

O. P. Malhotra

Vs

State of Punjab and Others

Civil Appeal No. 1488 of 1971

(N. L. Untawalia, P. N. Bhagwati, A. C. Gupta JJ)

23.04.1975

JUDGMENT

GUPTA, J. –

The dispute in this case relates to the inter se seniority between the appellant and respondents 2, 3 and 4. They are all Engineers in the Punjab Services of Engineers (Buildings and Roads Branch), Class I. By a notification dated February 18, 1960 the Governor of Punjab fixed the seniority of Class I officers in the Punjab Services of Engineers (Building and Roads Branch) including the appellant and the respondents Nos. 2, 3 and 4. In this seniority list the appellant held the 5th position and respondents 2, 3 and 4 occupied the 7th, 8th and the 12th position respectively. By another order made on August 28, 1969 the Governor of Punjab refixed the seniority of these four officers on the ground that the seniority determined earlier was based on a wrong application of the Service Rules. The order reads :

"ORDER OF THE GOVERNOR OF PUNJAB"

The existing seniority of the officers of Public Works Department (B & R), appointed as Executive Engineers by promotion and those appointed to Class I as Assistant Executive Engineers by direct appointment, having been wrongly fixed simply on the basis of date of confirmation in P.S.E.I. under Rule 13(1) of P.S.E. (B & R). Rules, 1942 while it should have been determined by Government under proviso (a)(i) Rule 13 is on just and equitable basis, the Governor of Punjab, in partial modification of the Punjab Government Notification No. 1756-B & R/60/6549, dated the 18th February, 1960, is pleased to refix seniority in respect of the following Class I Officers of P.W.D. B & R, allocated Punjab in the order indication below :

#(1) Shri D. K. Sehgal,(2) Shri G. S. Toki,(3) Shri B. S. Grewal,(4) Shri O. P. Malhotra.##

In fixing the seniority in the aforesaid manner the factors regarding the total length of service, continuous length of service as XEN, age and merit have been taken into account.

PARAMJI SINGH, Secretary to Government, Punjab, P.W.D. B & R.Dated, the 28th, August, 1969.##

On the same day, August 28, 1969, a notification was also issued modifying the earlier notification

dated February 18, 1960 and re-fixing the seniority of the said officers in accordance with the above order. The appellant, O. P. Malhotra, challenged the validity of the order and the notification dated August 28, 1969 by a writ petition filed before the Punjab and Haryana High Court. The petition was dismissed by learned single Judge of that High Court. The Letters Patent Appeal preferred against that order was also dismissed. In this appeal by special leave, the appellant questions the correctness of the decision of the High Court.

2. To appreciate the questions arising for decision in this appeal, it would be necessary to find out how the appellant and the respondents 2, 3 and 4 came to occupy the positions they did in the previous seniority list which was revised by the impugned order and the notification. The appellant, O. P. Malhotra, was appointed as Assistant Executive Engineer on July 3, 1951 on the result of an open competitive examination held by the Punjab Public Service Commission (hereinafter referred to as the Commission) to fill four vacancies in the Punjab Services of Engineers, Class I, Buildings and Roads Branch. In this examination respondent No. 2, though permitted to appear, did not sit for the examination. There is some dispute as to the exact date when the appellant was confirmed in the post of Assistant Executive Engineer; the appellant claims that he was confirmed on July 3, 1953 but according to the respondents the date of confirmation is January 14, 1954. There is, however, no dispute that the appellant was promoted to officiate as Executive Engineer on July 1, 1954 and was confirmed as Executive Engineer on September 1, 1956. On May 30, 1962 he was promoted as officiating Superintending Engineer and was confirmed in the post of Superintending Engineer on March 11, 1966.

