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RAM SEWAK PRASAD
v.
STATE OF U.P. AND ORS.

JULY 11, 1991

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[KULDIP SINGH AND M. FATHIMA BEEVI, JJ.]

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Uttar Pradesh Subordinate Excise Service Rules, 1967—Rule 3(ix) and 5 and Uttar Pradesh Subordinate Excise Service Rules, 1983—Rule 3(g), 3(j), 5 and 21(1)—Interpretation of—Excise Inspector—Appointed on ad hoc basis—Held entitled to claim seniority and promotion vis-a-vis those who were appointed later in point of time.

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The petitioner was appointed as Excise Sub-Inspector in February 1964 in the State of U.P. and was later promoted as Excise Inspector on *ad hoc* basis on February 24, 1972. He was confirmed as Excise Sub-Inspector w.e.f. April 1, 1967. Though promoted on *ad hoc* basis, the petitioner has continuously been working as Excise Inspector since February 24, 1972. Raghbir Singh and Ram Dhan, respondents are direct recruits to the post of Excise Inspector and they had joined the cadre later in point of time than the petitioner i.e. after 24.2.1972. They were promoted to the post of Excise Superintendent on 29.9.1983 and the petitioner was ignored. Being aggrieved the petitioner has filed this petition under Article 32 of the Constitution.

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According to the State and other respondents, the petitioner's promotion to the post of Excise Inspector being on *ad hoc* basis was against the 1967 rules, he continues to be an *ad hoc* appointed and as such is not a member of the Excise Inspectors service constituted under the rules. His name has not been shown in the seniority list of Excise Inspectors. According to them his case has rightly not been considered for further promotion. On the other hand, it is contended on behalf of the petitioner that the 1967 Rules in as much as they confine the channel of promotion to Tari Inspectors and Clerks were wholly arbitrary and as such violative of Articles 14 and 16 of the Constitution. It is submitted on his behalf that the petitioner is, in any case, entitled to be promoted substantively to the cadre of Excise Inspectors under 1983 rules and he is also entitled to fixation of seniority by counting his entire service as Excise Inspector from 1972 onwards. Respondents concede that the petitioner can be appointed under 1983 rules, but contend that he is not entitled to the benefit of past service for purposes of seniority.

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Allowing the writ petition this Court

HELD: When the 1967 rules were enforced on May 24, 1967 there was in existence a permanent cadre of Excise Sub-Inspectors. The nature of duties of both the cadres were similar. The Excise Inspectors, on molasses duty of the ranges, used to supervise the work of Excise Sub-Inspectors under them. The Excise Sub-Inspectors were thus natural contenders for the post of Inspectors. There was no justification whatsoever with the framers of the 1967 rules to have kept the Excise Sub-Inspectors out of the channel of promotion to the post of Excise Inspectors. *Prime facie* there is no escape from the conclusion that the Excise Sub-Inspectors were dealt with in an arbitrary manner by the framers of 1967 rules. [890H-891B]

It is not disputed that under the 1983 rules, the petitioner is eligible to be promoted and appointed as Excise Inspector. [891C-D]

The 1983 rules came into force on March 24, 1983. There is nothing on the record to show as to why the petitioner was not considered for promotion under the 1983 rules till today. Inaction on the part of the State Government is wholly unjustified. The petitioner has been made to suffer for no fault of his. He has been serving the State Government as Excise Inspector since February 24, 1972 satisfactorily. [891E]

