

B. N. Nagarajan and Others

Vs

State of Karnataka and Others

Civil Appeals Nos. 2329-2370 of 1979

(A. D. Koshal, V. R. Krishna Iyer, P. S. Kailasam JJ)

03.05.1979

JUDGMENT

KOSHAL, J. –

1. By this judgment we shall dispose of 42 appeals by special leave, namely, Civil Appeals Nos. 2329 to 2370 of 1977, all of which are directed against a judgment dated November 30, 1976 of a Division Bench of the High Court of Karnataka. Civil Appeals Nos. 2329 and 2351 to 2370 of 1977 have been filed by different persons who were appointed Assistant Engineers in the Karnataka State on October 31, 1961, by way of direct recruitment while the other 21 appeals have been filed by that State.
2. The facts giving rise to the impugned judgment may be set down in some detail. A new State came into existence on November 1, 1956 as a result of integration of the areas which formed part of the erstwhile States of Mysore, Madras, Coorg, Bombay and Hyderabad (hereinafter referred to as the Merged States). It was then given the name of one of its constituents, namely, the State of Mysore, which was later changed to that of the Karnataka State. In the Public Works Departments of the Merged State there was a class of non-gazetted officers ranking below Assistant Engineers. The class was designated as Graduate Supervisors in the Merged State of Mysore, as Junior Engineers in the Merged State of Madras and as Supervisors in the Merged State of Hyderabad and Bombay. The Graduate Supervisors were paid a fixed salary of Rs. 225 per mensem which was lower by Rs. 25 per mensem as compared to the starting salary of Assistant Engineers, who, in the normal course, were expected to head sub-divisions. To the post of Assistant Engineer a Graduate Supervisor was appointed only on promotion.
3. Prior to November 1, 1956, quite a few Graduate Supervisors were given charge of sub-divisions and designated as Sub-Divisional Officers in order to meet the exigencies of service and they continued to act as such after the merger when they claimed equation of their posts with those of Assistant Engineers in the matter of integration of services. To begin with their claim was turned down by the Central Government who equated the posts of Graduate Supervisors with the posts of Junior Engineers of the Merged State of Madras and the posts of Supervisors of the Merged States of Hyderabad and Bombay.
4. By a notification dated February 6, 1958, the Government of Karnataka (then known as the Government of Mysore) promulgated the Mysore Government Servants (Probation) Rules, 1957 (hereinafter called the Probation Rules) and on the next day came into force the Mysore Government Servants (Seniority) Rules, 1957 (hereinafter referred to as the Seniority Rules), both having been framed under Article 309 of the Constitution of India.

5. On October 1, 1958, the Karnataka Public Service Commission invited applications from candidates for appointment to the posts of Assistant Engineers by direct recruitment.

6. In the meantime Graduate Supervisors and Government employees holding equivalent posts had continued to press their claim for the equation of their posts with the posts the Assistant Engineers and they succeeded partially when, on November 15, 1958, the Karnataka Government promoted 167 of them (including 107 Graduate Supervisors who had been working as such in the Merged State of Mysore) as officiating Assistant Engineers with immediate effect. The promotion was notified in the State Gazette dated November 20, 1958 (Ex. A) the relevant portion whereof may be reproduced for facility of reference :

The following supervisors of Public Works Department are promoted as officiating Assistant Engineers with immediate effect and until further orders against the existing vacancies subject to review after the finalisation of the Inter-State Seniority List of Supervisors and the Cadre and Recruitment Rules of Public Works Department. The promotion of officers from Sl. No. 74 to 167 against existing vacancies will be purely on a temporary basis pending filling up of the vacancies by Direct Recruitment as per rules. The seniority inter se of the promotees will be provisionally according to the order given below :

7. 299 more persons of the same class were promoted to the post of Assistant Engineers by eight notifications published during the period from December 22, 1958 to October 13, 1960.

8. On August 21 (31 ?), 1960, the State Government passed an order in regard to the 107 Graduate Supervisors from the Merged State of Mysore as mentioned above, directing that they be treated as Assistant Engineers and be paid the pre-revision scale of pay of Rs. 250-25-450 from November 1, 1956 to December 31, 1956 and the revised scale of pay of Rs. 250-25-450-30.600 from January 1, 1957 onwards. The order further directed that the said 107 officers shall be placed on the inter-State seniority list below the Assistant Engineers.

