

PRINCIPLES OF SENIORITY- PREFERENCE IN POSITION OF AN EMPLOYEE

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Abstract:

Employees recruited to same cadre are similarly situated but the moot question which arises is on what basis seniority inter se the said similarly situated employees be determined for the purpose of promotions, pay scales etc.

1. MEANING OF SENIORITY

Seniority, in service law, connotes the precedence or preference in position of an employee over other employees similarly situated. Seniority in simple English means a longer life than of another thing or person taken for comparison. In the case of a Government servant, it means 'the length of service'. If the service of one person is longer than that of another the first named person is called senior to the other.

The question of assigning of seniority arises only in relation to employees who are similarly situated i.e. where they are functioning in the same rank, grade or cadre. This is because seniority is a comparative or relative concept. The comparison obviously has to be between employees who are equally circumstanced. If the employee belongs to two distinct classes, the question of inter se seniority between the members of such distinct classes cannot arise.¹

2. THE OBJECT OF ASSIGNING SENIORITY

A system of promotion is the essence of modern management and when a person is recruited in an organization he must be given an opportunity to advance. The object of assigning seniority is to facilitate the filling of promotional posts. Although under many statutory rules or administrative instructions seniority is not the sole factor in granting promotion e.g. when the rules provide for seniority-cum-merit or merit-cum-seniority, yet it is difficult to find rules or instructions which completely ignore seniority in relation to promotion. Even in cases of selection posts the seniority in the feeder grade from which the selection is to be made can be an important factor because employees of a given seniority are treated in the zone of consideration while granting promotion to the selection posts.²

¹ Bag, R.K., Service law of Government Employees, Eastern Law House, 2013

² *ibid*

3. FIXATION OF SENIORITY

Where statutory provisions (including rules) or administrative instructions provide for the factors to be taken into consideration and the manner to be adopted in fixation of seniority, then subject to such provisions or instructions being constitutionally or otherwise valid, seniority has to be fixed in accordance with such provisions or instructions.³

3.1 The Primacy of Statutory Provisions

As in other fields of service law, the first step in resolving a disputed question of seniority is to ascertain whether there are any statutory provisions operating in the field. If statutory provisions exist then they will have primacy. By statutory provisions is meant an Act of the legislature or rules, regulations, orders, notifications etc. issued in exercise of powers conferred by the Act. If there is a statute or Act covering the field of seniority then rules whether made under Article 309 or otherwise would be ineffective or invalid.⁴

3.2 Absence of Rules: Executive Order

In the absence of rules relating to seniority or any particular aspect of principles relating to the law governing seniority, the employer is entitled to fill up the gap by an executive order.

In *Union of India vs. H.R. Patankar*⁵, the Supreme Court held that it is now well settled law that even if there are no statutory rules in force for determining seniority in a service or even if there are statutory rules but they are silent on any particular subject, it is competent to the Government by an executive order to make appropriate Seniority Rules or to fill in the lacuna in the statutory rules by making an appropriate seniority rule in regard to the subject on which the statutory rules are silent.

3.3. The statute, the rules and the executive instructions must be constitutionally or otherwise valid

It is axiomatic that the statute or the rules or executive instructions governing seniority must be valid both, constitutionally or otherwise. As far as constitutional validity is concerned although, generally speaking, the relevant provision is tested against Article 14 and 16, yet in some cases they might have to pass the test in the context of other constitutional provisions namely, Article 309 or Article 148 of the Constitution. The rules may be invalid if they transgress the provisions of the Act under which they are framed. Executive instructions might have to be tested against Article 14 and 16 as well the provisions of Article 73 and 162 which delineate the extent of executive powers of the Centre and the State respectively.⁶

³ Pal, Samaraditya, Law Relating to Public Service, Lexis Nexis, 3rd Edition, 2013

⁴ *ibid*

⁵ 1984 AIR, SC, 1587

⁶ Pal, Samaraditya, Law Relating to Public Service, Lexis Nexis, 3rd Edition, 2013

4. PRINCIPLES FOR DETERMINATION OF SENIORITY

Following are the principles governing the determination of the seniority:-

4.1 General Principles

Where there are no rules or administrative instructions for fixation of seniority, the general principles evolved by judicial precedents would be applicable.

