

Devdutta and Ors. etc.

Vs

State of M.P. and Ors. etc.

Civil Appeal No. 3412-13 of 1986

(L. M. Sharma, N. D. Ojha JJ)

09.10.1990

JUDGMENT

OJHA, J.:-

These two civil appeals by special leave have been preferred against the common judgment of the Madhya Pradesh High Court rendered in two writ petitions being Miscellaneous Petition No. 259 of 1982 and Miscellaneous Petition No 503 of 1982. Certain persons after being selected by the Public Service Commission were appointed as Sales-tax Inspectors in the State of Madhya Pradesh. They shall hereinafter for the sake of convenience be referred to as existing Sales-tax Inspectors. In another Department of the Government of Madhya Pradesh, there were certain persons who were working as Block Level Extension Officers. The Government of Madhya Pradesh reorganised Blocks all over the State as a result whereof 50% of the posts of Block Level Extension Officers were rendered surplus. A policy decision was taken by the State Government to absorb the surplus employees in equivalent post in the other Government Departments. A meeting was held on 30th September 1965 in the office room of the Secretary Planning and Development Department for settling principles and procedure for absorption of such surplus personnel which was attended by the Secretaries of the various Department of the Government, Director of Panchayat and Social Welfare, Director of Industries and Director of Public Instruction. In that meeting general principles and procedure for absorbing these surplus personnel were settled and it was inter alia agreed that;

"(a) the surplus staff should be absorbed on equivalent posts and carrying the same pay scale as far as possible. But if they are absorbed on posts carrying slightly lower pay scale, their present pay scale should be protected;

(b) they should be treated as having been transferred from one post to another so that there may be no break in their service."

A Committee consisting of the Commissioner of Sales Tax, The Additional Commissioner of Sales Tax and the Deputy Commissioner of Sales Tax, Headquarters, held an interview of such surplus Block Level Extension Officers who were to be absorbed as Sales-tax Inspectors and as a result of that Interview they were appointed to the post of Sales-tax Inspectors. These appointments seem to have been made on various dates between 13th February, 1967 and 28th September, 1970. The Block Level Extension Officers who were so absorbed as Sales-tax Inspectors. At this place it is necessary to refer to certain orders having a bearing on the matter of absorption as aforesaid. The first such order in the sequence which deserves to be noticed is a Memo dated 29th March, 1967 issued in the name of Governor of Madhya Pradesh. It provided:

"The Ex-Block Development officers and the Ex-Block Level Extension Officers have been exempted by the Government from the competitive examinations to be conducted by the Public Service Commission for the purpose of absorption as Sales-tax Inspectors. The Selection of these personnel to the said post shall be done by the departmental selection committee."

The other order which requires mention is a memorandum dated 22nd May, 1967 issued by the Government of Madhya Pradesh General Administration Department *inter alia* to all Departments of Government. It contained certain decisions in respect of the surplus Class-III (Executive) ministerial and class-IV employees of the development blocks on their absorption in other Departments of Government. These decisions *inter alia* were about fixation of pay and fixation of seniority should be fixed with regard to the completed years of service counted for fixation of initial pay and the number of increments allowed therein. This Memorandum was also issued "By order and in the name of the Governor of Madhya Pradesh". With reference to this Memorandum it was, by a subsequent Memorandum dated 8th November, 1967, provided that the State Government had further decided that the facilities granted to surplus personnel to the Development Blocks vide G.A.D. Memo under reference may also be extended to such employees absorbed in Class-III executive posts. At this place it may be mentioned that the post of Sales-tax Inspector is a Class-III (Executive) Post. Another Order dated 19th July 1973 was issued by the Madhya Pradesh Government to all the heads of the Departments regarding facilities to the extra officials on being absorbed in other Departments. The provision with regard to seniority was the same as in the Memorandum dated 22nd May, 1967.

