

M. B. Hiregoudar

Vs

State of Karnataka and others

C. A. No. 4375 of 1991

(A. M. Ahmadi, M. M. Punchi JJ)

29.10.1991

JUDGEMENT

AHMADI, J.:-

1. Special leave granted.

2. The controversy which we are required to resolve in this appeal by special leave is regarding the appellant's seniority vis-a-vis respondents Nos. 3 to 7. The factual background which has given rise to this controversy, briefly stated, is as under:

In the year 1966 posts of Junior Engineer (Mechanical) were created in the Department of Mines and Geology (Ground Water Surveys and Drilling Unit) of the State of Karnataka. The appellant who was then working as a Rigman in the Drilling Unit of the Department was appointed Junior Engineer (Mechanical) in the scale of Rs. 200-375 on one of the said posts by an order dated 14th August, 1967 issued by the Director of the department. Subsequently, he was regularly recruited through the State Public Service Commission in the said post w.e.f. 4th May, 1970. However, even though the Director had requested the State Government to frame Recruitment Rules for the newly created post immediately after its creation, the Recruitment Rules were not finalised till the issuance of a Notification dated 26th June, 1973. Before the appellant was regularly recruited through the State Public Service Commission in the year 1970 the Director had apprised the Government of the action which he proposed to take to fill up the post. The appointment order was issued after the Public Service Commission had advertised the post and had selected persons for appointment to the said posts. The appellant was initially appointed on probation for one year and on his satisfactorily completing the probation period he was continued in service and was later confirmed in the said post by an order dated 13th June, 1974 w.e.f. 29th September, 1972.

3. Respondents Nos. 3 to 7 entered service as Drillers in 1964-65. The appellant and the respondents Nos. 3 to 7 were promoted as Assistant Drilling Engineers by the Director's order dated 16th December, 1974, The Office Order No. 676/74-75 shows that the appellant and one another were working as Junior Engineers at the relevant time whereas respondents Nos. 3 to 7 were working as Drillers before their promotions as Assistant Drilling Engineers. The State Government did not approve of the Director's action in promoting the appellant since he was a local candidate and directed that he be reverted. However, no such reversion took place. The State Government also did not take any further action. The appellant was shown senior to respondents Nos. 3 to 7 in the said cadre of Assistant Drilling Engineers. The appellant was subsequently promoted by the State Government to the next higher post of Drilling Engineer in 1980 and further as Chief Drilling Engineer in 1984 which post he was holding at the date when his seniority came to be disturbed.

The appellant was throughout shown senior to respondents Nos. 3 to 7 till the revised provisional seniority list in regard to the cadre of Assistant Drilling Engineers was published on 31<sup>st</sup> December, 1987. Since objections were invited the appellant objected to his being shown junior to respondents Nos. 3 to 7 but to no avail. Even in the final seniority list dated 4<sup>th</sup> May, 1989 he was shown junior to respondents Nos. 3 to 7. Respondents Nos. 3 to 7 were shown in both the provisional and final seniority list at Serial Nos. 1 to 5 whereas the appellant was shown at Serial No. 6. Thus, for the first time, since his regular appointment in the year 1970, he was shown junior to respondents Nos. 3 to 7 under the provisional seniority list issued in 1987 and the final seniority list issued in 1989. The appellant, therefore, challenged the provisional seniority list as well as the final seniority list by an Application No. 2564 of 1989 preferred to the Karnataka Administrative Tribunal. The Tribunal by its order dated 3<sup>rd</sup> September, 1990 rejected his application holding that his initial entry into service as a Junior Engineer was itself irregular and since he did not have the requisite experience of three years as a regular incumbent he was not qualified to be promoted to the next higher post of Assistant Drilling Engineer because his regular employment could only be related from the date of framing of the Recruitment Rules for the cadre which came to be notified on 23<sup>rd</sup> August, 1973. In this view of the matter, the Tribunal held that the service of the appellant from 4<sup>th</sup> May, 1970 to 23<sup>rd</sup> August, 1973 could not be taken into consideration for the purpose of determining his inter se seniority vis-a-vis respondents Nos. 3 to 7. The appellant, feeling aggrieved by the dismissal of his application, has approached this Court under Article 136 of the Constitution.

