

SUPREME COURT OF INDIA

R. Hariharan

Versus

K. Balachandran Nair

(V.N. Khare and S.N. Phukan, JJ.)

Civil Appeal Nos. 9090-91 of 1996.

11.09.2000

JUDGMENT

V.N. Khare, J. - The appellants herein are Engineers in the service of Kerala State Electricity Board (hereinafter referred to as the "Board") and have preferred these appeals against the judgment rendered by the Division Bench of the Kerala High Court whereby the writ petition and the writ appeal filed by the respondents were allowed and the Board was directed to re-fix the seniority in the light of legal position indicated therein. As a result of the said judgment, the appellants contend that they would be treated as junior to the respondents.

2. The Board was established under Section 5 of the Electricity (Supply) Act, 1949 on 7th March, 1957. Prior to 1.10.1966, 7 employees were appointed by the Board on various categories of posts like Overseer, Tracer etc. The Kerala Public Service Commission (Additional Functions) Act, 1963 (hereinafter referred to as the "Act") came into force with effect from 1.10.1966. The Act provided for exercise of certain additional functions by the Kerala Public Service Commission in respect of appointments of officers and servant of the Board and their conditions of service. During the period 1972 to 1974 the appellants - four in number, were recruited through the Public Service Commission on different dates to different categories of posts like Overseer, Tracer etc. On 18.4.1975, the Board issued an Order that out of 50 per cent quota of direct recruits in the cadre of Asstt. Engineer 40 per cent were to be appointed from open market and remaining 10 per cent were to be recruited from qualified Engineering Graduates in the employment of the Board. The case of the respondents is that the recruitment of these two categories of direct recruits were to be made with the consultation of the Public Service Commission. During the period 1976 to 1980, the Public Service Commission did not take any step for recruitment to fill up the 10 per cent quota set apart for the in-service Engineering Graduates who were in employment with the Board. Since the appellants and others - totalling eleven in numbers were Engineering Graduates in the service of the Board, the Board on different dates beginning from 26.12.1976 to 1.8.1979 appointed them to the posts of Assistant Engineer (Civil) against 10 per cent quota reserved for the in-service Engineering Graduates in the Board. The letter of appointment indicated that appointments of the appellants were provisional during the period of probation and in case they pass two Departmental tests viz., 'Departmental test for Executive Staff' and 'Account Test Lower' and further on satisfactory completion of the probationary

period, their services would be regularised.

3. On successful completion of the probationary period, the Board by separate orders regularised the appointments of all the 11 Assistant Engineers including the appellants from the date of their joining duties as Assistant Engineers. The writ petitioners who are the respondents herein were recruited in the cadre of Assistant Engineer (Civil) through the Public Service Commission and had joined their duties on 21.10.1981. Although the services of 11 employees including the appellants were regularised by the Board, yet the Public Service Commission declined to give its concurrence to the regularisation of the service with effect from the date of their joining duties. There being difference of opinion between the Board and the Public Service Commission on the question of date of regularisation of services of the appellants, the Board referred the matter to the State Government under sub-section (2) of Section 3 of the Act. The State Government on receipt of the reference from the Board again referred the matter to the Public Service Commission. Thereafter, the State Government after considering the matter, by an order dated 12.5.82 overruled the advice of the Public Service Commissioner and approved the regularisation of the services of the appellants with direction that *inter-se* seniority of the Assistant Engineers whose services have been regularised shall be determined from the date on which each Assistant Engineer acquired the necessary qualification. Consequent upon the order of the State Government dated 12.5.1982 a gradation list of Assistant Engineers was prepared wherein the appellants were shown above to the respondents herein. After a lapse of 5 years the respondents herein who are direct recruits and joined duties on 21.10.1981, filed a writ petition O.P. No. 7730 of 1987 for quashing the Govt. Order dated 12.5.1982 and the consequent gradation list Ext. 12 to the writ petition. In the said writ petition 10 Assistant Engineers including the appellants were arrayed as respondents 15 to 24. A learned Single Judge of the Kerala High Court dismissed the writ petition on the ground that the challenge to the seniority list was highly belated and further there was no violation of quota of 10 per cent earmarked for in-service Engineering Graduate. Against the said judgment the respondents herein filed a Writ Appeal before a Division Bench of the High Court. During the pendency of the Writ Appeal two other Assistant Engineers (Civil) who were also directly recruited and had joined their duties on 21.10.1981 filed another Writ Petition No. 12363/93 seeking quashing of the Govt. Order dated 12.5.1982 and the gradation list Ext. P.12. The writ appeal and the writ petition filed by the writ petitioners were consolidated and heard together. During the pendency of the writ appeal and the writ petition the appellants were promoted to the posts of Executive Engineers. The Division Bench after hearing the matter was of the view that the date of the order of the first appointment of the appellants would be the date when their services were regularised i.e. 12.5.1982 and, therefore, the respondents who joined their duty on 21.10.1981 have to be treated senior to the appellants. The High Court allowed the writ appeal and the writ petition and directed the Board to re-fix the seniority in the light of what was stated in the judgment.