As is apparent from the seniority list dated 6th January, 1981 showing the position of the Sales-tax Inspectors as on 1.4.80, the existing Sales-tax Inspectors were confirmed on various dates between 1st November, 1956 and 5th October, 1968. With regard to fixation of seniority of the absorbed Sales-tax Inspectors on decision seems to have been taken till 15th February 1980 when an Order of that date was issued from the office of Sales-tax Commissioner of Madhya Pradesh which provided that the Sales-tax Inspectors mentioned therein who were absorbed between 1970 were made permanent to that post according to the directions of the Government with effect from 31st March, 1967 (presumed date). The seniority list referred to above indicates that the names of the absorbed Sales-tax Inspectors are to be found at serial Nos. 21 to 104 having 31st March, 1967 as the date of confirmation of all of them. The existing sales-tax Inspector Soni Badri Prasad shown at serial No. 20 was confirmed on 22nd May; 1966 whereas the existing Sales-tax Inspector Cangrade Dashreth Lal shown at serial No. 105 was confirmed on 1st April 1967.

The existing Sales-tax Inspectors as well as the absorbed Sales-tax Inspectors both felt aggrieved by the confirmation order of the absorbed Sales-tax Inspectors with effect from 31st March, 1967, the seniority list aforesaid prepared on its basis as well as a subsequent seniority list dated 15th May, 1982. The two writ petitions referred to above were filed in the High Court, one by the existing Sales-tax Inspectors and the other by the absorbed Sales-tax Inspectors. Both of them were decided by a common judgment whereby the order dated 15th February, 1980 referred to above was quashed and seniority was directed to be fixed in accordance with the Recruitment Rules and general conditions of service Rule. It is this judgment which is the Subject-matter of these two civil appeals, both having been filed by some of the absorbed Sales-tax Inspectors.

The contention of the existing Sales-tax Inspectors is that the absorbed Sales-tax Inspectors could not be confirmed on 15th February, 1980 retrospectively with effect from a presumed date, namely, 31st March, 1967. According to them the determination of seniority, taking confirmation as the

basis, is erroneous as they were entitled to have the entire period between their actual appointment and confirmation taken into consideration; whereas the grievance of the absorbed Sales-tax Inspectors is that since they had been working in another department of the State Government as Block Level Extension Officers from various dates between 13th November, 1956 and the actual date of their absorption, they were entitled to have the entire period of their service as Block Level Extension Officers taken into consideration and the fixation of their seniority on the basis of their having been confirmed from the presumed date of 31st March, 1967 is erroneous.

It was also sought to be urged before us on behalf of the existing Sales-tax Inspectors that the appointment of the absorbed Sales-tax Inspectors as Sales-tax Inspectors was illegal having been made not in conformity with the relevant rules and without the recommendation of the Public Service Commission. For the absorbed Sales-tax Inspectors existing Sales-tax Inspectors was applicable to the absorption is Sales-tax Inspectors of the surplus Block Level Extension Officers and that it was the executive instructions issued in this behalf particularly dated 29th March, 1967, 22nd May, 1967, 8th November, 1967 and 19th July, 1973 referred to above which applied to their absorption.

Having heard learned counsel for the parties and M.C. Katarpanch, respondent No. 15 in C.A No. 3412 of 1986, we are, on the facts of the instant case, so far as this submission is concerned, of the opinion that the validity of the absorption as Sales-tax Inspectors of the surplus Block Level Extension Officers does not deserve to be permitted to be challenged in these appeals and that we have to proceed on the basis that their appointment by absorption as Sales-tax Inspectors was valid. It is true, as has been pointed out on behalf of the existing Sales-tax Inspectors, that the surplus Block Level Extension Officers when called for interview for the purpose of being considered suitable for absorption were required to bear themselves the traveling expenses and that fresh letters of appointment were issued to them after the interviews. In our opinion, however, these circumstances are of very little significance for discerning the true nature of their absorption. In this connection it is of significance that no material has been brought to our notice to indicate that the services of the surplus Block Level Extension officers had ever been factually terminated. Again, notwithstanding the fact that the nature of their appointment as Sales-tax Inspectors after interview was temporary, they were allowed to uninterruptedly continue to hold the post of Sales-tax Inspector and were subsequently not only confirmed on that post but were also given as hoc promotions as Assistant Sales-tax officers. Another circumstance which is of significance in this behalf is that no relief for the quashing of their appointments was sought for by the existing Sales-tax Inspectors in the writ petition filed by them before the High Court nor was, as is apparent from the judgment appealed against, any such relief pressed before the High court. In fact, even the fixation of their pay as Sales-tax Inspectors consequent upon their absorption, which was done in accordance with the executive instructions referred to above, does not seem to have been ever challenged. On the other hand it is specifically stated in the judgment appealed against: "It is not in dispute that the respondents 4 to 88 were absorbed in the Sales-tax Department between 13.2.1967 to 28.9.1970 although the respondent's original departments and some of them right from the year 1948 long before the petitioners were appointed as Sales-tax Inspectors." It is for these reasons that we are of the opinion that now it is too late a stage to challenge the validity of appointment of the absorbed Sales-tax Inspectors on that post.