4. The appellant contends that the order of the Tribunal suffers from a number of fallacies, namely, firstly, the Tribunal has failed to realise that the appellant was recruited as a regular employee on selection by the State Public Service Commission pursuant to an advertisement issued in this behalf and, therefore, the appellant's employment was regular in nature and not that of a mere local candidate; secondly, the post to which he was appointed was a regularly created post and was higher than that of respondents Nos. 3 to 7 even during the period there existed no recruitment rules and in any case after his confirmation w.e.f. 29<sup>th</sup> September, 1972 it was not open to the Tribunal to hold that his appointment was irregular and thirdly, the Tribunal had erred in overlooking the guideline issued by the State Government on 5<sup>th</sup> July, 1976 which specifically provided that all appointments made by the Government or under specific authority of Government either by direct recruitment or by promotion or on or after 1<sup>st</sup> November, 1956 but prior to the commencement of the Rules regarding recruitment to such cadres may be treated as regular'. The appellant contends that in pursuance of this guideline issued by the State Government even if it is assumed that his initial appointment was irregular it had to be treated as regular throughout. The appellant therefore, contends that the Tribunal's order suffers from certain patent infirmities and deserves to be set aside. It appears that before the Tribunal respondents Nos. 1, 2, 4, 6 and 7 did not file any counter challenging the appellant's claim to seniority but respondents Nos. 3 and 5 concerted the appellant's claim while the State Government avoided entering into the arena by filing a counter but instead presented the relevant files to the Tribunal. So far as respondents Nos. 3 and 5 are concerned, they supported the action taken by the state Government in preparing both the impugned provisional as well as the final seniority lists. They contended that since they were regular employees and had entered service before the appellant and were promoted to the post of Assistant Drilling Engineers along with the appellant they were clearly senior to the appellant and the State Government was, therefore, justified in showing them at Serial Nos. 1 to 5 and the appellant at Serial No. 6 in the seniority list. They, therefore, contend that this appeal is without substance and needs to be dismissed.

5. We have heard counsel for the rival contestants. Counsel of the State Government submitted that they had prepared the seniority list for reasons already stated but they would not like to take sides and would abide by the decision of this Court.

6. In order to appreciate the controversy, it is necessary to refer to the Karnataka Civil Services (Classification, Control and Appeal) Rules, 1957. According to Rule 5, the Civil Services of the State of Karnataka are classified into Class I, Class II, Class III and Class IV posts. Class I and Class II are gazetted Posts whereas Class III and Class IV consist of non-gazetted Posts. So far as Class III posts are concerned the initial appointments have to be made by the authorities mentioned in Column 2 of Schedule II appended to the Rules. In regard to the posts of Junior Engineers the IInd Schedule makes the Director the Appointing Authority. There can, therefore, be no doubt that the initial appointment of the appellant was by an authority competent to appoint. It is indeed true that at the time when the appellant was selected by the State Public Service Commission and appointed as Junior Engineer w.e.f. 4th May, 1970 there were no specific Recruitment Rules in existence for the post in question. As stated earlier, the posts were created, for the first time in 1966 and since then the Director had been in correspondence with the State Government for framing of the Recruitment Rules for the said posts. Since recruitment Rules were not framed for. the one reason or the other, in 1969 the Director wrote letter to the State Public Service Commission to advertise the vacancies and select candidates for appointment. Simultaneously, he wrote a letter informing the State Government of the action taken by him in requesting the State Public Service Commission to advertise the posts and select candidates for appointment. Pursuant to the requisition sent by him the Commission selected candidates and forwarded the list to the Director who was the Appointing Authority under the Karnataka Civil Services (Classification, Control and Appeal) Rules, 1957. The Director who was competent to make the appointment by virtue of Rule 7 issued a letter of appointment dated 24th April, 1970 whereupon the appellant took charge w.e.f. 4th May, 1970. It, therefore, becomes apparent that the posts were regularly created sometime in 1966 and the appellant was duly selected by the State Public Service Commission and appointed to the post in question in 1970. The appellant being an engineering graduate was qualified for appointment to the post in question.