4. Shri P.P. Rao, learned senior counsel, appearing for the appellants advanced three submissions. The first submission is that under the Act there is no requirement of consultation with the Public Service Commission in regard to suitability of the candidate to be appointed to the post of Assistant Engineers in the Board and, therefore, the seniority of the appellants has to be determined with effect from the

date of their first ad-hoc appointments. The second submission is that if it is held that consultation with the Public Service Commission was necessary with respect of the appointment of the appellants in the Board, the State Government in exercise of its over-riding power conferred by sub-section (2) of Section 3 of the Act cured the defect of non-consultation with the Public Service Commission by over-ruling the advice of the Public Service Commission and ordering for regularisation of the services of the appellants with effect from the dates the appellants acquired qualification. The third submission is that in any event if it is held that the Kerala State and Subordinate Rules, 1958 are applicable to the appointment of Assistant Engineers in the Board, the Government has power under rule 39 of the said Rules to retrospectively remove the hardship by regularising the services of the appellants.

5. Learned counsel appearing for the respondents argued that under the Act, consultation with the Public Service Commission in regard to the suitability for appointment to the post of Assistant Engineers is mandatory and once the Public Service Commission declined to give concurrence to the regularisation of services of the appellants with effect from the date of their joining duties, the seniority of the appellants has to be determined from the date they were regularised in the service of the Board. The further argument of learned counsel for the respondents is that under rule 27 of the Rules the ad-hoc appointment of the appellant cannot be taken into consideration for the purpose of determining *inter-se* seniority of Assistant Engineers and as such the respondents are to be treated as senior to the appellants in the cadre of Assistant Engineer (Civil).

6. Learned counsel for the appellants in support of his argument referred to Section 3 of the Act and argued that sub-clauses (a) and (b) of sub-section (1) of Section 3 of the Act being in *para materia* with clause (3)(a) and (b) of Article 320 of the Constitution. The State legislature having not enacted any substantive provision like clause (1) of Article 320 in Section 3 of the Act, there was no obligation on the part of the Board to consult the Public Service Commission with regard to suitability of the candidates for appointment as Assistant Engineer in the Board. His farther argument is that the Board is competent to appoint Assistant Engineers under Section 15 of the Electricity Supply Act. Clause (a) of sub-section (1) of Section 3 requires the Board to consult the Public Service Commission on all matters relating to method of recruitment to services and posts under the Electricity Board and clause (b) of sub-section (1) of Section 3 of the Act casts duty on the Board to consult the Public Service Commission on the principles to be followed in naming appointments to services and posts under the Board and in making promotions and transfers from one service to another. According to appellants only on aforesaid situations the Public Service Commission is required to be consulted and not on the matter relating to the suitability of the candidates for appointments as Assistant Engineers in the Board. No doubt, the argument is attractive and at the first glance appeared carrying substance. But on a deeper consideration, we find that second part of clause (b) of sub-section (1) of Section 3 of the Act requires the Board to consult the Public Service Commission in the matter of appointment to the posts of Assistant Engineers in the Board. The object of the Act is to provide certain additional functions by the Kerala Public Service Commission in respect of appointment of officers and servants in the Kerala Electricity Board and in laying down their conditions of service. Section 3 of the Act provides for the functions of Public Service Commission in respect of

services under the Board, which is extracted below :-

"3. Functions of the Public Service Commission in respect of services under the Electricity Board. - (1) Notwithstanding anything contained in the Electricity (Supply) Act (Central Act 54 of 1948), or the rules or regulations made thereunder regarding the recruitment and conditions of service of officers and servants of the Electricity Board, the Public Service Commission shall be consulted -

(a) on all matters relating to method of recruitment to services and posts under the Electricity Board;

(b) on the principles to be followed in making appointments to services and posts under the Electricity Board and in making promotions and transfers from one service to another and on the suitability of candidates for such appointments, promotions or transfers;

(c) on any claim by or in respect of a person who is serving or has served under the Electricity Board that any costs incurred by him in defending legal proceedings instituted against him in respect of acts done or purporting to be done in the execution of his duty should be paid out of the funds of the Electricity Board;

(d) on the claim for the award of a pension in respect of injuries sustained by a person while serving under the Electricity Board and any question as to the amount of such award;

and it shall be the duty of the Public Service Commission to advise on any matter so referred to them :

Provided that the Government may make rules specifying the matters in which either generally or in any particular class of cases or in any particular circumstance, it shall not be necessary for the Public Service Commission to be consulted.