3. Respondent 2, D. K. Sehgal, was appointed by the Punjab Government as Temporary Assistant Executive Engineer in April, 1947. He was promoted as officiating Executive Engineer on November 9, 1948. The validity of this officiating appointment which was made without the approval of the Commission is disputed. However, in June, 1950 he was reverted as Temporary Assistant Executive Engineer. In November, 1950 he was considered for departmental promotion as Assistant Executive Engineer, in the Punjab Services of Engineers, Class I, Buildings and Roads branch against two vacancies, but was not found suitable by the Commission. It appears that though he was not found fit by the Commission for the post of Assistant Executive Engineer, he was promoted again by the Punjab Government to officiate as Executive Engineer, again without the approval of the Commission. In January, 1951 he was allowed to appear in the competitive examination held by the Commission for recruitment to the post of assistant Executive Engineer but, as stated already, he did not sit for the examination. It is no the result of this examination that the appellant was appointed as assistant Executive Engineer. In December, 1951 the Commission considering cases for departmental promotion again found him unsuitable to fill any of the three existing vacancies in the post of Assistant Executive Engineer. On May 9, 1953 he was appointed as Assistant Engineer in the Punjab Service of Engineers, Class II, in the Buildings and Roads Branch. Prior to 1953 the Class II Service was not in existence. On January 1, 1956 he was appointed as Assistant Executive Engineer in Class I Service. It is claimed that the appointment was by way of transfer. This claim is disputed. Respondent No. 2 was confirmed in the post of Assistant Executive Engineer on the date of his appointment January 1, 1956. He was confirmed as Executive Engineer on November 1, 1958 and promoted as officiating Superintending Engineer on December 25, 1960. On March 11, 1966 he was confirmed as Superintending Engineer.

4. Respondent 3, G. S. Toki, started as Temporary Assistant Engineer in the Punjab Works Department, Irrigation Branch. His services were transferred to the Buildings and Roads Branch where he was appointed as a temporary Assistant Engineer. He was also considered by the Commission for promotion to one of the two existing vacancies in the post of Assistant Executive

Engineer but was not elected as he was ranked 4th in order of merit by the Commission. As stated already, he failed to qualify in the competitive examination held by the Commission in January 1951. In June, 1961 he was promoted as officiating Executive Engineer without the approval of the Commission. In December, 1951 he was placed 7th in order of merit by the Commission considering cases for departmental promotion to three existing vacancies in the post of Assistant Executive Engineer, and as such failed to qualify. On May 9, 1953 he was appointed as Assistant Engineer in the Punjab Service of Engineers. Class II, in the Buildings and Roads Branch. On January 1, 1956 he was appointed Assistant Executive Engineer. Class I, to which post he was confirmed on the same date. In his case also, the claim is that the appointment was by way of transfer which is disputed. On January 10, 1959 he was confirmed as Executive Engineer and in December, 1960 he was promoted as officiating Superintending Engineer. He was confirmed as Superintending Engineer on March 11, 1966.

5. B. S. Grewal, respondent No. 4, joined in 1944 as Temporary Assistant Engineer, Buildings and Roads Branch. He also was not found suitable by the Commission for departmental promotion as Assistant Executive Engineer, Class I, to one of the two existing vacancies. He also failed to qualify in the competitive examination held in January, 1951 for any of the four posts of Assistant Executive Engineer, Class I. On July 2, 1951 he was appointed as officiating Executive Engineer without the approval of the Commission. In December, 1951 he was not considered fit by the Commission for departmental promotion as Assistant Executive Engineer, Class I, against the three vacancies which were to be filled by promotion. On July 1, 1954 he was appointed as Assistant Engineer, Class II, in the Buildings and Roads Branch. As mentioned above, this Class II, Service came into being only in 1953. On September 1, 1956 he was appointed as Assistant Executive Engineer, Class, I. He was also confirmed in this post on the same day. As in the cases of the other two respondents, it is in dispute whether this appointment was by way of transfer. He was confirmed as Executive Engineer on March 16, 1960 and promoted as officiating Superintending Engineer on June 28, 1963. When the writ petition was filed in the High Court he was not yet confirmed in the post of Superintending Engineer.