Now coming the question of seniority, the term "absorbed" in Service Jurisprudence with reference to a post in the very nature of things implies that an employee who has not been holding a particular post but is holding a different post in a different department is brought to that post either on deputation or by transfer and is subsequently absorbed in that post wherefore he becomes a holder

of that post in his own right and loses his lien on his parent post. No one asserts that the instant one was a case of the absorbed Sales-tax Inspectors been initially sent on deputation from the post of Block Level Extension Officer to the post of Sales-tax Inspector and pointed out by the High Court, it was not disputed that the surplus Block Level Extension Officers had been absorbed in the post of Sales-tax Inspectors it is obvious that it was a case of absorption by transfer. In this connection it would be useful to recapitulate that the minutes of the meeting referred to above held on 30th September, 1965 laying down the principles of procedure for absorbing the surplus personnel specifically stated that the surplus staff which was to be "absorbed" should be treated as having been transferred from one post to another post to another so that there may be no break in their service."

The question as to whether the fixation of seniority Government was valid or not has to be considered in the aforesaid background. The crux of the problem, therefore, is as to what principle should govern the fixation of *inter se* seniority of the Sales-tax Inspectors who were directly recruited as such, namely, the existing Sales-tax Inspectors and those who became holders of that post by absorption on transfer from one Government department to another, namely, the absorbed Sales-tax Inspectors. The competing claims are, as already indicated above, that whereas the existing Sales-tax Inspectors contended that the date of confirmation alone was not relevant and that even the period between the dates of their actual appointment and confirmation should be counted for fixing their seniority, the contention of the absorbed Sales-tax Inspectors is that the entire period of their service as Block Level Extension officers should also be taken into consideration while fixing their seniority.

In so far as the legal position with regard to fixation of seniority is concerned it may be pointed out that a Constitution Bench of this Court in *Direct Recruit Class Engineering Officer Association v. State of Maharashtra and Others*, [1990] 2 SCC715 after a conspectus of various earlier decisions has *inter alia* held;

"(A) Once an incumbent is appointed to a post according to rule, his seniority has to be counted from the date of his appointment and not according to the date of his confirmation.

The corollary of the above rule is that where the initial appointment is only *ad hoc* and not according to rules and made as stop-gap arrangement, the officiating in such post cannot be taken into account for considering the seniority.

(B) If the initial appointment is not made by following the procedure laid down by the rules but the appointed continues in the post uninterruptedly till the regularization of his service in accordance with the rules, the period of officiating service will be counted."

On its basic there is obviously substance in the assertion of the existing Sales-tax Inspectors that the period from the respective dates of their appointments to those of their confirmation deserve to be counted while fixing their seniority. As regards the absorbed Sales-tax Inspectors, even if their initial appointment as Sales-tax Inspector is, for the sake of argument, taken to be irregular as was sought to be urged before us on behalf of the existing Sales-tax Inspectors, the said appointment not being only *ad hoc* and they having continued in the post uninterruptedly till the regularization of their service, which event even if may be treated to have taken place on 15th February, 1980 when they were granted retrospective confirmation with effect from 31st March, 1967 they are entitled to have

the entire period of their service as Sales-tax Inspector counted inasmuch as their confirmation at any rate with effect from 15th February, 1980 cannot be said to be in violation of any rule. The question which, therefore, remains to be considered is about the period during which they worked as Block Level Extension Officers before they were absorbed as Sales-tax Inspectors. Is the entire period to be taken into consideration or only a part of it and if so, what part or is the said period to be ignored in its entirety, are question which call for an answer.

