

Delhi Water Supply And Sewage Disposal Committee and Others

Vs

R. K. Kashyap and Others

Civil Appeals Nos. 527 and 528 of 1986

(G. L. Oza, K. Jagannatha Shetty JJ)

28.10.1988

JUDGMENT

JAGANNATHA SHETTY, J. –

1. These two appeals by leave are from the judgment of the Delhi High Court dated July 12, 1985 in L. P. No. 8 of 1978.

2. The first appellant in the first appeal is the Delhi Water Supply and Sewage Disposal Undertaking (the "Undertaking"). The appellants in the next appeal are some of the Executive Engineers in the Undertaking. The common case of the appellants is that the inter se seniority in the cadre of Executive Engineers after their regularisation should reflect the corresponding rankings in the feeding cadre of Assistant Engineers. But the contesting respondents who are also Executive Engineers contended to the contrary. Their case is that the continuous officiation in the post till regularisation should be the basis for determining the seniority. These rival contentions are required to be decided in the appeals.

3. The facts leading to the appeals are not in dispute and may briefly be stated thus :

The Municipal administration of the Union Territory of Delhi is governed by an Act called the Delhi Municipal Corporation Act (the "Act"). The Act came into force on April 7, 1958. Section 92 of the Act provides power to the Undertaking to appoint certain categories of officers. But that power is not absolute. No appointment to any category of 'A' post shall be made except after consultation with the Union Public Service Commission (the "Commission"). That is the constraint in Section 96. Such consultation, however, is not required if the appointment is for a period not exceeding one year, or to such ministerial posts as may be specified in consultation with the Commission. The consultation with the Commission is required to be made in accordance with the regulation framed under Section 97. The Regulation framed by the Commission has a long title called "The Union Public Service Commission (Consultation) by Delhi Municipal Corporation Regulations, 1959". It provides procedure for promotion as well as direct recruitment of officers in the Corporation.

4. Section 98 confers power to the Corporation to make regulations with regard to conditions of services of officers and other employees appointed by the Corporation and other incidental matters. Section 480(2) states that no regulation made by the Corporation shall have effect until it has been approved by the Central Government and published in the official gazette. Section 480(1) gives interim powers to the Central Government to make regulation which the Corporation could have

made under Section 98. In exercise of the power under Section 480(1) the Central Government has framed what is termed as the Delhi Municipal Corporation Service Regulations, 1959.

5. In 1964 four additional posts of Executive Engineers were created in the Undertaking. The Commissioner after considering the eligibility and suitability of the Assistant Engineers then available in the Undertaking recommended three names : J. P. Gupta, Mahbood Hussain and R. K. Kashyap for being appointed as Executive Engineers. He also intimated that there was nothing in record against those officers. On April 17, 1964 they were appointed as Executive Engineers for a period of one year or till the posts are filled up in consultation with the Commission. These are respondents 1 to 3 in C. A. No. 527 of 1986. Shri S. S. Ramrakhyani (respondent 4) and P. T. Gurnani (respondent 6) were not then in the Undertaking. They were working as Assistant Engineers in the general wing of the Corporation. It appears they were selected as Executive Engineers in the Undertaking on April 9, 1965. They reported as Executive Engineers in the Undertaking On April 12, 1965 after they were relieved from the general wing of the Corporation. They were also appointed for one year in the first instance. On February 5, 1969 their lien was cancelled in the general wing. They were, however, given the benefit of their service rendered as Assistant Engineers for all purposes. The other respondents were also appointed on ad hoc basis on like terms on different dates. S. Parkash respondent 5 was appointed on August 21, 1965. A. V. Panat respondent 7 was appointed on December 21, 1965. Respondents 10 and 11 in 1966, respondent 12 in 1967 and respondents 8 and 9 were appointed in 1969. They continuously in their respective posts till their services were regularised by the Commission. The Commission regularised their services with effect from January 8, 1971.

6. The list of names of officers whose services were regularized by the Commission evidently did not reflect their inter se seniority in the cadre. The Commission, therefore, was asked to prepare their seniority list. But there is nothing on record to indicate that the Commissioner did anything of the kind. He, however, appears to have followed the seniority in the cadre of Assistant Engineers for the purpose of posting the Executive Engineers on current duty charge of the post of Superintendent Engineers. Some of the officers thereupon moved the High Court with Writ Petition No. 237 of 1973 seeking a direction to the Undertaking to prepare a proper seniority list of Executive Engineers. The High Court accepted the writ petition and directed the Undertaking to prepare a seniority list of Executive Engineers (Civil).

