

D. N. Agrawal and Another

Vs

State of Madhya Pradesh and Others

Civil Appeal No. 931 of 1986

(Kuldip Singh, P. B. Sawant JJ)

23.03.1990

JUDGMENT

SAWANT, J. -

1. The two appellants in this case had joined the service in the Public Works Department of the respondent - Madhya Pradesh States, as Overseers, They were thereafter appointed as Junior Engineers by Direct recruitment - Appellant 1 on August 29, 1969 and appellant 2 on September 12, 1969. Although the High Court in its impugned judgment has stated that they were promoted as Junior Engineers from the posts of Overseers, it appears that that statement is not correct since their orders of appointment to the post of Junior Engineers which are Annexures P-1 and P-2 to the writ petition filed in the High Court show that their appointments as Junior Engineers were not by way of promotion. This however, makes no difference to the issues involved in the present appeal. We have stated it to keep the record straight. The grievance of the appellants is with regard to their seniority in the next promotional post, viz, that of Assistant Engineer.

2. The Recruitment Rules which govern the said promotional post are known as Madhya Pradesh P.W.D. (Gazetted) Recruitment Rules, 1969 (hereinafter referred to as the 'Rules'). According to these Rules, Junior Engineers, Overseers, Head Draftsmen are eligible to be considered for promotional to the post of Assistant Engineer on their securing the requisite experience. Each of these categories further has a fixed quota of its own. The Departmental promotion committee, DPC to be short, whose constitution is also prescribed in these Rules, is required to consider the names of all eligible candidates on merits, and judge their suitability in all respect on merit-cum-seniority basis. The DPC is also required to arrange the names of all the selected candidates ordinarily in the order of their seniority unless junior is exceptionally meritorious in which case, of course, he is given a higher number in the selection list. This list is then sent through the State Government to the public Service Commission for its consideration and approval. The list as approved by the Commission then becomes the select list, and promotions are made from this list in the same order as is arranged in the list.

3. However, in case of an administrative exigency, the State Government is given power to appoint anyone not included in the said list if the vacancy is not likely to last for more than three months. Under the Rules, to be eligible to be considered for promotion to the post of Assistant Engineer, a Junior Engineer has to have an experience of two years as Junior Engineer.

4. It appears that the State Government wanted a certain number of Assistant Engineers, but enough number of Junior Engineers with requisite qualifying service were not available at the relevant time. Admittedly the appellants were two of such unqualified Junior Engineers since they had not

completed their two years' qualified service as Junior Engineers at the relevant time. Hence, taking resort to the Rule of Administrative Exigency contained in the proviso to Rule 19(1) of the said Rules, the government promoted some Junior Engineers including both the appellants as Assistant Engineers on July 22, 1971 on purely ad hoc basis. In the order appointing them, it was stated as follows : "Since adequate number of Junior Engineers with requisite qualifying service are not available for appointment as Assistant Engineers, and but for these promotions large number of Assistant Engineers posts would remain vacant affecting the construction work ... These appointment will not be deemed to determine seniority as Assistant Engineer for any purpose whatsoever."

5. It is not disputed that on July 22, 1971 when the appellants were so appointed as Assistant Engineers on ad hoc basis, appellant 1 was short of two years' qualifying service period by one month and appellant 2, by two months. They became qualified on August 22, 1971 and on September 11, 1971 respectively.