9. On December 3, 1960, the Karnataka Government promulgated the Mysore Public Works Engineering Department Services (Recruitment) Rules, 1960, (hereinafter referred to as the Recruitment Rules) under Article 309 of the constitution of India, which envisaged appointment of Assistant Engineers in the Public Works Department by direct recruitment to the extent of 40 per cent and by promotion for the rest, viz., 50 per cent from the cadre of Junior Engineers and 10 per cent from the cadre of Supervisors. The cadre of Assistant Engineers was stated in the Rules to consist of 344 permanent and 345 temporary posts.

10. On October 23, 1961, the Recruitment Rules were amended so as to be operative retrospectively i.e., with effect from March 1, 1958.

11. On October 31, 1968, 88 candidates were appointed as Probationary Assistant Engineers by direct recruitment.

12. Two notification were issued by the State Government on February 27, 1962. By each one of them 231 Junior Engineers were given "regular promotions" as Assistant Engineers with effect from specified dates falling within the period November 15, 1958 to November 10, 1960. The first of these notifications stated inter alia :

..... However, the promotions are subject to review after finalisation of the Inter-State

## Seniority List of Junior Engineers . . .

The second of the notification issued on February 27, 1962 mentioned that the officers named therein would be deemed to be temporarily promoted and permitted to continue to officiate as Assistant Engineers on a provisional basis and until further orders.

13. The case of the said 107 officers received further consideration at the hands of the State Government, who, on October 6, 1962, issued another order (Ex. D) superseding the one dated August 31, 1960, and promoting them as Assistant Engineers with effect from November 1, 1956.

14. By September 24, 1956, the number of Probationary Assistant Engineers appointed through direct recruitment (hereinafter called directed recruits) had fallen to 85 for reasons which need not be stated. On that day the State Government passed an order that they had all completed their period of probation satisfactorily and stood absorbed against substantive vacancies with effect from November 1, 1962.

15. In 1971 various orders were passed promoting some of the direct recruits to the posts of Executive Engineers and these orders were challenged in a writ petition dated September 15, 1971, by the promotees to the posts of Assistant Engineers (hereinafter referred to as the promotees).

16. On September 26, 1972, a list (Ex. G) of Assistant Engineers indicating their seniority inter se as on November 1, 1959, was prepared by the State Government. In that list the promotees were accorded seniority to their satisfaction. However, that list was superseded by another list dated September 4, 1973, in which the seniority inter se of all Assistant Engineers functioning in the State Public Works Department as on January 1, 1973 was declared. The new list purported to have been framed in accordance with the Recruitment Rules. Objections to the list were invited and were submitted by various officers.

17. During the year 1973 more writ petitions challenging the promotion of direct recruits to the posts of Executive Engineers were instituted by the promotees on whose behalf two claims were made before High Court, namely :

- (1) that they had been regularly promoted as Assistant Engineers against substantive vacancies with retrospective effect and rightly so; and
- (2) that in the case of those of them whose promotion was made effective from a date prior to March 1, 1958, the Recruitment Rules, especially the quota rule, could not affect them adversely.

Both these claims were accepted by the High court, the first on the basis of the decision of this Court in *Ram Prakash Khanna v. S. A. F. Abbas* (AIR 1972 SC 2350 : (1972) 1 SCC 784) coupled with the pleadings of the parties and the various orders issued by the State Government and mentioned above, and the second on the authority of another decision of this Court in *V. B. Badami v. State of Mysore* ((1976) 1 SCR 815 : (1976) 2 SCC 901 : 1976 SCC (L & S) 353). The High Court accordingly held that the quota rules would not be attracted to the case of those promotees who had been appointed to the posts of Assistant Engineers with effect from a date prior to March 1, 1958. By way of a 'clarification' the High Court further ruled that the promotion of the 107 officers working in the Merged State of Mysore was made to substantive posts of Assistant Engineers with effect from November 1, 1956, and that the State Government or the direct recruits could not be allowed to urge to the Contrary. According to the High Court such promotion was subject to review

only if the course was warranted and necessitated by the final inter-State seniority list of Junior Engineers, the right to review having been reserved by the Government in its orders dated February 27, 1962. In relation to the direct recruits the High Court made a reference to the judgment of this Court in *B. N. Nagarajan v. State of Mysore* ((1966) 3 SCR 682 : AIR 1966 SC 1942) wherein it was held that their appointments, although made after the Recruitment Rules had come into force, were valid, as the process of direct recruitment had been set in motion by the State Government in exercise of its executive powers under Article 162 of the Constitution of India well before the Recruitment Rules were promulgated and that those appointments were therefore "outside the Recruitment Rules". The High Court consequently held that the direct recruits were also not subject to the quota rule which could not, according to it, affect them adversely.