4.2 Length of Service

The fundamental principle which has gained favour is that in determining inter se seniority of employees, the length of actual service rendered in the same cadre or grade would be the generally accepted criterion. It is not an absolute principle, for example, where the initial as hoc appointment was not in accordance with the rules, seniority would have to be determined from the date of regularization and not the date of initial entry. It follows that the length of service must be rendered in the same grade or cadre except in cases relating to transfer or deputation where the services in an equivalent grade might also be taken into consideration.⁷

4.2.1 Computing Length of Service

In computing the length of service the authorities can prescribe different points of time from which the service was or is deemed to have commenced. Although the length of service is the generally accepted principle, the principles to be applied for computing such length will necessarily depend on varying circumstances. More particularly, the problem which the Courts have to face is the point of time from which the length of service has to be determined. For example, whether the length is to be computed from the date of probationary appointment or substantive appointment, from officiating promotion or substantive promotion, from the date of transfer to a department or date of appointment in the original department etc. and although the computation problems have arisen mostly in cases where recruitment to a cadre has been from two sources i.e. direct recruitment and promotion.⁸

- **From the date of appointment**

The date of appointment is, normally, the starting point of the computation of the length of service. The date of appointment would mean the date of substantive appointment, and that will be the date of entry into the service. An employee cannot be granted seniority prior to him. Late comers to regular stream cannot steal a march over early arrivals who are already in regular queue. Service rendered by virtue of wrong appointment/promotion which is subsequently set aside does not count for seniority.⁹

- **From the date of continuous officiation**

⁷ Bag, R.K., Service law of Government Employees, Eastern Law House, 2013

⁸ Pal, Samaraditya, Law Relating to Public Service, Lexis Nexis, 3rd Edition, 2013

⁹ *ibid*

There is no substantial qualitative difference between the previous heading and the present heading. But the courts have had to reconcile and resolve competing claims of computation based on continuous officiation and the date of appointment because in many areas of service law appointment is taken to mean sub-substantive appointment as opposed to officiating appointment.¹⁰

As regards to seniority is concerned it is the actual service rendered, whether officiating or otherwise, which will be the yardstick for measuring the length of service for the purpose of seniority.¹¹

- **From the date of probationary appointment**

In computing the length of service the period during which the employee is under training or probation is to be reckoned.

- **From the date of passing examination**

The rules may provide the date of passing an examination as the determining criteria for inter se seniority in the promotional grade.

- **Including the period of deputation**

So long as the service of the employee in the new department is satisfactory and he is obtaining the increments and promotions in that department it stands to reason that the satisfactory service and the manner of its discharge in the post he actually holds should be deemed to be rendered in the parent department also so as to entitle him to such promotions which have nay nexus with seniority i.e. seniority cum merit. But on the question as to whether a deputationist will carry with him the seniority of parent cadre it has been held in the negative in *S.P. Indu vs. Metro Railways*¹², wherein the court was of the view that the deputationist would be treated as junior as he was holding a lien in his parent cadre.

- **From the date of absorption**

In *Director, Central Bureau of Investigation vs. D.P. Singh*¹³, where an office memorandum provided that 'in the case of a person who is initially taken on deputation and absorbed later, his seniority in the grade in which he is absorbed will normally be counted from the date of absorption', the contention that seniority of employee who has been holding the post of DSP in CBI since 24.11.77 from that date must be counted was rejected since it would render the provision of instruction redundant.

- **Transfer from one cadre to an equivalent cadre**

When a person is transferred from one cadre to another equivalent cadre in order to secure greater efficiency, he cannot be made to forfeit the benefit of the period of service rendered by him in the erstwhile cadre. The same principle applies to integration of cadre. Benefit of past services cannot be denied even if there has been transfer to a new department.

- **Break in Service**

¹⁰ *ibid*

¹¹ *ibid*

¹² 2007 (11) SCC, 500

¹³ 2010 (1) SCC 647

When an employee takes up a job in some other service he loses his lien on the previous service and thus there was a break in service and for the purpose of his seniority and eligibility for promotion his services would be reckoned from the date of his rejoining the fresh service.