6. There is no dispute that the Punjab Service of Engineers, Building and Roads Branch (Recruitment and Conditions of Service) Rule, 1942, will govern this case. The impugned order of the Governor and the notification, dated August 28, 1969, proceed on the basis that the earlier order fixing the seniority of the officers concerned was made wrongly on the basis of Rule 13(1) of the Rules while it should have been determined under proviso (a)(i) of Rule 13. The High Court has found that this claim was justified and the earlier order adopted a wrong rule in fixing the seniority of the officers. The relevant portion of Rule 13 is set out below :

13. (1) The seniority of members of the service shall be determined by the dates of their confirmation in the Service;

Provided that -

(a) in the case of -

(i) a member appointed by transfer from another branch of the service of the Crown, or of a member promoted either from the old service, or the subordinate engineering service, or recruited from temporary engineers, or

(ii) a member whose period of probation has been extended by Government under

the provisions of sub-rule (3) of Rule 12, seniority shall be determined by Government

#(b) * *(2) * *##

The service, as defined in Rule 3(m), means " the Punjab Service of Engineers in the Buildings and Roads Branch ". The appellant, as would appear from the facts stated above, was confirmed several years before respondents No. 2, 3 and 4. So, if sub-rule (1) of Rule 13 applies, the earlier order fixing seniority was correct and valid and cannot be disturbed. According to the impugned order the seniority should have been determined under proviso (a)(i) to Rule 13(1). The case of the respondents is summed up as follows in the written statement filed on behalf of first respondent, State of Punjab :

The seniority of respondents Nos. 2 to 4 was to be fixed under proviso (a)(i) of Rule 13 of 1942 Rules as they had been appointed to the Class I Service by transfer under Rule 9 read with Rule 6(5) of 1942 Rules

It is necessary now to refer to the relevant rules of the Punjab Service of Engineers. Buildings and Roads Branch (Recruitment and Conditions of Service) Rules, 1942 :

4. Subject to any rules or order made by the Secretary of State or the Governor-General with reference to the prior claims of the members of the Indian Service of Engineers members of the service shall be eligible for appointment to all grades of the service, viz., Chief Engineer, Superintending Engineer, Executive Engineer and Assistant Executive Engineer :

Provided that -

(a) all first appointment to the Service, except as hereinafter provided, shall be to the post of Assistant Executive Engineer;

#(b) * * *##

5. No person shall be appointed to the Service who is not a male and, unless he -

* * *##

(d) has, in the case of a candidate for direct appointment on the advice of the Commission passed such competitive examination or such other test as the Commissioner may prescribe for appointment to the service, and * * *

6. Subject to the provision of Rules 4 and 5 appointment to the service shall be made in India and in England, after consultation with the Commission, by any of the following methods -

(1) by direct appointment in India in accordance with Rule 7;

(2) from officers belonging to the old service and engineering subordinates, in accordance with Rule 8,

(3) from apprentice engineers appointed under the rules given in Appendix C on the

advice of the Commission as suitable to serve an apprenticeship in the department and who have completed their practical training of not less than two years and are not less than 22 or more than 27 years of age on the 1st August immediately preceding the date on which the appointment is made;

(4) from temporary engineers who have held their appointments for not less than three years continuously before the date of appointment to the service, and are not less than 26 years of age on the 1st August immediately preceding the date on which the appointment is made;

(5) by transfer or appointment in accordance with Rule 9 of an officer already in the service of the Crown;

(6) by direct appointment in England in accordance with Rule 10 :

Provided that -

(a) no officer belonging to the old service, no engineering subordinate and no apprentice engineer or temporary engineer shall be appointed to the service unless he has been declared by the Chief Engineer to be fit for such appointment; and

(b) appointment to the service of officers belonging to the old service, or of engineering subordinates or of apprentice engineers or temporary engineers shall be made by selection and no such officer, subordinate, apprentice engineer or temporary engineer shall be entitled to such appointment as of right.

The 'Old Service' referred in Rule 6(2) has been defined in Rule 3(1) as meaning "the Punjab Service of Engineers (Old) in the buildings and Roads Branch."

9. Government may in special cases and after consulting the Commission, transfer an officer already in the service of the Crown, to the service.

12. (1)(a) Members of the service promoted from the old service will not be on probation.

(b) Members of the service recruited from persons already serving the department (other than members of the old service) and such apprentice engineers as have had two years apprenticeship or more shall be on probation for one year or less.

(c) All other members recruited to the service shall be on probation for two years.