(2) In the case of any difference of opinion between the Public Service Commission and the Electricity Board on any matter, the Electricity Board shall refer the matter to the Government and the decision of the Government thereon shall be final :

Provided that the Government before taking a decision against the advice of the Commission shall refer the matter to the Commission."

Section 4 empowers the Government to frame rules in consultation with the Public Service Commission for carrying out the purpose of the Act and also to frame rules on the matters where it shall not be necessary for the Public Service Commission to be consulted. In exercise of the said power Government of Kerala has framed rules which is known as 'Kerala Public Service Commission (Additional Functions) (Consultations) Rules, 1966'. Rule 3 of the rules provide the matters where the Public Service Commission is not required to be consulted. Rule 5 then provides that it would not be necessary for the Board to consult the Commission where the appointment of a person is made temporarily for a total period not exceeding three months or where appointment has to be made in public interest owing to an emergency which has arisen to fill immediately a vacancy in the post and there

would be undue delay in making the appointment after such consultation. Rule 5 further provides that the concurrence of the Commission shall be obtained for the continuance of such temporary appointments beyond three months.

7. Now coming to clauses (a) and (b) of sub-section (1) of Section 3 the Act, it is no doubt true that clause (a) provides for consultation on all matters pertaining to method of recruitment to services. A perusal of clause (b) of sub-section (1) of Section 3 of the Act shows that clause (b) is in two parts. The first part of clause (b) runs as under :

"on the principle to be followed in making appointments to services and posts under the Electricity Board and in making promotions and transfers from one service to another."

The second part of clause (b) runs as under :

"and on the suitability of candidates for such appointments, promotions or transfers."

So far as the first part of clause (b) is concerned, we are in agreement with the contention of learned counsel for the appellant that it pertains to laying down the principles to be followed in making appointments to the service and does not provide for consultation with regard to appointments in service. But the same is not the position in the case of second part of clause (b), extracted above. The language employed in clause (b) is plain and simple and there is no ambiguity in it. Both the parts of clause (b) operate on different fields. The first part of clause (b) requires consultation by the Public Service Commission on the principles followed in making appointments, promotions and transfers, whereas later part of clause (b) casts duty on the Board to consult the Public Service Commission on the matters pertaining to appointments, promotions and transfers of the employees of the Board meaning thereby that the Public Service Commission is required to be consulted on the suitability of the candidates for appointments promotions or transfers. It is true that there is no substantive provision like clause (1) of Article 320 of the Constitution in Section 3 of the Act. However, later part of clause (b) is complete and substantive provision in itself and as such Section 3 of the Act does not require enactment of any further provision like clause (1) of Article 320 of the Constitution providing for judging the suitability of candidates by the Public Service Commission in the matter of appointments. This interpretation of ours is in consonance with the object of the Act for which the Act has been enacted. If we put any other interpretation and hold that the Public Service Commission is not required to be consulted in the matters of appointments, promotions or transfers, the same would be repugnant to the object of the Act which means that the provisions of the Act are meaningless and without any purpose. Further, the rules framed by the State Government in exercise of its powers under Section 4 of the Act has already provided the situations where appointments in the Board would require no consultation with the Public Service Commission. There is no mention in the rules that there would be no consultation with the Public Service Commission in respect of appointments of Assistant Engineers in the Board. It is settled principle of interpretation that the Court shall lean towards an interpretation which advances object of the Act. We are, therefore, of the view that second part of clause (b) of sub-section (1) of Section 3 provides for consultation with the Public

Service Commission in the matters of appointments of Assistant Engineers in the Board. This view of ours also finds support from a decision of this Court in *State of Jammu and Kashmir v. Mrs. Raj Dulari Razdan and others, 1979(1) SCC 461*, wherein the Constitution Bench of this Court held that clause (b) of sub-section (2) of Section 133 of Jammu & Kashmir Constitution which is analogous to clause (b) of sub-section (1) of Section 3 of the Act requires consultation with the Public Service Commission in the matter of suitability of candidates for appointments, promotions and transfers in the service.

