A. P. Mayankutty

Vs

The Secretary and Another

Civil Appeal No. 841 of 1974

P. V. Antony and Others

Vs

Union of India and Others

Civil Appeal No. 1575 of 1970

(Y.V. Chndrachud, P.N. Shinghal, P.K. Goswami JJ)

08.02.1977

JUDGMENT

CHANDRACHUD, J. –

1. Since these two appeals involve identical questions, we propose to state the facts of one of these only. The decision in Civil Appeal No. 1575 of 1970 will govern the other appeal.

2. The three appellants were appointed as temporary Junior Engineers in the Madras Highway Subordinate Service under Rule 10(a)(i)(1) of the Madras State and Subordinate Services Rues. Appellants 1 and 2 were appointed on June 6 and June 8, 1951 respectively while the third appellant was appointed on June 30, 1950. A few years later they were appointed to the very same posts after selection by the Public Service Commission and in course of time, orders were issued under Rule 23(a) of the aforesaid rules permitting them to commence their probation from dates anterior to the dates of their appointments after selection by the Public Service Commission but subsequent to the dates of their initial appointments under Rule 10(a)(i)(1). The first appellant was permitted to commence his probationary period on July 4, 1954, the second on July 18, 1954 and the third on March 15, 1953.

3. On November 1, 1956, on the reorganisation of States, appellants were allotted as Junior Engineers to the Kerala State which was formed by inclusion therein of parts of the States of Madras and Travancore-Cochin. As in other States, so in Kerala, it became necessary to fix rules of seniority governing employees drawn from different States, parts of which were integrated in Kerala. A conference of Chief Secretaries of various States was held on May 18 and 19, 1956, to consider problems arising out of reorganisation of States and the consequent integration of services. Pursuant to the decision taken in that Conference, the Government of Kerala passed an order on December 29, 1956, providing that the relative seniority as between persons drawn from different States and holding posts declared to be equivalent shall be determined by considering the length of continuous service in the equated grade, whether such service it temporary or officiating quasi permanent or permanent. The order, however, expressly provided that in the aforesaid

determination, the period for which an appointment was held "in a purely stop-gap or emergency arrangement" was to be excluded. On April 3, 1957 the Government of India issued a directive under Section 117 of the States Reorganisation Act stating that it was agreed that in determining the relative seniority as between two persons holding posts declared as equivalent to each other and drawn from different States, the length of continuous service, whether temporary or permanent, in the particular grade should be taken into account, excluding "periods for which an appointment is held in a purely stop-gap or fortuitous arrangement". On April 2, 1958 the Government of Kerala issued a clarificatory order stating that for computing length of continuous service "only short periods for which an appointment was held in purely stop-tap or emergency appointment will be excluded". It issued another order on August 16, 1961 stating that one year of temporary service of Junior Engineers allotted from Madras would be excluded for the purposes of fixing their interstate seniority. Representations were made against this order to the Government of India which directed by an order dated March 1, 1962 that services rendered under provisional or emergency appointments by the Travancore-Cochin or Madras personnel prior to November 1, 1956 before regularisation of their appointments should be taken into account for the purposes of decidinng interstate seniority, only if such service is either regularised, or it is in a time-scale of pay and is reckoned for grant of increments in the time-scale and is continuous. On May 16, 1962 the Government of Kerala passed an order modifying its earlier orders so as to conform to the decision taken by the Government of India on March 1. Consequently, in October 1962 a provisional integrated gradation list of Junior Engineers was prepared by the State Government giving to the appellants ranks therein at serial Nos. 145, 137 and 123 respectively.

4. Employees drawn from the Travancore-Cochin area being evidently prejudiced by the decision of the Kerala Government made representations to the Government of India which, on February 16, 1963 recommended three alternatives for the acceptance of the Kerala Government. The first alternative thus recommended was that the officers allocated to Kerala from the former Madras State may be allowed the benefit of emergency service towards seniority in the equated category if such service would have been regularised from the date of their emergency appointment and if it would have been counted for interstate seniority on November 1, 1956, had these officers remained in Madras. The second alternative was that the principles laid down by the Government of Madras in their order dated July 17, 1957 be accepted. By the third alternative it was stated that the Government of India would have no objection even if the State Government was to adopt the rule that interstate seniority would be determined on the basis of the length of continuous service in the equated grade subject to the exclusion of service rendered in purely stop-gap or emergency arrangements and that only short periods for which appointment was held under such arrangements should be excluded. On May 10, 1963 the Government of Kerala passed an order adopting the first two alternatives but not the third.

5. The appellants thereafter filed a writ petition in the Kerala High Court which was disposed of in December 1964 by directing them to file representations to the Government of India on the basis of a certain decision rendered by the High Court earlier. The appellants accordingly made representations and on those being rejected, they filed a writ petition in the High Court in August 1965. That writ petition having been dismissed, they have filed this appeal by special leave.

6. The question which arises for decision is whether the services rendered by the appellants under Rule 10(a)(i)(1) of the Madras State and Subordinate Services Rules must be taken into account for the purpose of fixing their seniority in the service of the Kerala Government as from November 1, 1956. It is urged on behalf of the appellants that the aforesaid service ought to be taken into account because such service can be taken into account under Rule 23, secondly because such service is not

liable to be excluded by reason of the directives issued earlier by the Government of India and thirdly because if the appellants had remained in Madras, the temporary service rendered by them would have been taken into account for fixing their seniority. Counsel for the appellants says that they were granted increments from the date of their initial appointments, that the temporary service rendered by them was counted for the purpose of eligibility for promotion to the higher posts of Assistant Engineers, that they were duly qualified to hold the post of Junior Engineers, that they were entitled and permitted to appear for departmental tests which are open only to the probationers, that their service books were opened from the date of their initial appointments, and that the concurrence of the Public Service Commission was obtained for continuing them in service after the expiry of three months and then again after the expiry of one year. These facts and circumstances, according to the appellants, would justify the counting of temporary service rendered by them for the purpose of fixing their seniority.