#(2) * * *##

(3) On the conclusion of the period of probation of any member, Government may confirm such member in his appointment, or if his work has, in the opinion of Government, not been satisfactory, Government may dispense with his service if recruited direct, or revert him to his former post if recruited otherwise, or may extend his period of probation by such period as it may deem fit, and on the expiry of such extended period of probation may pass such orders as it could have passed on the expiry of the first period of probation, provided the total period of probation shall not

exceed three years.

#(4) * * *##

The term 'department' occurring in Rule 12(1)(b) has been defined in Rule 2(k) as "the Buildings and Roads Branch of the Public Works Department of the Punjab Government."

8. The impugned order of August 28, 1969 is based on proviso (a)(i) to Rule 13(1). The question is whether in view of the facts stated earlier and the rules quoted above, respondents No. 2, 3 and 4 could be said to have been appointed by transfer from another branch of the service of the Crown. Rule 6 enumerates the various methods of appointment to the service, sub-rule (5) of Rule 6 mentions "transfer or appointment in accordance with Rule 9 of an officer already in the service of the Crown", as one of the methods. Rule 9 provides that the Government in special cases and after consulting the Commission can transfer an officer already in the service of the Crown to the 'Service'. Rule 9 thus speaks of transfer of an officer already in the service of the Crown to the Punjab Service of Engineers in the Buildings and Roads Branch. It is plain that Rule 9 refers to the transfer of an officer employed in some service of the Crown other than the Punjab Service of Engineers in the Building and Roads Branch. Obviously an officer employed in the Buildings and Roads Branch of the Punjab Service of Engineers cannot be transferred to the same branch where he is already working. Respondents Nos. 2 to 4 before they were Appointed as Assistant Executive Engineers, Class I, had been employed as Assistant Engineers, Class II, in the Buildings and Roads Branch. Clearly, their appointments to higher posts in the Buildings and Roads Branch could not have been by way of transfer as contemplated in Rule 9.

9. It appears that the Commission in their letter dated June 16, 1956 on the subject of the suitability of several officers including respondents Nos. 2 to 4 for appointment to Punjab Service of Engineers, Class I, in the Buildings and Roads Branch, pointed out referring to Rule 6(5) that it could not apply to a case "which relates to the promotion of offices in the same line, i.e. from P.S.E. Class II to P.S.E. Class I in the Punjab P.W.D. B & R Branch". The Government in an earlier letter to the Commission dated May 4, 1956, had expressed the view that Rule 9 read with Rule 6(5) of the 1942 Rules was "the most nearer applicable in these cases". This letter of the Government which possibly means that of the rules Rule 9 read with Rule 6(5) was the nearest applicable to such cases was really an admission that Rule 9 and Rule 6(5) did not apply to these cases. In any event we have found that Rule 9 or Rule 6(5) has no application to the cases of respondents Nos. 2 to 4.

10. There is no alternative case that these appointments were by promotion, it Rule 9 was not applicable. Clearly, such a case could not be made because proviso (a)(i) to Rule 13(1) is limited to appointments by promotion from the old service, or the subordinate engineering service or from temporary engineers. Respondents Nos. 2 to 4 belonged to none of these categories. Class II Services in the Buildings and Roads Branch of the Punjab Service of Engineers to which these respondents belonged, was brought into existence only in 1953 and naturally could not be mentioned in the 1942 Rules as one of the categories of service from which promotion as Assistant Executive Engineer, Class I, was permissible.

11. The proviso to Rule 13(1), even assuming it applied, did not give the Government arbitrary powers to determine seniority in any manner it liked disregarding altogether the other rules. The Government had to exercise this power in a reasonable manner keeping in mind the guidelines supplied by the other rules. It was however contended on behalf of the respondents that the earlier

order fixing the seniority of the officers concerned did not take into account the length of service and the experience of respondents Nos. 2 to 4 and this error was set right by the impugned order. We do not think that this claim is justified. It appears from the judgment of the High Court that the previous seniority list was prepared on the basis of a note of the then Chief Secretary to the Punjab Government, Shri Mangat Rai. In the High Court, and also before us, both sides referred to this note dated April 1, 1959. Shri Mangat Rai in his note stated his conclusion on this matter as follows :

Much heat and argument has been generated in this case in regard to giving these officers (including respondents Nos. 2 to 4) benefit of previous service before their entry into Class I It is unsupportable that these officers should be placed as senior to those who were taken in earlier recruitments when some and in fact most of them, were given a chance of selection but were not selected.