4.3 The Rotational System (Rota Rule)

When recruitment to a service is from two or more sources, the authorities can adopt the rotational system in fixing the seniority. The rotational system implies that after the recruitment has taken place from two groups e.g. Direct Recruits and Promotees, the list is arranged in such a way that there is one person from the Direct Recruits and one person from the promotes alternatively. Of course, the precise manner of rotation i.e. whether it will be 1:1 or 2:1 or something else would depend on the relevant rules or administrative instructions.¹⁴

4.4 Quota System: The Quota Rule

When recruitment to service is to be made from two or more sources the statutory provisions or administrative instructions governing such recruitment must fix a quota in respect of each of the sources according to which such recruitment is to take place. For example, if the recruitment to a cadre is to be made by direct recruitment from the open market and also by promotion from in service candidates, a quota specifying the number of direct recruits and the promotes might be fixed. The quota might have reference to the number of vacancies e.g. when it says that 50 percent of the vacancies will be filled up by direct recruitment and 50 percent of the vacancies will be filled up by promotion; or, it might say that the recruitments shall be in such manner so as to ensure that the total strength of the cadre is distributed equally amongst direct recruits and promotes at any given point of time.¹⁵

4.5 On The Basis Of Merit

Service rules very often provide that when a recruitment takes place through selection or competitive examination, the inter se seniority of the recruited candidates should be determined on the basis of merit i.e. the results of the selections or examination. The scheme of the regulations may disclose that seniority will have to be fixed accordance with merit.

4.6 Prior Selection

In the area of selection, an employee who is included in a select list on the basis of a prior selection would be entitled to seniority over those selected pursuant to a latter selection.

4.7 The Date of Acquisition Of Qualification

¹⁴ Pal, Samaraditya, Law Relating to Public Service, Lexis Nexis, 3rd Edition, 2013

¹⁵ Pal, Samaraditya, Law Relating to Public Service, Lexis Nexis, 3rd Edition, 2013

The date of acquisition of qualification for the entry into a cadre can also be a basis for determination of seniority. It has been recognized by the Supreme Court in *Government of Andhra Pradesh vs. M.A. Kareem*¹⁶.

4.8 On Integration Of Two Services

When two services are integrated the authorities can adopt a principle different from computing seniority on the basis of length of service.

4.9 Giving Of Weightage

It is now well settled in the case of *Devi Prasad vs. Government of A.P.*¹⁷ that the Government can, on relevant considerations, give weightage to a particular category of Government servants out of two or more such categories although they were rendering somewhat similar kind of service. There may be many relevant considerations for giving such weightage e.g. experience, special qualifications etc.

4.10 Inter Se Seniority Between Reserved And General Category Candidates

Where reserved candidates have been promoted earlier to a general candidate, their seniority in the cadre will rank from the date of joining on promotion and this seniority is not and cannot have the effect of getting wiped out after the promotion and of general candidates¹⁸. But the question as to whether roster point promotions given to reserved candidates from the feeder category to the promoted category will give them seniority in the promoted category was re-examined by a Constitution Bench of Supreme Court in *Ajit Singh vs. State of Punjab*¹⁹. The principle laid down is where the promotional rules are based on quality or equal opportunity involving evaluation of comparative merits of the candidates concerned, it will not be permissible to delink the seniority rule from the recruitment (or promotional) rule based on equal opportunity and apply it to promotions made on the basis of the roster. This is because roster promotions are for different class viz. reservations who already had the benefit of accelerated promotion outside the equality principle and, the balancing exercise required that they should not be allowed to fall back and take advantage of general seniority rule which adopts the principle of continuous officiation for computation of length of service in the promotional cadre.

5. MERGER AND INTEGRATION

When there is a merger of two or more establishments or intergration of two or more cadres, the inter se seniority amongst the employees in the merged establishment or the integrated cadre has to be determined on some rational principle. The mere fact that some

¹⁶ 1991 Supp (2) SCC 183

¹⁷ 1980 AIR (SC) 1185

¹⁸ Jagdish lal vs. State of Haryana, 1997 (5) JT, 387

¹⁹ 1997, SCC (L&S), 1239

hardship has been caused to members who are integrate will not render such a rule for determination of seniority invalid.²⁰

An employer has a right to merge or integrate different cadres into one single cadre or to spilt a single cadre into different cadres for rationalizing administration. There may also be a transfer of establishment by reason of one employer taking over the establishment of another employer e.g. Government of India taking over the Central Workshop of the Irrigation Department of the State of Punjab.