7. Having given every consideration to these matters we think it impossible to accept the appeal. A fact of fundamental importance which permeates every one of these considerations is that the appellants were appointed under Rule 10(a)(i)(1) of the Madras State and Subordinate Services Rules which runs thus :

> 10. Temporary appointments. - (a)(i)(1) Where it is necessary in the public interest owing to an emergency which has arisen to fill immediately a Vacancy in a post borne on the cadre of a service, class or category and there would be undue delay in making such appointment in accordance with these rules and the Special Rules, the appointing authority may temporarily appoint a person otherwise than in accordance with the said rules.
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> This provision contemplates the making of temporary appointments when it is necessary in the public interest to do so owing to an emergency which has arisen for filling a vacancy immediately. Such appointments, in terms, are permitted to be made otherwise than in accordance with the rules. The letters of appointment issued to the appellants mention expressly that they were appointed under Rule 10(a)(i)(1), that the appointments were "purely temporary necessitated on account of the non-availability of regularly selected candidates conferring no claim for future appointment as Junior Engineers... and that the appointment is liable to be terminated at any time without previous notice". In face of the provisions of the rule and the terms of the appointment it seems to us clear that the appellants were appointed purely as a matter of stop-gap or emergency arrangement. Since such service cannot be taken into account for purpose of seniority, the appellants cannot contend that the entire service rendered by them from the date of their initial appointment must count for purposes of seniority.

8. Clause (iii) of Rule 10(a) makes this position clearer by providing that a person appointed under clause (i) shall, whether or not he possesses the qualifications prescribed for the service, be replaced as soon as possible by a member of the service or an approved candidate qualified to hold the post under the relevant rules. The fact that the appellants were qualified to hold the posts cannot, therefore, entitle them to count for the purposes of seniority the period during which they served in a stop-gap or emergency arrangement. Clause (v) of Rule 10(a) provides that a person appointed under clause (i) shall not be regarded as a probationer, that he is not entitled by reason only of such appointment to any preferential claim to future appointment to the service and that the services shall be liable to be terminated at any time without notice and without assigning any reason. These

provisions reflect significantly on the nature of the appointment held by the appellants and show that the appellants were appointed initially on a uniquely precarious tenure. Such tenures hardly ever count for seniority in any system of service jurisprudence.

9. It is now only necessary to consider the appellant's argument that had they remained in Madras, their entire service would have counted for purposes of seniority. In support of this argument reliance was placed on the correspondence between the Governments of Kerala and Madras, but neither that correspondence nor a certain order dated June 11, 1960, which is at Ex. P-17 in the record, can avail the appellants. In a way of saying, the proof of pudding is in the eating. It is needless to speculate as to what course the appellants' destiny would have taken had they remained in Madras, because the Government of Madras itself did not treat the entire service of the appellants as regular when they were selected by the Public Service Commission. That parent government undoubtedly assigned to them artificial dates for fixing the commencement of their probationary periods but such dates, though anterior to the dates of their actual selection by the Public Service Commission, were quite subsequent to the dates of their initial appointment. As stated earlier, the appellants were appointed initially in June 1951 and June 1950, but the Government of Madras, prior to the reorganisation of the States, had directed that their probationary periods should be deemed to commence in July 1954 and March 1953. This shows that the services rendered by the appellant under Rule 10(a)(i)(1) were treated by the Government which appointed them as a matter of stop-gap, emergency or fortuitous arrangement.

10. The decision in C. P. Damodaran Nayar v. State of Kerala ([1974] 2 SCR 867 : (1974) 4 SCC 325 : 1974 SCC (L & S) 280) on which the appellants' counsel has placed reliance for showing that temporary service of the kind rendered initially by the appellants can be counted for the purposes of seniority has no application to the instant case. One of the appellants in that case was selected as a District Munsif by the Madras Public Service Commission and was posted as such on May 26, 1951. He was in continuous service in that post since his appointment but on being allotted to the State of Kerala on November 1, 1956 his seniority was reckoned from October 6, 1951 on the footing that the said date was assigned to him as the date of commencement of his continuous service. Dealing with the appeal arising out of the dismissal of his writ petition, this Court held that the service rendered by the appellant after his initial appointment was neither emergency service nor was it a purely stop-gap or fortuitous arrangement. The distinguishing feature of that case, which is highlighted in the judgment of the Court, is that the appellants therein was "appointed in a regular manner through the Public Service Commission" and therefore his appointment could not "by any stretch of imagination" be described as having been made to fill a purely stop-gap or fortuitous vacuum (p. 876). In our case the initial appointment was not only made without any reference to the Public Service Commission but the various rules and the term of the appellants' appointment to which we have drawn attention show that the appellants were appointed purely as a matter of fortuitous or stop-gap arrangement. The concurrence of the Public Service Commission to the continuance of the appellants in the posts filled by them, first after the expiry of three months and then after the expiry of one year, was obtained not with a view to regularising the appointments since their inception but for the purpose of meeting the requirements of a provision under which such concurrence is necessary to obtain if an appointment made without selection by the Public Service Commission is required for any reason to be continued beyond three months or a year.

11. For these reasons we confirm the judgment of the High Court and dismiss this appeal. There will be no order as to costs.

12. Civil Appeal No. 841 of 1974 will also stand dismissed but without an order of costs.

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