18. Summing up, the High Court gave the following directions :

- (1) Promotees other than those covered by direction (2) and direct recruits would not be governed by the quota system as envisaged in the Recruitment Rules.
- (2) Promotees who were appointed to posts of Assistant Engineers with effect from March 1, 1958, or later dates, would be governed by the quota system as envisaged in the Recruitment Rules.
- (3) Promotees appointed Assistant Engineers prior to October 31, 1961, would rank senior to the direct recruits whose appointments were made on that date.
- (4) The claim of each of the promotees to the next higher post shall be considered with effect from a day prior to that on which any officer found junior to him was promoted.

19. The first contention we would like to deal with is one raised by Mr. F. S. Nariman appearing for the direct recruits. He argued that the scope of the writ petitions instituted by the promotees was limited to the question of promotion of Assistant Engineers as Executive Engineers and that no challenge to the seniority list dated September 4, 1973, could be entertained. In this connection reference was made to the prayer clause appearing in Writ Petition No. 462 of 1973 which is in the following terms :

In this writ petition, it is prayed that this Court may be pleased to :

- (1) Quash the promotion of respondents 2 to 31 to the cadre of Executive Engineers made as per order dated February 3, 1973.
- (2) Direct respondent 1 to considered the case of the petitioner for promotion to the cadre of Executive Engineers with effect from February 3, 1973 on which date respondents 2 to 31 were promoted; and
- (3) Pass an interim order, restraining respondent 1 from making further promotion to the cadre of Executive Engineers without considering the case of the petitioner for such promotion, pending disposal of this writ petition.

(It was assumed at the hearing of the appeals that the prayer made in the other writ petitions is to a similar effect).

20. It is true that no prayer has been made by the promotees to quash or rectify the seniority list dated September 4, 1973, but then their whole case is based on the contention that they had been promoted to the posts of Assistant Engineers in a substantive capacity prior to the appointment of the direct recruits, that they would take precedence over direct recruits in the matter of seniority and regular absorption in the cadre of Assistant Engineers and that it was on that account that the promotion of direct recruits to the posts of Executive Engineers without consideration of the case of the promotees for such promotion was illegal. The attack on the said seniority list therefore is inherent in the Case set up by the promotees, of which it forms an integral part. In this view of the matter we cannot agree with Mr. Nariman that the scope of the writ petitions is limited as stated by him.

21. No exception is or can be taken on behalf of the promotees to the finding arrived at by the High Court that the appointment of direct recruits to the posts of Assistant Engineers was in order, in view of the judgment of this Court in *B. N. Nagarajan v. State of Mysore* ((1966) 3 SCR 682 : AIR 1966 SC 1942). Nor can it be urged with any plausibility on behalf of direct recruits that the appointment of the promotees as Assistant Engineers prior to the enforcement of the Recruitment Rules lay outside the powers of the Government or was otherwise illegal. The real dispute between the direct recruits and the promotees revolves round the quality of the tenure held by the latter immediately prior to the enforcement of the Recruitment Rules and that is so because of the language employed in Rule 2 of the Seniority Rules. The relevant portion of that rule is extracted below :

2. Subject to the provisions hereinafter contained, the seniority of a person in a particular cadre of service or class of post shall be determined as follows :

(a) Officers appointed substantively in clear vacancies shall be senior to all persons appointed on officiating or any other basis in the same cadre of service or class of post;

(b) The seniority inter se of officers who are confirmed shall be determined according to dates of confirmation, but where the date of confirmation of any two officers is the same, their relative seniority will be determined by their seniority inter se while officiating in the same post and if not, by their seniority inter se in the lower cadre;

(c) Seniority inter se of persons appointed on temporary basis will be determined by the dates of their continuous officiation in that grade and where the period of officiation is the same the seniority inter se in the lower grade shall prevail.