In R.S. Makashi v. I.M. Menon, [1982 1 SCC 379] the question of security arose among the members of the staff who, for maintaining a new department, had been drawn from four different sources. It was pointed out that in such a situation it was inevitable that some reasonable principles had to be formulated for the determination of the *inter se* seniority of the personnel appointed to work in the different categories of posts in the new organization. Rules for fixation of seniority were framed by the Government, validity of some of which was challenged on the ground of being violate of Articles 14 and 16 of the Constitution. Rule 4(a) was one such rule. A learned Single Judge of the High Court struck down that rule. While reversing the judgment of the High Court it was held:

"Almost the entire reasoning of the learned single Judge is based on an assumption that there is an invariable "normal rule" that seniority should be determined only on the basis of the respective dated of appointment to the post and that any departure from the said rule will be *prima facie* unreasonable and illegal. The said assumption is devoid of any legal sanction. We are unable to recognize the Existence of any such rigid or inflexible rule. *It is open to the rule-making authority to take a note of the relevant circumstances obtaining in relation it each department and determine with objectivity and fairness what rules should govern the inter se seniority and ranking of the personnel working in the concerned departments and ranking of the personnel working the concerned departments and the courts will only insist that the rules so formulated sho87uld be reasonable, just and equitable.* Judged by the said test of reasonableness and fair ness, the action taken by the Government in equating the clerical personnel which had rendered two years ♦ regular service in other departments with the temporary Supply Inspectors of the CFD and in directing as per impugned Rule 4(a) that their inter se seniority shall be determined with reference to the length of service calculated on the basis of the said equation cannot be said to be in any way discriminatory or illegal. We are unable to accept as correct the view expressed by the learned Singh Judge of the High Court that "while fixing the seniority in the higher post, it is not open to take into consideration any service rendered in the lower post and the at by itself spells out discrimination."

Relying on the aforesaid decision it was held in *Wing Commander J. Kumar v. Union of India and Others*, [1982] 3 SCR 453:

Equally untenable is the further plea advanced by the appellant that since the R & D is an integrate cadre, there cannot be any further classification of the officers comprised therein on the basis of the length of service put in by them in their respective parent services prior to their permanent secondment in the R & D. As pointed out by this Court in the decision in *R.S. Makashi v. I.M. Menon*, (supra), it is a just and wholesome principle commonly applied in such situations where person from different sources or drafted to serve in a new Service that their pre-existing length of service in the parent department should be respected and preserved by

taking the same into account in determining the new service cadre. Such a provision does not involve any discrimination violatate of Article 16 of the constitution."

In K. Madhavan and Anr. etc. v. union of India and Ors. etc., [1988] 1 SCR 42 it was held that it will be against all rules of service jurisprudence if, when a Government servant holding a post is transferred to the same or an equivalent post in another Government Department, the period of his service in the post before transfer is not taken into consideration in computing his seniority in the post to which he is transferee. The transfer cannot wipe out this length of service in the post from which he has been transferred.

It is true that *R. S. Makshi and Others as well as Wing commander J. Kumar*; (supra) were cases where new service was created But, in our opinion, on that ground alone the principle enunciated therein cannot be treated as to be confined only to a case where new service was created. The observations made therein are obviously based on equitable principles and it is those principles which were applied in the case of *K. Madhavan* (Supra).