The rules or administrative orders which bring about integration might provide for principles and manner in which the seniority of the integrated employees are to be determined. Needless to say such rules or orders must pass the test of constitutionality which particularly implies that they must be based on some fair, just and rational principle. But what would be fair, just and rational principle will vary according to the facts and circumstances of the case and particularly the historical background of the integration.

6. GRADATION OR SENIORITY LIST

The seniority of an employee, is generally, indicated in a list commonly referred to as a Gradation List or a Seniority List. A Gradation List has to be prepared in accordance with the principles of seniority and in the manner provided in rules or executive instructions.

6.1 Object Of Gradation List

An employee must know his exact seniority position vis-à-vis other employees. It is also important for the employer to readily locate the precise seniority position of an employee at any given point of time. This is obviously because one of the important incidence of a service career namely, promotion, is either fully dependent on seniority or seniority plays a very important role in the consideration of the promotional process. An invariable practice has thereof developed of publication of a gradation or a seniority list showing the respective seniority placements of the employees. Such gradation list are published from time to time in accordance with the frequency, if any, stipulated in the rules or administrative instructions.

6.2 Must Reflect The Principles Of Seniority

A gradation list has to be prepared in accordance with the principles of seniority laid down either statutorily or by executive instructions or rules, and normally the validity of such a list is required to be judged by reference to such principles of seniority. Since the seniority is normally determined amongst those in the same cadre, the list must also be confined to those who belong to that cadre e.g., if the cadre consists of direct recruits only, then the list must reflect the direct recruits only and not others.

²⁰ Pal, Samaraditya, Law Relating to Public Service, Lexis Nexis, 3rd Edition, 2013

7. CONCLUSION

Seniority, in service law, connotes the precedence or preference in position of an employee over other employees similarly situated. Seniority means a longer life than of another thing or person taken for comparison. In the case of a Government servant, it means 'the length of service'. If the service of one person is longer than that of another the first names person is called senior to the other.

In *Andhra Pradesh Cooperative Oil Seeds Growers Federation Ltd. Vs. D. Achyuta Rao*²¹, the Supreme Court has held that seniority confers a very valuable right on an employee and his entire future career is at times dependent upon such seniority. Seniority, therefore, must be determined by rules validly framed or norms enunciated and/or followed which are consistent with the principles enshrined in Articles 14 and 16 of the Constitution of India.

In *State of Uttaranchal vs. Madan Mohan Joshi*²², the Supreme Court held that as seniority or inter se seniority is not a fundamental right but a civil right the persons whose seniority might be effected are necessary parties and such rights are to be determined in their presence.

In *State of U.P. vs. Dinkar Sinha*²³ and *Suresh vs. Yeotmal District Central Cooperative Bank Ltd.*²⁴, the Supreme Court held that although seniority may not be a fundamental right but a civil right, the infringement of this right is permissible only if there are validly framed rules to this effect. If however, any such rules takes away such right it has to receive a strict construction. But even if on such strict interpretation such civil right cannot be saved then it may amount to arbitrary destruction of the right violating Articles 14 and 16 of the Constitution. Since it is civil right, the Supreme Court has held that the questions of seniority cannot be effectively adjudicated upon unless the persons who are shown senior to the aggrieved employee are impleaded as parties.

In *N.K. Chauhan vs. State of Gujarat*²⁵, the Supreme Court observed that although length of services the generally accepted norm for determining seniority, it is obvious that in some cases length of service cannot be the basis for determining seniority e.g. when two or more persons join a service on the same date. Therefore other norms like merit or age have been adopted to meet such situations where the criteria of length of service cannot be applied.

If there are statutory provisions or rules or directions providing the manner in which seniority is to prepared, then a list which not prepared in accordance with such provisions or rules or directions will be invalid.

²¹ 2007, (13), SCC, 320

²² 2008, (6) SCC, 797

²³ 2007, (10), SCC 548

²⁴ 2008, (12) SCC, 558

²⁵ 1977, (1), SCC, 750

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