7. Accordingly, the Undertaking prepared a seniority list. The services rendered on ad hoc appointments were excluded for the purpose. The seniority was determined reflecting the respective rankings in the feeding cadre.

8. The aggrieved officials challenged the validity of that seniority list before the Delhi High Court in C. W. No. 1339. The learned Single Judge before whom the writ petition came for disposal dismissed the same. He held that Rule 6 of the Delhi Administration Seniority Rules, 1965 would govern the determination of seniority of the officers. He also held that that seniority should be in the order of regularisation and not on the basis of original as hoc appointments. But the Division Bench upon appeal took a different view. The learned Judges held that the determination of seniority of officers is not governed by any statutory rule and continuous officiation in the post should be the basis. To be more specific, the learned Judges observed :

The normal rule is that seniority is governed by the period of continuous officiating service in the absence of any other seniority rule. The period of continuous officiating in the case of the present petitioners will, therefore, be the governing

principle.

The reason we have found is that the delay in making recruitment rules and making regular appointment in accordance with the procedure envisaged by the Act really been the result of a conflict between the Corporation and the Union Public Service Commission. In the result, for years on, the persons have continued on an ad hoc basis. This has happened even in cases where the appointment was not on ad hoc basis initially. In such cases, the period of continuous ad hoc service cannot be treated as a stopgap arrangement. This is, in fact a regular appointment, which is held in abeyance because the recruitment rules were not settled and the procedure not finalised. These is, in fact a regular appointment, which is held in abeyance because the recruitment rules were not settled and the procedure not finalised. These appointments have eventually been regularised after the recruitment rules had been settled and the procedure laid down.

9. The correctness of the view taken by the High Court has been challenged in these appeals.

10. We have heard the counsel on both sides and examined the various contentions carefully. The first question for consideration is whether the Delhi Municipal Corporation Service Regulations, 1959 is applicable to employees of the Undertaking. As earlier noticed, the Regulation was framed by the Government of India under Section 480(1) of the Act. Regulation 3 provides :

3. Unless otherwise provided in the Act or these regulations, these regulations shall apply to all Municipal officers and other Municipal employees whose pay is chargeable to the "General Account" of the Municipal Fund :

Provided that nothing in these regulations shall apply to such Municipal officers and other Municipal employees as are appointed under any contract or render part-time service or are in receipt of daily wages.

11. As is obvious significantly from Regulation 3, the Regulations shall apply only to Municipal officers and other Municipal employees whose pay is chargeable to the "General Account" of the Municipal Fund. Section 99 of the Act provides for establishment of the "Municipal Fund". It consists of three different accounts :

- (i) Electric Supply Account;
- (ii) Water Supply and Sewage Disposal Accounts; and
- (iii) General Account.

12. General Account is only one of the three accounts. The Undertaking has a separate account of its own. It is called "Water Supply and Sewage Disposal Accounts". It is said that the income and expenditure or the accounts of the Undertaking is separate from and independent of the "General Account" of the Municipal Fund. O. P. Kelkar, Deputy Commissioner (Water) in his affidavit filed in C. A. No. 527 of 1986 has also expressly stated so. The salary of the employees in the Undertaking is paid out of the account of the Undertaking and not from the "General Account" of the Municipal Fund. The Service Regulations, 1959 do not apply to those who are paid out of other accounts. It applies only to those who are paid out of "General Account".

13. In view of the stand taken by the Undertaking and also in the light of the said provision of the Act it must be held that the Service Regulations, 1959 has no application to the category of officers

with whom we are concerned in these appeals.

14. It was, however, argued for the appellant that the office memorandum of the Home Ministry of the Government of India dated December 22, 1959 could be called into aid for the purpose of determining the seniority of officers in the Undertaking. Reference was made to General Principle 5(i) with the Explanatory memorandum thereunder which directs that where promotion is made on the basis of selection by Departmental Promotion Committee, the seniority of such promotes shall be in the order in which they are recommended for such promotion by the Committee. But there is hardly any substance in this contention too. It is basically faulty. The office memorandum proprio vigore does not apply to employees of the Undertaking. It could be applied if it could fall within the scope of "Rules" as defined in Regulations of 1959. Since Service Regulation, 1959 itself is not attracted to employees of the Undertaking it would be futile to contend that the office memorandum would govern their seniority.