Rule 21(i) of the 1983 rules specifically permits substantive appointment to the cadre of Excise Inspectors with back date. In all probability the provision of back date appointment was made in the 1983 rules to do justice to persons like the petitioner. The petitioner is eligible under the rules to be appointed as Excise Inspector by way of promotion. Accordingly the Court directed that the petitioner shall be deemed to be appointed by way of promotion as substantive Excise Inspector under the 1983 rules with effect from February 24, 1972. The petitioner shall be entitled to the benefit of his entire period of service as Excise Inspector from February 24, 1972 towards fixation of his seniority in the cadre of Excise Inspector. The petitioner shall be considered for promotion to the post of Excise Superintendent from a date earlier than the date when respondents Ram Dhan and Raghubir Singh were promoted to the said post. The petitioner shall also be entitled to be considered to the post of Assistant Excise Commissioner in accordance with the rules from a date earlier than the date when any of his juniors were promoted to the said post. [891G, 892B-E]

None of the respondents who have already been promoted to the

A higher rank of Excise Superintendents or Assistant Excise Commissioners be reverted to accommodate the petitioner or any other person similarly situated. The State Government shall create additional posts in the cadre of Excise Superintendents and Assistant Excise Commissioners to accommodate the petitioner and other similar persons, if necessary. [892F]

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Masood Akhtar Khan & Ors. v. State of Madhya Pradesh, [1990] 4 S.C.C. 24; *Direct recruits Class-II Engineering Officers Association v. State of Maharashtra & Ors.*, [1990] 2 S.C.C. 715; *P. Mahendran & Ors. etc. v. State of Karnataka & Ors. etc.*, [1990] 1 S.C.C. 411; *State of Punjab v. Jagdip Singh & Ors.*, [1964] 4 S.C.R. 964; *Krishena Kumar & Ors. v. Union of India & Ors.*, [1990] 4 S.C.C. 207; *A.K. Bhatnagar & Ors. v. Union of India & Ors.*, [1990] 2 Scale 949; *Baleshwar Dass & Ors. etc. v. State of U.P. & Ors.*, [1981] 1 S.C.R. 449; *Narender Chadha & Ors. v. Union of India & Ors.*, [1986] 1 S.C.R. 211; *Rejendera Prasad Dhasmane v. Union of India & Ors.*, [1988] 3 J.T. 190 and *Kumari Shrilekha Vidyarthi etc. etc. v. State of U.P. & Ors.*, [1990] 4 J.T. 211, referred to.

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ORIGINAL JURISDICTION: Writ Petition (Civil) No. 13704 of 1983.

(Under Article 32 of the Constitution of India).

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P.N. Lekhi and M.K. Garg for the Petitioner.

Prithvi Raj, P.P. Rao, Govind Mukhoty, Satish Chander, Raju Ramachandran, Mrs. S. Dikshit, A.K. Sangal, P.K. Chakraborty, Ms. Sandhya Goswami and Y.C. Maheshwari for the Respondents.

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K.R. Gupta, Smt. Nanita Sharma, R.C. Gubrele, Vivek Sharma and O.P. Sharma for the Intervener.

The Judgment of the Court was delivered by

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KULDIP SINGH, J. Ram Sewak Prasad, the petitioner before us, was appointed as Excise Sub-Inspector, in the State of Uttar Pradesh in February, 1964 and was promoted to the post of Excise Inspector on *ad hoc* basis on February 24, 1972. He was confirmed as Excise Sub-Inspector by an order dated December 2, 1972 with effect from April 1, 1967. Though promoted on *ad hoc* basis the petitioner

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has continuously been working as Excise Inspector since February 24, 1972. A

Raghubir Singh and Ram Dhan, respondents are direct recruits to the post of Excise Inspector. They joined as such on March 29, 1972 and May 14, 1972 respectively. They were promoted to the post of Excise Superintendent by an order dated September 29, 1983. It is not disputed that the petitioner was not considered for promotion along with the respondents or at any time thereafter. Even his name was not shown in the seniority list of Excise Inspectors circulated from time to time. The respondents, including the State Government, have taken the stand that the petitioner's promotion to the post of Excise Inspector was against the rules, he continues to be an *ad hoc* appointee and is not a member of the Excise Inspectors Service constituted under the rules. For that reason he is neither been shown in the seniority list of Excise Inspectors nor considered for promotion to the post of Excise Superintendent. B
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It is necessary to examine the relevant statutory rules regulating recruitment and conditions of service of the Excise Inspectors. Rule 3(ix) and 5 of the Uttar Pradesh Subordinate Excise Service Rules, 1967 (hereinafter called '1967 rules') are as under: D