7. The State Government's approach while sliding down the appellant in seniority vis-a-vis the respondents Nos. 3 to 7 may be briefly noticed. After the recruitment rules for Junior Engineers (Mechanical) were framed and brought into effect w.e.f. 23rd August, 1973, it was felt that the two posts of Junior Engineers were filled by direct recruitment contrary to the said rules which provided a ratio of 50% by promotion from the cadre of Drillers and 50% by direct recruitment. Since both the posts were filled by direct recruitment, it was felt that this ratio was violated. The date of the appellant's seniority was, therefore, reckoned from 23rd August, 1973 and since the appellant had not acquired experience of three years he was held ineligible for promotion to the next higher post of Assistant Drilling Engineer. His entry into the promotional post was, therefore, pushed down to 23rd August, 1976 and accordingly respondents Nos. 3 to 7 were placed above him in the seniority list. The Tribunal concurred with this approach. The Tribunal held that the initial appointment of the appellant as Junior Engineer (Mechanical) by the Director was not supported by any rules and the Director not being the appointing authority for the said posts in 1970, the appellant's appointment was not regular. Secondly, the Tribunal concurred with the Government that the appellant's entry into the cadre of Assistant Drilling Engineers must be assumed to be w.e.f. 23rd August, 1976 and hence respondents Nos. 3 to 7 were clearly senior to him. In short the Tribunal approved of the Government's approach in toto.

8. With respect we find it difficult to approve of the said approach. As pointed out earlier, the posts were sanctioned in 1966. Initially the appellant was appointed as a local candidate but later the Director requested the State Public Service Commission to advertise the said two posts and select Candidates for appointment to the said posts. Pursuant to the advertisement so issued the appellant applied, was found qualified and was selected for appointment. The Director; therefore, made the

appointment as he was the appointing authority for Class III posts under the Karnataka Civil Services (Classification, Control and Appeal) Rules, 1957, vide Rule 7(2) read with Column 2 of Schedule II thereto. That rule clearly shows that the Director is the appointing authority for Junior Engineers, a Class III post. The Tribunal was, therefore, not right in holding that the appointment made was irregular as it was not by the appointing authority. The Tribunal was wrong in holding that the Director was not the appointing authority for Junior Engineers. Strictly speaking, that was not the approach of the Government. The Government held the appointment irregular as in its opinion it had exceeded the quota of 50% for direct recruits. This view is based on the premise that the services must be regularised applying the 1973 Rules retrospectively. Here there are two fallacies, firstly the appellant being senior of the two direct recruits appointed as Junior Engineers, he would fill the slot for the one post which went to direct recruits on the 50% quota and secondly it was not permissible to question the appointment made in 1970 in 1987 when the intervening period none had challenged the appellant's appointment. The objection which the Government had raised on his promotion to the next higher post was that he was a local candidate and not a regular appointee, an objection which was not pursued presumably on realising that he was selected by the State Public Service Commission before appointment. Not only that the Government acquiesced in his appointment by promoting him to the next higher posts in 1980 and 1984. Since the posts existed on the establishment and selection for appointment was made by the State Public Service Commission and the Director was competent to make the appointment, it cannot be said that the absence of recruitment rules makes the appointment illegal or irregular when it is found that the appellants a degree holder, was eligible for appointment to the post. This is so also because irregular appointments were regularised by the Government Memorandum dated 5th July, 1976, the relevant part whereof reads as under:

"3(a). All appointments made by Government or under specific authority of Government either by direct recruitment or by promotion on or after 1st November, 1956, but prior to the commencement of rules regulating recruitment to such cadres may be treated as regular."