Reliance was placed by learned counsel for the absorbed Sales-tax Inspectors on the decision of this Court in the case of *K. C. Vasudeva and Other v. Union of India and Others*, [1980] Suppl. SCC 341 where in was held that fixation of seniority between existing employees and those taken over form an autonomous body after its dissolution must be based not on mere compassion but on rational criteria having full consideration for rights of other parties affected and having nexus with efficiency in administration. Government must apply its mind and give reasons for its exercise of power to give relaxation to one class of employees. In our opinion the said decision in clearly distinguishable. Firstly, that was a case where employees not of another Government Department but of an autonomous body were brought in a Government Department and in the matter of determination of seniority the period during which they had worked in the autonomous body was taken into account. Emphasis was placed in that case on this circumstance when it was pointed out that such employees were new entrants into Government service and even so they were given credit for their former service in the autonomous body. Secondly, unlike the in instant case in that case credit for the entire period of service in the autonomous body seems to have been given. What is, however, noteworthy is that it was specifically stated in paragraph 5 of the report of that case the "it is perfectly within the power of the Government of have a rationalization of the entire situation and if it thinks fit even to give weightage or credit for service" in the autonomous body. The principle of giving weightage was approved by this court in an earlier decision also in the case of *S.G. Jai Singhghani v. Union of India*, [1967] 2 SCR 703 and is a well recognized principle in the sphere of determination of seniority.

In view of the legal position enumerated above, it is true that the claim of the existing Sales-tax inspectors that the period between the dates of their appointment and confirmation should be counted seems to be justified but it is equally true that the claim of the absorbed Sales-tax Inspectors that the period during which they worked in their parent Department should also be taken into account, does not obviously appear to be off the mark. If the period between the dates of appointment and confirmation of the existing Sales-tax Inspectors was counted for fixing their seniority but the period during which the absorbed Sales-tax Inspectors worked in their parent Department was ignored, the former would have obviously been placed on amore advantageous position but only to the prejudice of the latter as it would have amounted to sacrificing their interest. If, on the other hand, the periods referred to above in case of both the sets of Sales-tax Inspectors was taken into account, it would have resulted in granting benefit of the absorbed Sales-tax Inspectors at the cost of the existing ones and presumably including those who had already been

promoted as Assistant Sales-tax Officers, even prior to 22nd May 1967, inasmuch as the period during which they had served in their parent Department was much longer than the period of officiating of the existing Sales-tax Inspectors. This was its duty to evolve some policy or equitable formula, which did justice, as far as possible, to the competing claims of both the sets of Sales-tax Inspectors. It was apparently in search of such a formula that the State Government appears to have given retrospective confirmation to the absorbed Sales-Tax Inspectors from a presumed date and determined the seniority on the basis of the dates of confirmation. This section can be justified even on the matter of determination of seniority. The principle formulated in the case of R.S. Makashi (Supra) with reference to a rule of seniority namely that "the Courts will only insist the rules so formulated should be reasonable, just and equitable" with the result that if they meet this requirement the Court will not interfere, would in our opinion apply even to a case of executive action of determining seniority if the above test is satisfied. It is also relevant to point out that no statutory rule has been brought to our notice which may run counter to the decision mentioned above taken by the government. The two rules to which our attention has been invited are (I) Madhya Pradesh Civil Services (General Conditions of Service) Rules 1961 and (ii) Madhya Pradesh Sales-tax Subordinate Class III Executive Service Recruitment Rules, 1966. In so far as the 1966 Rules are concerned, they do not contain any provision about seniority. The 1961 Rules, no doubt, deal with seniority in Rule 12 but having gone through the said Rule we are of the opinion that the case of the absorbed Sales-tax Inspectors does not fall under any of the categories enumerated therein.

At this place, we may mention that nothing substantial has been brought to our notice by either party on the basis of which it could safely be said that on the peculiar facts and circumstances of this case already referred to above, the decision of the State Government did not satisfy the above, the decision of the State Government did not satisfy the above said test and was either arbitrary or discriminatory.

In this view of the matter, we are of the opinion that it was not a fit case for interference by the High Court in exercise to its jurisdiction under Article 226 of the Constitution of India with the decision of the State Government.

In the result, these civil appeals are allowed, the common judgement of the High Court in the two writ petitions referred to above is set aside and both the said writ petitions are dismissed. In the circumstances of the case, however, the parties shall bear their own costs in this Court as well as in the High Court

P.S.S.

Appeals allowed.

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