6. It appears that while the appellant continued to act as Assistant Engineers on ad hoc basis, on August 7, 1972, respondent 40 to 63 were appointed as Assistant Engineers by direct recruitment. Thereafter, on November 22, 1972 respondent 2 to 39 and the appellant were selected as Assistant Engineers by the DPC. On the same date, the State Government issued an order of appointment of the appellants and respondent 2 to 39 in which appellant 1 was shown at serial No. 14 and appellant 2 at serial No. 28. The State Government thereafter prepared a seniority list of Assistant Engineers which reflected the seniority of appellant as having been appointed on and from November 22, 1972 and as per the ranking given in the said order of November 22, 1972. The appellants challenged the seniority list before the high Court by a writ petition. Although it appears the appellants had also joined to the petition those Junior Engineers who were promoted as Assistant engineers along with the appellants by The same order and whose seniority in the list had reflected their placement in the order of appointment, the challenge to the seniority of those Junior Engineers was given up at the time of the arguments before the High Court, and it was confined to the seniority of respondents 2 to 39 who were Overseers and were selected by the DPC from their own quota as Assistant Engineers along with the appellants, and to the seniority of respondents 40 to 63 who were appointed by direct recruitment on August 7, 1972.

7. The first challenge common to the seniority of all the respondents 2 to 63 was based on the contention that the appellants' ad hoc service as Assistant Engineers from July 22, 1971, when they were promoted on ad hoc basis, to November 22, 1972, on which date they were selected as regular appointees, was not taken into account. The second challenge was confined to the seniority given to the respondent 2 to 39 by giving them a weightage of their experience as Overseers. The High Court negatived both the challenges and dismissed the writ petition. Hence the present appeal.

8. The same contentions which were advanced before the High Court are advanced before us. We will, therefore, first examine the grievance that the ad hoc service of the appellants was not counted for the purpose of the appellants' seniority. A heavy reliance is placed on behalf of the appellants on the decision of this Court reported in *Baleshwar Dass v. State of U. P.* ((1980) 4 SCC 226 : 1980 SCC (L & S) 531 : (1981) 1 SCR 449) in support of the contention that ad hoc officiation is entitled to be counted for the purpose of seniority. The ratio of the said decision however is not applicable to the present case. In that case there was no dispute that the temporary appointment or officiation were qualified to be appointed to posts when they were initially appointed. All the procedural formalities of their appointments were also followed, namely, they had completed their probationary period, the Public Service Commission had given its approval and they had also been medically examined and

found fit. No rule was breached in making their appointment. The vacancies to which they were appointed were also substantive vacancies. Their appointments, however, had continued for a number of years although there was no obstacle whatsoever in making them regular or permanent. All that had remained to be done was the issuance of a formal order of regularisation of the appointment which for unexplained reasons, the government had failed to do for a number of years. The court therefore observed that "a post of short duration, say of a few months, is different from another which is terminologically temporary but is kept on for 10 or more years under the head "temporary" for budgetary or other technical reasons. Those who are appointed and hold temporary posts of the latter category are also members of the service provided they have been appointed substantively to that temporary post." A little later, the court made further observations in this connection, as follows : (SCC pp. 243-44, paras 33 and 35)

Government will ascertain from this angle whether the capacity in which posts have been held was substantive or temporary. If it is not, the further point to notice is as to whether the appointments are regular and not in violation on any rule, whether the public service commission's approval has been obtained and whether probation, medical fitness etc. are complete. Once these formalities are complete, the incumbents can be taken as holding posts in substantive capacities and the entire officiating service can be considered for seniority. For other purposes they may remain temporary..

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 exist. 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."

It will thus be seen that in that case the appointments to the substantive vacancies were made according to rules after complying with the procedure for regular appointment. There was no requirement of the Recruitment Rules which was left to be complied with. In our case, unless the DPC makes the selection, none can be appointed as Assistant Engineer regularly.

9. Similar were the facts in the case of G. P. Doval v. Chief Secretary, Government of U. P. ((1984) 4 SCC 329 : 1984 SCC (L & S) 767) In that case the petitioners were temporarily appointed as Khandsari Inspectors having been selected in the departmental competitive test and interview. Their appointments were however "subject to final selection by Public Service Commission at a later date". Some of the respondents were also appointed to the same posts subsequently in the same manner. The names of these recruits were later forwarded to the Public Service Commission which accorded its approval to their appointments. The department drew up a provisional seniority list on the basis of the recommendations of the said Commission by taking the date of approvals/selection by the Commission in respect of each candidate as the basis for determining the length of continuous offication. The department supported its action on the ground that it had prepared the list by reckoning seniority from the date of their "substantive appointments" in accordance with an earlier government order of 1940 which prescribed certain guidelines or model rules for framing rules governing conditions of service. The model set out in the order suggested two independent principles for determining seniority, namely, (i) the date of substantive appointment and (ii) the date of the order of first appointment, if such appointment is followed by confirmation. In the seniority list, the petitioners were placed below the respondents though they were initially appointed prior to the respondents. This Court quashed the seniority list holding that the question as to from what date