This was clarified by the subsequent letter dated 17th September, 1977 as under:

"Para 3(a) states that all the appointments made by Government or under specific authority of Government either by direct recruitment or by promotion on or after 1-11-1956 and prior to the commencement of the Cadre and Recruitment Rules of the concerned cadre may be treated as regular, that is to say, the action taken by Government on other Appointing Authorities in resorting either of the modes of recruitment is regular. This para does not say that the appointment of local candidates as stop-gap arrangement is regular."

The Tribunal refused to place reliance on the above on the erroneous ground that the Director was not the appointing authority and the appellant was a local candidate. Once both these are found to be erroneous there is no reason to brush aside the said guidelines. It may also be appreciated that the services of local candidates in Class III cadre were regularised by Office Order No. 177/71-72 dated 31st August, 1971 and had the appellant not have been appointed as a regular candidate w.e.f. 4th May, 1970 his service would also have been regularised as a local candidate.

9. From what we have discussed above it is obvious that the entire approach of the State Government and the Tribunal was erroneous. Besides, the appellant was shown senior to respondents Nos. 3 to 7 right from 1970 to 1987 when his seniority came to be disturbed. During

the said period of 17 years all attempts to disturb his seniority had failed. No one successfully challenged it in Court. The appellant's seniority which had stabilised over a Period of time and on the basis whereof he was granted promotions by the Government could not be disturbed by doubting the regularity of the initial appointment after so many years. It was not as if he had gained experience as an ad hoc employee in a stop-gap arrangement that his experience as a Junior Engineer could be overlooked. We are, therefore, of the opinion that his seniority in the promotion post could not be upset on the ground that he did not possess the requisite experience till 23rd August, 1976.

10. In *Direct Recruit Class II Engineering Officers' Association v. State of Maharashtra*, (1990) 2 SCC 715 : (AIR 1990 SC 1607), this Court held in paragraph 13 as under:

"The principle for deciding inter se seniority has to conform to the principles of equality spelt out by Articles 14 and 16. If an appointment is made by way of stop-gap arrangement, without considering the claims of all the eligible available persons and without following the rules of appointment, the experience on such appointment cannot be equated with the experience of a regular appointee, because of the qualitative difference in the appointment. To equate the two would be to treat two unequals as equal which would violate the equality clause. But if the appointment is made after considering the claims of all eligible candidates and the appointee continues in the post uninterruptedly till the regularisation of his service in accordance, with the rules made for regular substantive appointments, there is no reason to exclude the officiating service for purpose of seniority. Same will be the position if the initial appointment itself is made in accordance with the rules applicable to substantive appointments as in the present case. To hold otherwise will be discriminatory and arbitrary. "

In the present case also the appellant's appointment was made in 1970 after all eligible candidates were interviewed by the State Public Service Commission. As pointed out earlier, the posts were borne on the establishment and the Director was the appointing authority who made the appointment pursuant to the selection made by the State Public Service Commission. The appellant worked on that post uninterruptedly till he was promoted to the next higher post along with respondents Nos. 3 to 7. In these circumstances, his experience in the post of Junior Engineer (Mechanical) from 1970 till his promotion to the next higher post could not be ignored. We are, therefore, of the opinion that the ratio laid down by the Constitution Bench in the aforequoted paragraph applies with all force in the present case also.

11. In the result, we allow this appeal and set aside the order of the High Court (or Tribunal?). We hold that the appellant's seniority over respondents Nos. 3 to 7 as was obtaining before 31st December, 1987 when the provisional seniority list was published shall be restored and he shall be shown to be senior to respondents Nos. 3 to 7 by correcting the impugned final seniority list. The appeal is allowed accordingly with no order as to costs.

Appeal allowed.

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