15. The real question to be considered is what should happen to the valuable service rendered by officers in ad hoc appointments? Should it be excluded altogether while determining their seniority? If not, what should be the method to be employed in the absence of any rule or order providing for any procedure. It was argued that since the Commission regularised the services of all Executive Engineers with effect from a common date i. e. January 8, 1971, the inter se seniority in the lower cadre should be the proper basis in the higher cadre also. As otherwise, it was urged that a senior in the lower cadre might be junior in the higher cadre which would be contrary to all concepts in service jurisprudence. In this context, we were referred to a large number of authorities on either side. Most of the authorities involved the question of applicability of the quota rule linked up with the seniority of direct recruits and promotees. We are not concerned with that question. We may, however, refer to some of the decisions which have some bearing on the question before us.

16. In *Baleshwar Dass v. State of U. P.* Krishna Iyer, J., had this say : [SCC pp. 243-44, SCC (L & S) pp. 548-49 paras 33 and 35]

If a public servant serves for a decade with distinction in a post known to be not a casual vacancy but a regular post, experimentally or otherwise kept as temporary under the time honoured classification, can it be that his long officiation turns to ashes like a Dead Sea fruit because of a label and his counterpart equal in all functional respects but with ten years less of service steals a march over him because his recruitment is to a temporary vacancy? We cannot anathematize officiation unless there are reasonable differentiations and limitations.

The normal rule consistent with equity is that officiating service, even before confirmation in service has relevancy to seniority if eventually no infirmities in the way of confirmation exists. We see nothing in the scheme of the Rules contrary to that principle. Therefore, the point from which service has to be counted is the commencement of the officiating service of the Assistant Engineers who might not have secured permanent appointments in the beginning and in that sense may still be temporary, but who, for all other purposes, have been regularised and are fit to be absorbed into permanent posts as and when they are vacant.

17. In *A. Janardhana v. Union of India* D. A. Desai, J., said : [SCC p. 620, SCC (L & S) p. 486, para 28)

It is a well recognised principle of service jurisprudence that any rule of seniority has to satisfy the test of equality of opportunity in public service as enshrined in Article 16. It is an equally well

recognised canon of service jurisprudence that in the absence of any other valid rule for determining inter se seniority of members belonging to the same service, the rule of continuous officiation or the length of service or the date of entering in service and continuous uninterrupted service thereafter would be valid and would satisfy the tests of Article 16.

18. In *G. P. Chief Secretary, Government of U. P. Desai J.*, following *Baleshwar Dass* reiterated : [SCC pp. 341-42, SCC (L & S) pp. 779-80, para 15]

Now if there was no binding rule of seniority it is well settled that length of continuous officiation prescribes a valid principle of seniority. The question is : from what date the service is to be reckoned? It was urged that any appointment of a stopgap nature or pending the selection by Public Service Commission cannot be taken into account for reckoning seniority. In other words, it was urged that to be in the cadre and to enjoy place in the seniority list, the service rendered in a substantive capacity can alone be taken into consideration. We find it difficult to accept this bald and wide submission. Each case will depend upon its facts and circumstances. If a stopgap appointment is made and the appointee appears before the Public Service Commission when the latter proceeds to select the candidates and is selected, we see no justification for ignoring his past service. At any rate, there is no justification for two persons selected in the same manner being differently treated. That becomes crystal clear from the place assigned in the seniority list to petitioner 1 in relation to respondent 7. In fact if once a person appointed in a stopgap arrangement is confirmed in his post by proper selection, his past service has to be given credit and he has to be assigned seniority accordingly unless a rule to the contrary is made. That has not been done in the case of all the petitioners. The error is apparent in the case of petitioner 1 and respondents 7. These errors can be multiplied but we consider it unnecessary to do so. In fact a fair rule of seniority should ordinarily take into account the past service if the stopgap arrangement is followed by confirmation. This view which we are taking is borne out by the decision of this Court in *Baleshwar Dass v. State of U. P.* It is thus well settled that where officiating appointment is followed by confirmation unless a contrary rule is shown, the service rendered as officiating appointment cannot be ignored for reckoning length of continuous officiation for determining the place in the seniority list.