Earlier in the note Shri Mangat Rai elaborated his views on this question :

Rule 13 which deals with seniority makes it clear in its substantive provision that seniority shall be determined from the date of confirmation. Proviso (a) however states that promoted officers, Government has the power to determine seniority ad hoc. Much controversy has raised around this rule, and most extreme claims can be made and have been made in regard to it. It is in the first place clear that such a proviso cannot give Government a complete free hand to fix seniority but that such action must be based on reasonable ground and if possible sound convention. For example, theoretically it is possible under this rule to argue that Government may place a particular promoted officer as more senior than a most senior Chief Engineer, but this would obviously be an absurd and unsupportable position. In the present case, the particular issue where controversy has been extreme in regard to this point is whether a direct recruit may be put lower in seniority to a promoted officer, even if the latter is recruited after him and as is the case with most officers here even if the promoted officer has been considered along with the direct recruit and has not been selected. In this connection, on point has been considered already, namely that Rule 12 provides for weightage for promoted officer in regard to a shorter period of probation. This (sic) have already conceded as sound under paragraph 6. Beyond this I am, however clear Government should not and cannot go If it was intended to give weightage to promoted officers in regard to seniority in such an important matter it is inconceivable that it would not have formed an integral part of one of the main rules of service, rather than that it should be covered under a general proviso, such general proviso usually existing only to deal with marginal and difficult case, in direct contrast is the question regarding probation, where weightage to be given to promoted officers has been clearly and most definitely stated Such selection by direct recruitment would in fact mean nothing, if promoted officers, subsequently selected and at the relevant time rejected, were put in seniority above the direct recruits. Government would thus be nullifying a clear policy decision that direct recruitment was necessary My categorical conclusion is that the proviso (a) to Rule 13 does not justify a free hand to Government to place later personnel above earlier and such a position is self-destroying and indeed absurd, particularly in the circumstances of this case, where later promoted officers were in several cases definitely rejected at an earlier stage of selection.

The extracts from Shri Mangat Rai's note quoted above clearly show that in preparing the previous

seniority list the length of service, experience and efficiency of the officers concerned were taken into account, and on the facts and the rules set out above, we are of opinion that the reasons stated in Shri Mangat Rai's note for not giving respondents Nos. 2, 3 and 4 precedence over the appellant are perfectly good and valid reasons.

12. Another contention, raised for the first time in this Court on behalf of the respondents, is that the case of the appellant himself was governed by proviso (a)(ii). The basis of this contention seems to be this. The appellant was appointed as Assistant Executive Engineer on July 3, 1951. In terms of Rule 12(1)(c) his period of probation was two years. He appears to have been confirmed on January 14, 1954. In Shri Mangat Rai's note there is a reference to the appellant's date of confirmation in these words :

This officer was confirmed two and half years after his date of appointment on the ground that his period of probation was two years and that he had also spent six months incharge of sub-Division under training.

It further appears from Shri Mangat Rai's note that the appellant had successfully completed his period of probation and according to Shri Mangat Rai, for the purpose of fixing seniority the appellant should be taken to have been confirmed immediately on the completion of his probation, on July 3, 1953. Proviso (a)(ii) to Rule 13(1) refers to an officer whose period of probation has been extended by the Government under the provisions of sub-rule (3) of Rule 12. Rule 12(3) relates to an officers whose period of probation is extended because in the opinion of the Government his work has not been satisfactory. There is no material on record suggesting that the appellant's period of probation was extended under Rule 12(3). The case of the appellant therefore could not attract proviso (a)(ii) to Rule 13(1).

13. The impugned order revising the previous seniority list does not appear to be justified on the rules and seems to us unwarranted and arbitrary. We therefore allow the appeal and quash the order and the notification dated August 28, 1969. The appellant will be entitled to his costs throughout from respondent No. 1.

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