"3(ix). "Member of the service" means a person appointed in a substantive capacity under the provisions of these rules, or of rules in force previous to the enforcement of these rules to a post in the cadre of the service" E

"5. Sources of recruitment—Recruitment to the service shall be made-

(a) by direct recruitment of candidates, on the result of a combined competitive examinations conducted by the Commission, who having been selected in the prescribed manner for undergoing practical training have completed the course of training and passed the departmental examination prescribed in rule 23: F
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Provided that no candidate shall be allowed to avail of more than three chances for appearing at the competitive examination;

(b) by promotion of permanent clerks of the office at H

A the Headquarters of the Excise Commissioner and other regional and Subordinate Excise Offices of Assistant Excise Commissioners and Superintendents of Excise in Uttar Pradesh; and

(c) by promotion of permanent Tari Supervisors

B The 1967 rules were superseded by the Uttar Pradesh Subordinate Excise Service Rules, 1983 (hereinafter called 1983 rules) which came into force on March 24, 1983. Rule 3(g), 3(j), 5 and 21(1) of the 1983 rules are reproduced hereinafter:

C “3(g). “Member of Service” means a person substantively appointed under or the rules or orders in force prior to the commencement of these rules to a post in the cadre of the service”.

D “3(j). “Substantive appointment” means an appointment, not being an *ad-hoc* appointment, on a post in the cadre of the service, made after selection in accordance with the rules and, if there are no rules, in accordance with the procedure prescribed for the time being by executive instructions, issued by the Government.”

E Sources of Recruitment. “5. Recruitment to the various categories of posts in this service shall be made from the following sources:

F (A) *EXCISE INSPECTOR*

(1) 90% by direct recruitment on the result of a combined competitive examination conducted by the Commission.

G (2) 10% by promotion from amongst the permanent Sub-Excise Inspectors.

H “Rule 21(1) Except as hereinafter provided, the seniority of persons in any category of post shall be determined from the date of the order of substantive appointment and if two or more persons are appointed together, by the order in which their names are arranged in the appointed order;

Provided that if the appointment order specifies a particular back date with the effect from which a person is substantively appointed, that date, will be deemed to be the date of order of substantive appointment and, in other case it will mean the date of issue of the order;”

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Mr. Satish Chandra, learned senior advocate, appearing for some of the respondents who are direct recruits of 1982/83 has contended that the 1967 rules were holding the field when the petitioner was promoted as Excise Inspector on *ad hoc* basis. According to him only clerks and Tari Supervisors could be considered for promotion to the post of Excise Inspector under rule 5 of the 1967 rules and the Excise Sub-Inspectors were not eligible. The petitioner's promotion being in violation of the 1967 rules, he was not a member of the service and as such was rightly not shown in the seniority list of Excise Inspectors. He, however, accepts the position that the petitioner can be considered for promotion to the post of Excise Inspector under the 1983 rules and would become member of the service from the date of promotion under the said rules. Mr. Satish Chandra finally contended that the appointment of the petitioner from 1972 to 1983 being violative of 1967 rules, the benefit of the said service cannot be given to the petitioner towards seniority in the cadre of Excise Inspectors. In support of his arguments Mr. Satish Chandra relied upon the judgments of this Court in *Masood Akhtar Khan and Others v. State of Madhya Pradesh and Others*, [1990] 4 S.C.C. 24 and *Direct recruits class-II Engineering Officers Association v. State of Maharashtra and Others*, [1990] 2 S.C.C. 715. Mr. Govind Mukhoty, Mr. P.P. Rao and Mr. O.P. Sharma, learned senior advocates appearing for various respondents reiterated, with different flavour, the arguments advanced by Mr. Satish Chandra. They further cited *P. Mahendran and Ors etc. v. State of Karnataka and Ors. etc.*, [1990] 1 SCC 411; *State of Punjab v. Jagdip Singh and Ors.*, [1964] 4 SCR 964; *Krishena Kumar and Ors. v. Union of India and Ors.*, [1990] 4 SCC 207 and *A.K. Bhatnagar and Ors. v. Union of India and Ors.*, [1990] 2 Scale 949. Mr. Prithviraj, learned senior advocate appearing for the State of Uttar Pradesh stated that it may be possible to absorb the petitioner in the cadre of Excise Inspectors from the date of enforcement of the 1983 rules but the benefit of service rendered by him as Excise Inspector prior to that date cannot be given to him.