19. Again in *G. S. Lamba v. Union of India, J.*, likewise commented : [SCC p. 628, SCC (P & S) p. 515, para 28]

In the absence of any other valid principle of seniority it is well established that the continuous officiation in the cadre, grade or service will provide a valid principle of seniority. The seniority lists having not been prepared on this principle are liable to be quashed and set aside.

20. Counsel for appellants, however, placed strong reliance on the decision in *Ashok Gulati v. B. S. Jain* and in particular the following observations of Sen, J., : (SCC pp. 616-17, ATC pp. 627-28, para 24)

that in the absence of any other valid principle of seniority, the inter se seniority between direct recruits and promotees should as far as possible be determined by the length of continuous service whether temporary or permanent in a particular grade or post (this should exclude periods for which an appointment is held in a purely stopgap or fortuitous arrangement). No doubt, there are certain observations in the two cases of *G. P. Doval* and *Narender Chadha*, which seem to run counter to the view we have taken, but these decisions turned on their own peculiar fact and are therefore clearly distinguishable and they do not lay down any rule of universal application.

21. We do not consider that this observation is of any assistance to the appellants in this case. It must be read in the context in which it appears and against the background of the facts of that case. It has been said more often and we repeat here that the judgments of courts or observations made thereon are not to be read as statutes. They are made in the setting of facts obtaining in a particular case. It is no exception in Ashok Gulati case. There this Court was concerned with the service rendered by certain officers in a purely stopgap or fortuitous arrangement. In the Public Works Department of the State of Haryana, certain persons were appointed as temporary engineers (ad hoc) for a period of six month. Some of them were drawn from the Employment Exchange. The appointment was not made in accordance with the cadre rules of the department. In the order of appointment given to each individual it was specified that their appointment was purely on ad hoc basis on a fixed salary of Rs. 400 + allowances. It was also notified that their services would be terminable without notice. It was further stated that the service rendered would not ensure to their benefit under the cadre rules. Later on, those posts were advertised by the Public Service Commission for regular recruitment. Some of those persons applied and were also selected. They were appointed regularly in the cadre. Then they claimed that their antecedent service in the ad hoc appointment should be taken into consideration for determining their seniority. This Court said "No". The reason was obvious. The terms of their ad hoc appointment did not allow them any benefit therefrom. It was a stopgap arrangement contrary to the cadre rules. They were, therefore, not entitled too count that service for determining the seniority. If it were allowed to them, it would have impaired the rights of persons ranked above them in the merit list of the Public Service Commission. It was in that context, the learned Judge made the aforesaid observation. It was not intended to be a discordant note against the normal rule of determining seniority as laid down in Baleshwar Dass case. In fact, the learned Judge in a later decision in Dass v. State of U. P., (ii) N. K. Chauhan v. State of Gujarat and (iii) in Baleshwar Patwardhan v. State of Maharashtra. It has been consistently held in these cases that in the absence of seniority rule, the continuous officiation in the post should be the guiding factor for determining the seniority.

22. In a more recent decision in Vasant Kumar Jaiswal v. State of M. P. Sabyasachi Mukharji, J., has also reiterated the same principle. The learned Judge said that in the absence of any statutory rule or executive memorandum or order for determination of seniority in a grade, the normal rule would be to determine the seniority on the basis of length in service.

23. Our attention was drawn to the decision of this Court in Dr. S. D. Choudhury v. State of Assam in support of the contention that the order in which the Commission regularised the services of the Engineers should be the basis for determining their seniority. In that case the appellants and respondents 4 to 6 were initially appointed as Assistant Professors under Regulation 3(e) of the Assam Public Service Service Commission Regulations on an officiating basis. It was obligatory, in terms of that regulation to consult the Service Commission, as soon as possible. Their services were eventually regularised by the Service Commissioner in one batch and their inter se seniority list was fixed on the recommendations of the Commissioner. The Commissioner recommended that it should be fixed as per the instructions of the government under notification dated February 5, 1964. That notification provided among others that if the appointments of a number of persons are regularised in one batch then the inter se seniority of those persons should be according to the merit list of the Service Commissioner. Even if the Service Commissioner does not give any merit list the appointing authority should request the Service Commissioner to indicate the order of preference of those persons. Accordingly, the inter se seniority of the persons were fixed after consulting the Commissioner and in accordance with the rankings assigned to them in the merit list of the Commission. This Court dismissed the appeal against the judgment of the High Court. In the course of the judgment, this Court observed : [SCC p. 285, SCC (L & S) p. 48, para 5]