Now insofar as the direct recruits are concerned they were appointed as Probationary Assistant Engineers, i.e., Assistant Engineers "appointed on probation" which term is defined in Rule 2 of the Probation Rules. That rule states :

2. For the purpose of these rules :-

(1) "Appointment on Probation" means appointed on trial in or against a substantive vacancy.

(2) "Probationer" means a Government servant appointed on probation. A government servant so appointed (and continuing in service) remains a probationer

until he is confirmed.

In view of these definitions it cannot be gainsaid that the direct recruits were appointed Assistant Engineers "substantively in clear vacancies" as envisaged by clause (a) of Rule 2 of the Seniority Rules. If any of the promotees also satisfied that requirement at any time earlier to October 31, 1961, he would be bracketed with the direct recruits under that clause and his seniority vis-a-vis those recruits would then be governed by clause (b) of the rule, i.e., on the basis of his and their respective dates of confirmation. If, on the other hand, none of the promotees can be said to have been appointed substantively in a clear vacancy, clause (a) aforesaid would have no application to them and all direct recruits would rank senior to them; and it is in the light of the said clauses (a) and (b) therefore that learned Counsel for the State and the direct recruits have challenged the finding of the High Court that the promotion of the 107 officers working in the Merged State of Mysore was made to substantive posts of Assistant Engineers with effect from November 1, 1956, and that the State Government or the direct recruits could not be allowed to urge to the contrary. The controversy has to be resolved in the light of the orders passed by the State Government from time to time in relation to those officers and others similarly situated.

22. The first order appointment promotees as Assistant Engineers is dated November 15, 1958 (Ex. A). That order made it clear that all the promotees covered by it were appointed officiating Assistant Engineers and were to hold office until further orders. The promotion was also made subject to review after the finalisation of the inter-State seniority list of Supervisors and the Recruitment Rules. The notification went on to state that in the case of 94 of the officers promoted under it, their appointment as Assistant Engineers was being made on a purely temporary basis inasmuch as they would have to vacate the posts against which they were being fitted, as soon as candidates were available through a process of direct recruitment. The language employed leaves no doubt that the promotion of the 107 officers was not substantively made, the tenure being specifically stated to be either "officiating" or "purely temporary" which expression clearly militate against a substantive appointment.

23. Orders made by the State Government later on and right up to October 31, 1961 when the direct recruits were appointed Assistant Engineers did not improve the position of any of the promotees in any manner. Those orders were either silent on the point of the nature of the tenure of the promotees as Assistant Engineers, or stated in no uncertain terms that the promotees would hold the posts of Assistant Engineers on a temporary or officiating basis. That is why Dr. Chitale and Mr. Sen, learned Counsel for promotees, mainly placed their reliance on the two notifications dated February 27, 1962 and order Ex. D dated October 6, 1962, the combined effect of which was to promote the said 107 officers as Assistant Engineers with effect from November 1, 1956 "on a regular basis". It was argued that the regularisation of the promotion gave it the colour of permanence and the appointments of the promotees as Assistant Engineers must therefore be deemed to have been made substantively right from November 1, 1956. The argument however is unacceptable to us for two reasons. Firstly, the words "regular" or "regularisation" do not connote permanence. They are terms calculated to condone any procedural irregularities and are meant to cure only such defects as are attributable to the methodology followed in making the appointments. They cannot be construed so as to convey an idea of the nature of tenure of the appointments. In this connection reference may with advantage be made to *State of Mysore v. S. V. Narayanappa* ((1967) 1 SCR 128, 132 : AIR 1967 SC 1071) and *R. N. Nanjundappa v. T. Thimmiah* ((1972) 2 SCR 799 : (1972) 1 SCC 409). In

the former this Court observed :

Before we proceed to consider the construction placed by the High Court on the provisions of the said order we may mention that in the High Court both the parties appear to have proceeded on an assumption that regularisation meant permanence. Consequently it was never contended before the High Court that the effect of the application of the said order would mean only regularising the appointment and no more and that regularisation would not mean that the appointment would have to be considered to be permanent as an appointment to be permanent would still require confirmation. It seems that on account of this assumption on the part of both the parties the High Court equated regularisation with permanence.