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Mr. P.N. Lekhi, learned senior advocate appearing for the petitioner vehemently argued that the petitioner was promoted in 'public interest' as Excise Inspector in the year 1972 and since then he

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A has been working as such continuously. He is being paid the same salary for doing the same work as is being done by the directly recruited Excise Inspectors. There can be no justifiable reason to treat the petitioner as an *ad hoc* Excise Inspector even after working as such for almost two decades. According to him the 1967 rules which confined the channel of promotion to Tari Inspectors and Clerks were

B wholly arbitrary and as such violative of Articles 14 and 16 of the Constitution of India. The Excise Sub-Inspectors are at a lower-rung in the same hierarchy of service to which Excise Inspectors belong. The Sub-Inspectors perform similar duties of less responsibility. Mr. Lekhi further contended that providing avenue of promotion to Tari Inspectors and Clerks who had no similarity or service-link with the

C cadre of Excise Inspectors and depriving the same to the Excise Sub-Inspectors render the 1967 rules arbitrary and discriminatory. He relied upon *Baleshwar Dass and Ors. etc. v. State of U.P. and Ors.*, [1981] 1 SCR 449; *Narender Chadha and Ors. v. Union of India and Ors.*, [1986] 1 SCR 211; *Rajendera Parsad Dhasmane v. Union of India and Ors.*, [1988] 3 J.T. 190 and *Kumari Shrilekha Vidyarthi etc. etc. v. State of U.P. and Ors.*, [1990] 4 J.T. 211. Mr. Lekhi finally submitted that the petitioner is, in any case, entitled to be promoted substantively to the cadre of Excise Inspectors under the 1983 rules and he is entitled to fixation of seniority by counting his entire service as Excise Inspector from 1972 onwards.

E It is not necessary to go into the judgments cited by the learned counsel for the parties. The judgments are on the peculiar facts of these cases and do not render much assistance to resolve the controversy before us.

F The 1967 rules provided recruitment to the cadre of Excise Inspectors by way of direct recruitment and by promotion. Recruitment by promotion was only confined to permanent clerks in the office of Excise Commissioner and Tari Supervisors. The Excise Sub-Inspectors were not eligible. On the plain interpretation of 1967 rules Mr. Satish Chandra is justified to contend that the petitioner was not eligible for promotion to the post of Excise Inspector and as such he

G could not be considered to be member of the Uttar Pradesh Subordinate Excise Service as constituted under the 1967 rules. On the other hand there is plausibility in the argument of Mr. P.N. Lekhi that rule 5 of the 1967 rules which denies avenue of promotion to the Excise Sub-Inspectors is arbitrary and discriminatory. When the 1967 rules were enforced on May 24, 1967 there was in existence a permanent

H cadre of Excise Sub-Inspectors. The nature of duties of both the cadres

were similar. The Excise Inspectors, on molasses duty of the ranges, used to supervise the work of Excise Sub-Inspectors under them. The Excise Sub-Inspectors were thus natural contenders for the post of Inspectors. There was no justification whatsoever with the framers of the 1967 rules to have kept the Excise Sub-Inspectors out of the channel of promotion to the post of Excise Inspectors. *Prima facie* there is no escape from the conclusion that the Excise Sub-Inspectors were dealt with in an arbitrary manner by the framers of 1967 rules. However, the view we propose to take on the interpretation of 1983 rules it is not necessary for us to deal with the respective arguments of the learned counsel for the parties regarding the 1967 rules.