the service is to be reckoned will depend upon the facts and circumstances of each case. It was observed there that : (SCC headnote)

"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. If the first appointment is made by not following the prescribed procedure but later on the appointee is approved making his appointment regular, then in the absence of the contrary rule, the approval which means confirmation by the authority which had the authority, power and jurisdiction to make appointment or recommend for appointment, will relate back to the date on which first appointment is made. 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, there is 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."

The court also found there that the earlier order of 1940 had not prescribed any binding rule of seniority and assuming that it did, the seniority list did not conform to the model. The model set out in the government order prescribed two different starting points for reckoning seniority and it was difficult to assume that the department adopted one and rejected the other without making a specific rule in that behalf.

10. It will thus be clear that the court was dealing with an altogether different situation in both the aforesaid cases. There was no dispute in those cases that except for the terminology and nomenclature there was no distinction between a temporary and permanent appointment and all that remained to be done in those cases was the formalisation of the appointments. That is not the situation in the present case. The appellants were ineligible to be appointed as Assistant Engineers initially. Their appointments were made specifically under the power given to the governments to make ad hoc appointments for administrative exigency. The appointment order made it clear that the appointments were in the said special circumstances and that they will not be deemed to determine seniority for any purpose whatsoever. There is further no dispute that no appointments could be made as Assistant Engineers except by way of either direct recruitment through the Public Service Commission or promotion through the selection made by the DPC as per the quota assigned to different categories. The first DPC which met for selection, after the appellants became qualified for being promoted, was held on October 12, 1972. It is in this meeting that the appellants were selected along with the other qualified promotees, namely, respondents 2 to 39. The DPC further had the power also to arrange the seniority of the promotees according to merits. For all purposes, therefore, the appointment of the appellants on July 22, 1971 was ad hoc and not according to rules. Their selection/appointment on November 22, 1972 by the DPC was further not a mere formality or a process undertaken only for formalisation of their earlier appointment. In the circumstances, their appointment on November 22, 1972 could not relate back to July 22, 1971 and hence they were not entitled to claim their officiation between July 22, 1971 and November 22, 1972 for being counted for the purposes of their seniority for placing them either above respondents 40 to 63, who were directly recruited on August 7, 1972 or above respondents 2 to 39, who were promoted by the DPC along with them, on November 22, 1972, and who happened to be senior to them even as Junior Engineers.

11. The other leg of the aforesaid contention was that the appellants were appointed under Rule 7(4) of the said Rules and not under the proviso to Rule 19 of the Rules inasmuch as under the latter

provision, their appointments could not have been made. The arguments was that the latter provision permitted appointments for an administrative exigency only in vacancies which did not last for more than three months. Since the appellants continued in the post for more than a year before they were selected on November 22, 1972, it should be held that their appointment was under Rule 7(4) of the Rules. As has been pointed out by the High Court, the recourse to Rule 7(4) is unwarranted because that provision deals with the method of recruitment and permits the State Government to adopt any method other than those provided there. One of the methods permitted by that provision admittedly is promotion, and since the appellants were admittedly promoted, though they were not qualified on that date, their case would not be covered by the third method of recruitment which is other than the one prescribed there. Therefore, the argument that they should be considered to have been recruited to the post of Assistant Engineer by a method other than that expressly provided by the said Rule 7(4) is only to be state to be rejected. Once it is held that they were promoted on ad hoc basis, what comes in the (sic into) play is the proviso to Rule 19(1) which permitted the government to make such ad hoc appointments for purely administrative exigencies.