24. In Nanjundappa case ((1972) 2 SCR 799 : (1972) 1 SCC 409) also the question of regularisation of an appointment arose and this Court dealt with it thus : (SCC p. 416, para 26)

Counsel on behalf of the respondent contended that regularisation would mean conferring the quality of permanence on the appointment whereas counsel on behalf of the State contended that regularisation did not mean permanence but that it was a case of regularisation of the rules under Article 309. Both the contentions are fallacious. If the appointment itself is in infraction of the rules or if it is in violation of the provisions of the Constitution illegality cannot be regularised. Ratification or regularisation is possible of an act which is within the power and province of the authority but there has been some non-compliance with procedure or manner which does not go to the root of the appointment. Regularisation cannot be said to be a mode of recruitment. To accede to such a proposition would be to introduce a new head of appointment in defiance of rules or it may have the effect of setting at naught the rules.

25. Apart from repelling the contention that regularisation connotes permanence, these observations furnish the second reason for rejection of the argument advanced on behalf of the promotees and that reason is that when rules framed under Article 309 of the Constitution of India are in force, no regularisation is permissible in exercise of the executive powers of the Government under Article 162 thereof in contravention of the rules. The regularisation order was made long after the Probation Rules, the Seniority Rules and the Recruitment Rules were promulgated and could not therefore direct something which would do violence to any of the provisions thereof. Regularisation in the present case, if it meant permanence operative from November 1, 1956, would have the effect of giving seniority to promotees over the direct recruits who, in the absence of such regularisation, would rank senior to the former because of the Seniority Rules read with the Probation Rules and may in consequence also confer on the promotees a right of priority in the matter of sharing the quota under the Recruitment Rules. In other words, the regularisation order, in colouring the appointments of promotees as Assistant Engineers with permanence would run counter to the rules framed under Article 309 of the Constitution of India. What could not be done under the three sets of Rules as they stood, would thus be achieved by an executive fiat. And such a course is not permissible because an act done in the exercise of the executive power of the Government, as already stated, cannot override rules framed under Article 309 of the Constitution.

26. The case has, for both the above reasons, to be decided on the footing that all through the relevant period the promotees held appointments as Assistant Engineers in a non-substantive capacity, i.e. either on an officiating or a temporary basis. This being the position, they would all rank junior to the direct recruits who, from the very start, held appointments made "substantively in clear vacancies".

27. We may here made it clear that this order does not cover such officers as were holding the posts of Assistant Engineers on a substantive basis prior to November 1, 1956 when the new State of Mysore now known as Karnataka came into being. Nor would it adversely affect the case of any Assistant Engineers who acquired a substantive status prior to the promulgation of the Recruitment Rules and the appointment of the direct recruits. Persons falling within those two categories will first have to be accommodated in the clear vacancies available and only the remaining vacancies will have to be utilized for fitting in the direct recruits and the Assistant Engineers who have disputed their claim in those proceedings. It may also be mentioned that the quota rule will not stand in the way of the Government giving effect to this arrangement which has been taken care of in the amendment (promulgated on October 23, 1961) to the Recruitment Rules. The relevant portion of that amendment is contained in item 3 thereof which is reproduced below :

3. To Rule 2 the following proviso shall be added and shall be deemed always to have been added, namely :

Provided that in respect of direct recruitment of Assistant Engineers for the first time under these rules the percentages relating to direct recruitment and recruitment by promotion specified in column 2 of the Schedule shall not be applicable and the minimum qualifications and the period of probation shall be the following, namely.

#Qualifications : .....##

It is common ground between the parties that the posts comprised in the cadre of Assistant Engineers constituted by the Recruitment Rules have yet to be filled in for the first time. The proviso extracted above therefore will apply fully to the utilization of those vacancies as stated above. It goes without saying that all questions of seniority shall be decided in accordance with the Seniority Rules and that the Recruitment Rules, as amended from time to time, shall be fully implemented as from the date of their enforcement, i.e., March 1, 1958.

28. In the result we accept the appeal, set aside the judgment of the High Court and decided the dispute between the parties in accordance with the observations made in paragraphs 5 and 6 hereof.

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