Rule 5 of the 1983 rules provides recruitment to the cadre of Excise Inspectors from two sources, 90% by direct recruitment and 10% by promotion from amongst the permanent Excise Sub-Inspectors. It is not disputed that under the 1983 rules the petitioner is eligible to be promoted and appointed as Excise Inspector. In the writ petition the petitioner has specifically pleaded that the service record of the petitioner is unblemished and he is holding the post of Excise Inspector within the 10% promotion quota provided for the permanent Excise Sub-Inspectors. The State Government in its counter has not denied these averments. The 1983 rules came into force on March 24, 1983. There is nothing on the record to show as to why the petitioner was not considered for promotion under the 1983 rules till today. Inaction on the part of the State Government is wholly unjustified. The petitioner has been made to suffer for no fault of his. He has been serving the State Government as Excise Inspector since February 24, 1972 satisfactorily. Least the State Government could do was to consider the petitioner for promotion under the 1983 rules. Mr. Prithviraj, learned counsel for the State of Uttar Pradesh has however fairly stated that the State Government is willing to promote the petitioner to the cadre of Excise Inspectors under the 1983 rules effect from the date of enforcement of the said rules.

Rule 21(1) of the 1983 rules provides that the seniority of a person in any category of post shall be determined from the date of the order of substantive appointment. First proviso provides that if the appointment order specifies a particular back date with effect from which a person is substantively appointed then the said back-date shall be deemed to be the date of order of substantive appointment. It is thus obvious that rule 21(1) of the 1983 rules specifically permits substantive appointment to the cadre of Excise Inspectors with back date. The framers of the 1983 rules were conscious that the cadre of

A Excise Sub-Inspectors was in existence from 1964 onwards and some of them were promoted to the post of Excise Inspectors much earlier to the enforcement of the 1983 rules. In all probability the provision of back-date appointment was made in the 1983 rules to do justice to persons like the petitioner. The petitioner is eligible under the rules to be appointed as Excise Inspector by way of promotion. It is not disputed that the petitioner was appointed as Excise Inspector on February 24, 1972 and he has been actually working in the said post continuously from that date and has been drawing the salary of the post of Excise Inspector. This is a fit case where the petitioner should be appointed as Excise Inspector under the 1983 rules by giving him back date appointment with effect from February 24, 1972.

C We, therefore, hold that the petitioner shall be deemed to be appointed by way of promotion as substantive Excise Inspector under the 1983 rules with effect from February 24, 1972. The petitioner shall be entitled to the benefit of his entire period of service as Excise Inspector from February 24, 1972 towards fixation of his seniority in the cadre of Excise Inspector. We further direct that the petitioner shall be considered for promotion to the post of Excise Superintendent from a date earlier than the date when respondents Ram Dhan and Raghubir Singh were promoted to the said post. The petitioner shall also be entitled to be considered to the post of Assistant Excise Commissioner in accordance with the rules from a date earlier than the date when any of his juniors were promoted to the said post.

F We make it clear that none of the respondents who have already been promoted to the higher rank of Excise Superintendents or Assistant Excise Commissioners be reverted to accommodate the petitioner or any other person similarly situated. The State Government shall create additional posts in the cadre of Excise Superintendents and Assistant Excise Commissioners to accommodate the petitioner and other similar persons, if necessary.

G The writ petition is allowed with costs in the above terms. We quantify the costs as Rs.10,000 to be paid by the State of Uttar Pradesh.

Y.Lal.

Petition allowed.