12. It was then contended that since the proviso to Rule 19 (1) permitted appointments in vacancies which were to last for more than three months, it should be held that after the appellants became eligible during the first three months of their appointments, their further continuation was on regular basis. This arguments has also no substance in it, for as pointed out earlier, for being selected for appointment as Assistant Engineers, the appellants had to face the DPC and the government had no power to make regular appointment to the said post unless the DPC had selected the candidates for the posts. Secondly, the proviso to Rule 19 (1) has to be read liberally. The said provision has to be interpreted to mean that the appointments under the said provision can be made for three months at a time. Thus there was nothing to prevent the State Government from renewing the appointment of the appellants every three months.

13. The second contention is directed against the seniority of respondent 2 to 39 and proceeds on the ground that the weightage given to them is illegal. This contention must also fail for the following reasons. Admittedly the Rules of Recruitment prescribe appointments to the post of Assistant Engineer from two sources, namely, (i) by direct recruitment and (ii) by promotion in the proportion of 50-50. The promotional posts are further required to be filled in from three different cadres in the following proportion :

- (i) 25 per cent from Junior Engineers
- (ii) 20 per cent from Overseers
- (iii) 5 per cent from Head Draftsmen/Draftsmen.

Under the Madhya Pradesh PWD (Non-Gazetted) Recruitment Rules of 1972 (hereinafter referred to as '1972 Rules'), the Overseers who acquire an Engineering degree or qualify for AMIE become eligible for promotion to the post of Junior Engineers as soon as the vacancy arises. The inter se seniority between the Overseers and the Junior Engineers in the cadre of Junior Engineers is to be fixed in accordance with Rule 14(3) of the said Rules by giving weightage of two months for every year of their service to the Overseers. When the DPC met on October 12, 1972 and considered the cases both of the appellants and the respondents, the Committee had submitted the names of the selected candidate cadre-wise, i.e., separately of Junior Engineers, Overseers, Head Draftsmen/Draftsmen. The General Administration Department thereafter considered the matter. Under the Rules, the Overseers were required to obtain an Engineering degree or qualify for AMIE

and were also required to serve for 12 years as Overseers to become eligible for being considered for appointment as Assistant Engineers. As against this, the Junior Engineers who were degree holders were required to serve only for two years to become eligible for being considered to the said post. Taking these aspects into consideration their inter se seniority, namely, the inter se seniority of the appellants and the overseer promotee respondents was fixed by the government according to the following formula which was in vogue for a number of years :

(a) In the cadre of Junior Engineers, Overseers so promoted were given weightage as per Rules of 1972, and promotional days for seniority in the cadre were fixed accordingly.

(b) In the cadre of Assistant Engineers, the date of reckoning of seniority was the one on which Junior Engineer or Overseer or Head Draftsman/Draftsman completed the respective span of service for eligibility.

Hence, when seniority was fixed as per the impugned seniority list of the cadre of Assistant Engineers, when admittedly the Rules of 1972 were in vogue, it was fixed according to the aforesaid formula. There is no dispute that according to the said formula, which can hardly be faulted, respondents 2 to 39 who were senior as Junior Engineers, were entitled to seniority over the appellants. It may further be pointed out that the Rules of 1972 were not challenged either before the High Court or before us. All that was challenged before the High Court was that these Rules were restricted in their application only to the promotions made to the post of Junior Engineers and were not applicable to the promotions made to the post of Assistant Engineers. On the face of it, such a challenge is meaningless because Rule 14 of the said Rules is clearly meant for the promotions to the post of Assistant Engineers. Otherwise the seniority given to the Overseers etc. in the seniority list of Junior Engineers on the basis of their service as Overseers, is meaningless. For all these reasons, we find no substance in this contention either.

14. We, therefore, confirm the decision of the High Court and dismiss the appeal. There will, however, be no order as to costs.

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