

Before M. M. Kumar and Jitendra Chauhan, JJ.

DR. SURESH KUMAR MANGAL AND OTHERS,—Petitioners

versus

STATE OF HARYANA AND OTHERS,—Respondents

C.W.P. No. 20173 of 2006

13th January, 2009

Constitution of India, 1950—Art. 226—Haryana Civil Medical (Group A) Service Rules, 1981—RI. 11—Instructions dated 24th November, 1962 issued by State Government—Seniority of members of H.C.M. (Group A) service—Provisions of RI.11 provide that inter se seniority is required to be determined on basis of principle of continuous length of service—Instructions dated 24th November, 1962 provide that date of recommendation in respect of direct recruits be regarded as determinative date for fixing their inter se seniority—Whether instructions could be made basis for determining seniority of a member of service—Held, no—Once rules have been framed in pursuance of powers under proviso to Article 309 then instructions on same subject would not operate—Date of recommendation may not have any relationship to become a criteria for determining seniority—Impugned order not sustainable in law and declared ultra vires of Rule 11 of the Rules.

Held, that a bare perusal of Rule 11 would show that inter se seniority of the members of the service is required to be determined on the basis of the principle of continuous length of service. It is further clear from the perusal of the rule that no significance is to be accorded to the date of recommendation made by the Public Service Commission as a principle for determining seniority of the direct recruits. For the direct recruits amongst themselves the order of merit determined by the Commission has to be regarded as final. Therefore, for all intents and purposes the principle of continuous length of service as laid down in Rule 11 of the Rules has to be a guiding factor for determination of seniority. It is well settled principle of law that once the rules have been framed in pursuance of powers under proviso to Article 309 of

the Constitution then the instructions on the same subject would not operate.

(Para 6)

Further held, that the instructions have only one object of determining batch seniority of direct recruit namely that the date of their recommendation would be the date which would determine their *inter se* seniority by freezing the order of merit as determinative principles. However, the instructions dated 24th November, 1962 could not be made the basis for determining seniority of a member of service which include promotees. Even otherwise the date of recommendation by the Public Service Commission may not have any relationship to become a criteria for determining seniority, therefore, the impugned order dated 1st December, 2006 is unsustainable in law and is declared *ultra vires* of Rule 11 of the Rules.

(Para 7)

R.K. Malik, Sr. Advocate with Yashdeep Singh, Advocate, *for the petitioners.*

Harish Rathee, Sr. D.A.G., Haryana, *for the State.*

R.N. Lohan, Advocate *for respondents No. 9, 13 & 24.*

Sunil Panwar, Advocate *for respondents No. 10, 11 & 20.*

M.M. KUMAR, J.

(1) A short question of law raised in this petition filed by the promotees under Article 226 of the Constitution is should the seniority of members of Haryana Civil Medical (Group-A) Service be governed on the principle of continuous length of service as per the provisions of Rule 11 of the Haryana Civil Medical (Group-A) Service Rules, 1981 (for brevity “the Rules”) or by the instruction dated 24th November, 1962 which provide that date of recommendation in respect of direct recruits by the Public Service Commission be regarded as determinative date for fixing their *inter se* seniority. The petitioners have prayed that order dated 1st December, 2006 (P-15) passed by the Financial Commissioner and Principal Secretary to Government of Haryana,

Department of Health be quashed which seeks to follow the principle of determining seniority from the date of recommendation of the Haryana Public Service Commission as per the instructions dated 24th November, 1962.

(2) Facts are beyond any pale of controversy. The petitioners were promoted as H.C.M.S. Class-I in the service known as H.C.M.S. (Group-A) on 21st June, 1996 from the post of Medical Officers (P-1). The private respondents who are direct recruit to the service were recommended for appointment on 20th June, 1996. All of them however were appointed to the service much later. One appointment letter to a private respondent has been placed on record (P-2) which is dated 13th July, 1996. The petitioners have claimed that the private respondents having been appointed subsequent to the date of their promotion, therefore they would rank senior to them as the continuous length of service is the principle laid down in Rule 11 of the Rules. In all the seniority list issued from time to time the petitioners have always been shown senior to private respondents. In that regard, the petitioners have placed reliance on the seniority list dated 1st September, 1997, 1st June, 2000 and 1st September, 2003 (P-3 to P-5). The seniority list has been drawn on the basis of Rule 11 of the Rules. The seniority lists have also been followed because many promotees being senior to private respondents were further promoted or given charge of the post of Civil Surgeon, P.M.O. Deputy Director.