It is not in dispute that the appellants and respondents 4, 5 and 6 were initially appointed Assistant Professors under Regulation 3(e) of the Regulations, on an officiating basis, to avoid delay, and it was obligatory, in terms of that regulation, to consult the Service Commission as soon as possible. The appointments were thus defeasible, and could not give rise to any legal right in favour of the parties. It is therefore futile to contend that as the appellants joined as Assistant Professors on an earlier date, they were entitled to rank senior to respondents 4, 5, and 6 irrespective of the result of the final recruitment through the Service Commission.

24. This Court could not have taken into consideration the officiating service of the persons therein in view of the government notification dated February 5, 1964 which specifically provided the principles for determining the seniority of persons whose services were regularised by the Service Commission. Since all of them were regularised in one batch after reference to the Service Commission their inter se seniority had to be determined according to the *merti* list of the Commission. The decision as to seniority in that case, therefore, rested on the specific notification of the government.

25. We may also mention that in regard to officers of Delhi Municipal Corporation where there was ad hoc appointments followed by regularisation of service, the Delhi High Court has taken a consistent view that such persons should get their service in the ad hoc appointment for determining seniority in the absence of any specific rule to the contrary (See *Municipal Corporation of Delhi v. K. K. Bhatia*).

26. So much as regards to general principle governing seniority in service jurisprudence. There is, however, one other important and fundamental principle which should not be forgotten in any case. The principle of counting service in favour of one should not be violative of equality of opportunity enshrined in Articles 14 and 16 of the constitution. If ad hoc appointment or temporary appointment is made without considering the claims of seniors in the cadre, the service rendered in such appointment should not be counted for seniority in the cadre. The length of service in ad hoc appointment or stopgap arrangement made in the exigencies of service without considering the claims of all the eligible and suitable persons in the cadre ought not be reckoned for the purpose of determining the seniority in the promotional cadre. To give the benefit of such service to a favoured few would be contrary to the equality of opportunity enshrined in Articles 14 and 16 of the Constitution. But if the claims of all eligible candidates were considered at the time of ad hoc appointments and such appointments continued uninterruptedly till the regularisation of services by the Departmental Promotion Committee or the Public Service Commission there is no reason to exclude such service for determining the seniority. Of course, if any statutory rule or executive order provides to the contrary, the rule or order will have supremacy. In the absence of any rule or order the length of service should be the basis to determine the seniority.

27. This takes us to the last contention urged for the appellants in Appeal No. 528 of 1986. The learned counsel tried to impeach the method by which the ad hoc appointments were made and in particular the ad hoc appointment of R. K. Kashyap-respondent 3. It was urged that on the date on which he was posted as Executive Engineer he did not have the required experience of five years in the Undertaking. It was made good by taking into consideration his past service in other establishment before he joined the Undertaking. The Undertaking then had no cadre rules of its own providing for such requirements. It was, therefore, argued that it was wrong on the part of the Undertaking to have counted his past service before he joined the Undertaking to make good the deficiency in his service. It is true that on the date on which respondent, and some others were initially considered and appointed as Executive Engineers, the Undertaking had no cadre rules of its

own. It however, followed the cadre rules of the general wing of the Corporation. That cadre rules provided for counting such past service. In our judgment, there was nothing wrong in following that cadre rules pending approval of its own cadre rules. Those cadre rules were uniformly applied to all the then available candidates for considering them for add hoc appointment. The Undertaking made no discrimination. There is indeed no dispute on this aspect. Before the High Court, it was a common case of parties that ad hoc appointment was necessary pending finalisation of the cadre rules and approval by the Commission. It was also a common case of parties that for the purpose of making ad hoc arrangements, the suitability of all the eligible officers was considered. Moreover, the Undertaking was repeatedly requesting the Commission to regularise the appointments by convening meeting of the Departmental Promotion Committee. It is, therefore, not proper to find fault with those ad hoc appointments at this stage.

28. From the foregoing discussions and in the light of the decision to which we have called attention, we have no hesitation in holding that the conclusion reached by learned Judges of the Delhi High Court is correct and does not call for any interference.

29. In the result, these appeals fail and are dismissed, but no order as to costs.

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