of retrospective promotion having been contemplated under the Rules,
 the manner in which promotion was effected was held to be illegal.

G 7. The Division Bench of the High Court accepted the said findings
 of the learned Single Judge. It, however, proceeded to determine the issue
 on equitable considerations opining that as both the appellants as also the
 private respondents were already promoted to the posts of Deputy
 Superintendent of Police in the J&K Police (Gazetted) Service, governed
 H by another set of rules, the writ petition became infructuous and the

direction of the learned Single Judge on the aforementioned premise to re-draw the seniority list placing the respondents above the appellants in the seniority list of Sub-Inspectors was not necessary to be implemented. A

8. Mr. Paramjit Singh Patwalia, learned senior counsel appearing on behalf of the appellants, submitted that the Division Bench of the High Court committed a serious error insofar as it failed to take into consideration that unless and until the appellants are held to be entitled to promotion in terms of the extant rules, their cases may not be considered for promotion to the post of Superintendent of police. B

9. Indisputably, the matter relating to seniority and promotion is governed by Jammu and Kashmir Civil Services (Classification, Control and Appeal) Rules, 1956 (for short "the 1956 Rules") and Jammu and Kashmir Police Manual. C

Rule 24 of the 1956 Rules provides that seniority should be determined on the basis of initial appointment to the post. Appellants were appointed on 25.04.1979 as direct recruits in the post of Sub-Inspectors. Private Respondents were working as Assistant Sub-Inspectors at the relevant time. In terms of Jammu and Kashmir Police Manual, different registers are maintained. Regulation 382 of the Police Manual provides for promotion from one rank or grade to another rank or grade. Clause (3) of Regulation 382 reads, thus: D E

"(3) For the purpose of regulating promotion among enrolled police officer, six promotion lists A, B, C, D, E and F shall be maintained. Lists A, B, C and D shall be maintained in the offices of the Range Deputy Inspectors General of Police, as prescribed in rules 386, 387, 388 and 389 and will regulate promotion to the ranks of Head Constable Junior Grade, Head Constable Senior Grade and Assistant Sub-Inspector. Lists E and F shall be maintained in the office of the Inspector General of Police as prescribed in rules 390 and 393(2) and will regulate promotion to the ranks of Sub-Inspector and Inspector." F G

11. Regulation 384 of the Police Manual also provides for the power to make officiating promotions which in case of promotion to Sub-Inspectors and Assistant Sub-Inspectors was within the jurisdiction of H

A Inspector General of Police. Clause (2) of Regulation 384 deals with officiating promotions. Clause (2) of Regulation 390 provides that entry in the List E would be the entry point for the purpose of promotion to the post of Sub-Inspector stating:

B “(2) No Assistant Sub-Inspector shall be confirmed in a substantive vacancy in the rank of Sub-Inspector unless he has been tested for at least a year as an officiating Sub-Inspector in independent charge of a police station.”

C Regulation 392 of the Police Manual provides for the method of filling up temporary vacancies in the rank of Sub-Inspector in terms whereof “the order in which names occur in the list should be disregarded, the opportunities of officiating in the higher rank being distributed as evenly as possible”. Regulation 398 provides for promotion register.

D 13. The relevant provisions of the Jammu and Kashmir Police (Gazetted) Service Recruitment Rules, 1984, being Rules 5, 14 and 20, read as under:

“5. Method of recruitment – Appointment to the service shall be made –

E (a) by direct recruitment

(b) by promotion;

in the ratio and in the manner specified against each post in Schedule – II.

F 14. Recruitment by promotion – (1) There shall be a Departmental Promotion Committee constituted by the Government from time to time who shall examine the promotion cases.

(2) *** *** ***

G (3) The Committee shall examine the service records of the officers included in the aforesaid list and prepare a select list of officers on the basis of merit and suitability with due regard to seniority.

H 20. Maintenance of seniority lists – Seniority of the members of the service shall be regulated under the Jammu and Kashmir Civil

Services (Classification, Control and Appeal) Rules, 1956. The Administrative Department shall maintain an up to date and final seniority lists in each grade of the service.” A

14. It is not in dispute that if the order dated 3.12.1985 is set aside, the appellants herein would be held to be senior to those of the respondents. B

The order dated 3.12.1985 is *ex facie* bad in law. Not only no retrospective promotion could be granted as has been held by both the learned Single Judge as also the Division Bench, entry in List E, having regard to Regulation 390 of the Jammu and Kashmir Police Manual per se did not confer any right upon the respondents to be promoted from that date. C

15. No executive order could be issued in derogation of the statutory rules far less a legislative act. The Rules being statutory in nature and having been framed under Jammu and Kashmir Civil Servants Removal of Doubts and Declaration of Rights Ordinance, 1956 have statutory force, the executive order in question was required to be issued in consonance and not in derogation thereof. D

In *State of Bihar and Ors. v. Akhoury Sachindra Nath and Ors.*, [1991] Supp 1 SCC 334, this Court held: E

“...It is well settled that no person can be promoted with retrospective effect from a date when he was not born in the cadre so as to adversely affect others. It is well settled by several decisions of this Court that amongst members of the same grade seniority is reckoned from the date of their initial entry into the service...” F

In *Kaushal Kishore Singh v. Dy. Director of Education and Ors.*, [2002] 9 SCC 634, this Court stated the law, thus:

“5. The claim of seniority of the employee is always determined in any particular grade or cadre and it is not the law that seniority in one grade or cadre would be dependent on the seniority in another grade or cadre.” G

In *State of Uttaranchal and Anr. v. Dinesh Kumar Sharma*, H

A [2007] 1 SCC 683, it was opined:

“34. Another issue that deserves consideration is whether the year in which the vacancy accrues can have any relevance for the purpose of determining the seniority irrespective of the fact when the persons are recruited. Here the respondent’s contention is that since the vacancy arose in 1995-96 he should be given promotion and seniority from that year and not from 1999, when his actual appointment letter was issued by the appellant. This cannot be allowed as no retrospective effect can be given to the order of appointment order under the Rules nor is such contention reasonable to normal parlance. This was the view taken by this Court in *Jagdish Ch. Patnaik v. State of Orissa*”

20. Similarly, although the statute provides for grant of officiating promotion, but the same is not conducive in the sense that even after getting officiating promotion, one may be reverted to the original post held by him. We do not mean to say that the seniority would be reckoned from the date of confirmation but we only intend to point out that the Rules having been provided for officiating promotion, the learned Single Judge was correct in taking that factor also into consideration for the purpose of determining the validity of the before impugned order the High Court. The said order dated 3.12.1985 even otherwise appears to be *mala fide* having been passed for unauthorised purpose. If the said order dated 3.12.1985 is read with the earlier one being dated 1.08.1985, the intention of the Government to favour the private respondents herein becomes explicit. It is not expected of a government to brazenly favour one set of employees so as to defeat the *bona fide* claim of the other set of employees. We, therefore, are of the opinion, that the impugned judgment cannot be sustained which is set aside accordingly. The appeals are allowed.

G 21. However, in exercise of our discretionary jurisdiction under Article 142 of the Constitution of India, we direct that despite this order if any monetary benefit has been conferred upon the private respondents, the same may not be recovered.

H K.K.T.

Appeals allowed.