(3) The petitioners have also made averments that private respondent No. 20 had filed a civil suit seeking a declaration that he being direct recruit was entitled to rank senior to the promotees. The Civil Court passed a decree on 16th August, 2003 and declared him senior to the promotees. Even the first appeal filed by the respondent-State was dismissed by the learned Addl. District Judge upholding the decree of the Civil Judge,—*vide* his order dated 1st April, 2004 (P-10). On further appeal filed by some of the petitioners belonging to the promotees' quota, this Court accepted the prayer of the private respondent No. 20 and allowed the suit to be dismissed as withdrawn so as not to affect the rights of the petitioners who were the appellants before this Court in RSA No. 4156 of 2004 decided on 6th July, 2006 (P-11). However the respondent-State was directed to finalize the seniority of

the Senior Medical Officer belonging to the service by granting adequate opportunity to all of them. Thereafter a tentative seniority list was circulated on 24th August, 2006 (P-12) and objections were invited to be filed by 8th September, 2006. The petitioners filed CWP No. 13976 of 2006 (P-13) which was disposed of on 8th September, 2006 by extending the period of filing objections upto 13th September, 2006 and the writ petition was disposed of on 8th September, 2006. The petitioner then filed objections bringing to the fore the issue of determining seniority on the basis of continuous length of service as per Rule 11 of the Rules (P-14) and on the basis claimed themselves to be senior to the private respondents. The objection raised by the petitioner have been rejected by the Financial Commissioner and Principal Secretary to Government of Haryana, Department of Health on 1st December, 2006 with the observation that seniority is to be determined on the principle laid down in the instructions dated 24th November, 1962 (P-16) that in respect of direct recruit the seniority would be reckoned from the date of recommendation of the Public Service Commission.

(4) The respondent-State has filed written statement. The broad facts have been admitted but it has made an attempt to defend the determination of seniority on the principle laid down in the instructions dated 24th November, 1962 (P-16). It has also been asserted in Para 6 of the written statement that merit fixed by the Public Service Commission should not be disturbed and the seniority must be fixed from the date of recommendation by the Public Service Commission and the objections have been rightly rejected.

(5) We have heard learned counsel for the parties.

(6) The basic principle which requires determination in the instant case is whether the instructions dated 24th November, 1962 would continue to operate once the subject matter has been occupied by the rules in the year 1981 which were framed in pursuance of proviso to Article 309 of the Constitution. Rule 11 of the Rules which is relevant for determining the controversy raised in this case reads as under :—

“Rule 11.—Seniority, *inter se* of members of the Service shall be determined by the length of continuous service on any post in the Service.

Provided that in the case of members appointed by direct recruitment, the order of merit determined by the Commission shall not be disturbed in fixing the seniority.

- (a) a member appointed by direct recruitment shall be senior to a member appointed by promotion or by transfer ;
- (b) a member appointed by promotion shall be senior to a member appointed by transfer ; and
- (c) in the case of members appointed by promotion or by transfer, seniority shall be determined according to the seniority of such members in the appointments from which they were promoted or transferred ;
- (d) in the case of members appointed by transfer from different cadres, their seniority shall be determined according to pay, preference being given to a member, who was drawing a higher rate of pay in his previous appointment and if the rates of pay drawn are also the same. Then by the length of their service in the appointments, and if the length of such service is also the same, the older member shall be senior to the younger member.”

(7) A bare perusal of the Rule would show that *inter se* seniority of the members of the service is required to be determined on the basis of the principle of continuous length of service. It is further clear from the perusal of the rule that no significance is to be accorded to the date of recommendation made by the Public Service Commission as a principle for determining seniority of the direct recruits. For the direct recruits amongst themselves the order of merit determined by the Commission has to be regarded as final. Therefore for all intents and purposes the principle of continuous length of service as laid down in Rule 11 of the Rules has to be a guiding factor for determination of seniority. It is well settled principle of law that once the rules have been framed in pursuance of powers under proviso to Article 309 of

the Constitution then the instructions on the same subject would not operate as has been held in the case of **Union of India versus Madras Telephone S.C. & S.T. Social Welfare (1)**. The same principles were laid down in the case of **K.K. Parmar versus High Court of Gujarat (2)**. All these principles of law are so well settled as to entertain any doubt since 1967 when the Constitution Bench had laid down the law in the case of **Sant Ram Sharma versus State of Rajasthan (3)**.

(8) The instructions have only one object of determining batch seniority of direct recruit namely that the date of their recommendation would be the date which would determine their *inter se* seniority by freezing the order of merit as determinative principles. However, the instructions dated 24th November, 1962 could not be made the basis for determining seniority of a member of service which include promotees. Even otherwise the date of recommendation by the Public Service Commission may not have any relationship to become a criteria for determining seniority, therefore the impugned order dated 1st December, 2006 (P-15) is unsustainable in law and is declared *ultra vires* of Rule 11 of the Rules.

(9) For all the reasons given above, the instant petition succeeds. The order dated 1st December, 2006 (P-15) is hereby quashed. The petitioners deserve to rank senior to the private respondents on the basis of continuous length of service and are declared senior to them. We further direct respondents No. 1 and 2 to consider the petitioners for promotion to the next higher post of Principal Medical Officers/Civil Surgeons/Deputy Directors (Senior Scale) by treating them senior to the private respondents on the basis of continuous length of service. The needful shall be done within a period of three months from the date of receipt of copy of this order.

R.N.R.

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- (1) (2000) 9 S.C.C. 71
 - (2) (2006) 5 S.C.C. 789
 - (3) AIR 1967 S.C. 1910