8. Coming to the next argument of learned counsel for the appellants, we find that originally the appellants were appointed through Public Service Commission on various categories of posts like Overseers, Tracers etc. The Board had reserved 10% posts of Assistants Engineers to be filled in from the qualified Engineering Graduates in the employment of the Board. During the period of 1976 to 1980, the Public Service Commission did not take any steps for recruitment to fill up the 10% quota set apart in the service for the Engineering Graduates who were in the employment in the Board. Since there was an emergent requirement for Assistant Engineers in the Board, the Board appointed the appellants who were in the service of the Board and possessed the requisite qualifications, to the post of Assistant Engineers on probation on the following terms :

1. He will be a probationer in the post of Assistant Engineer (Civil) for a period of 6 months on duty within a continuous period of one year from the date of joining duty.
2. He should pass the two Departmental tests viz. "Departmental test for Executive Staff" and "Account Test Lower" within the period of probation failing which the declaration of satisfactory completion of his probation may be postponed until he acquires these two tests or clause 5 below may be resorted to.
3. His appointments as Assistant Engineer (Civil) is in the scale of pay of Rs. 800-30-890-40-1250.
4. He is eligible to get the allowances admissible to the post held by him from time to time.
5. His appointment which is provisional during the period of probation, shall be regularised only on satisfactory performance of duties assigned to him during the period of probation. His services are liable to be terminated at any time during the period of probation, if his performance of duties is found to be unsatisfactory.
6. His duties and functions, in general as Assistant Engineer (Ele) will be in accordance with those laid down in B.O. No. EB.II.24780/75/25.2.1977 as amended or modified from time to time. He will have to attend to such works also as may be entrusted to him/her from time to time by superior officers.
9. The appellants passed the departmental examination and various tests and after successful completion of the probationary period their services as Assistant Engineers were regularised by the Board by an order dated 14.11.79 with effect from the date of joining their duties. One of such orders issued in favour of Shri V.

Venkiteswara Iyer, is extracted below :

"Kerala State Electricity Board

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Chief Engineer (Civil) K S E Board, Trivandrum.

Sub : Estt - Sri V. Venkiteswara Iyer, Asst. Engineer (C) Declaration of probation - Orders Issued -

Order No. EBC4/807/77 Dated 14.11.1979

Read : This office Memo No. EBC4/807/77/5.5.79 to Sri V.V. Venkiteswra Iyer.

ORDER

Sri V. Venkiteswara Iyer, First Gr. Overseer (Ele) Office of the Chief Engineer (Ele) KSE Board, Trivandrum was provisionally appointed as Assistant Engineer (Civil) and posted in this office vide this office memo read above and he had reported for duty on the A.N. of 5.5.79. As per the condition of appointment he will be a probationer in the post of Assistant Engineer (Civil) from the date of his joining duty in that post and the period of probation was then fixed as 6 months within a continuous period of one year.

The Executive Engineer, T.P.H. Office - has reported in Office note (i) dated 6.11.79 that the period of probation has been completed by Sri V. Venkiteswara Iyer, Assistant Engineer (Civil) satisfactorily.

Hence, it is hereby declared that Sri V. Venkiteswara Iyer has completed the probation satisfactorily and that his provisional appointment as Assistant Engineer (Civil) is regularised from the date of his joining duty.

Sd/-

Chief Engineer (Civil)"

However, the Public Service Commission did not agree for regularisation of services of the appellants with effect from the date of joining their duties and as such the matter was referred to the State Government. The State Government after consultation with the Public Service Commission found that the appellants had possessed the prescribed qualifications and were suitable to be appointed as Assistant Engineers and further they gained considerable experience and competence, and as such over-ruled the advice of the Public Service Commission and approved the regularisation of services of the appellants with effect from the date they acquired the requisite qualifications. Admittedly, the appellants had acquired the qualifications prior to 21.10.81, which is the date of joining duty by the respondents herein. In this background the question that arises is whether the Government could grant regularisation of services of the appellants as Assistant Engineers with effect from the date of acquisition of the requisite qualification. Sub-section (2) of Section 3 of

the Act provides that in case of any difference of opinion between the Public Service Commission and the Electricity Board on any matter, the Electricity Board is required to refer the matter to the Government and the decision of the Government thereon is to be treated as final. The said power of the State Government has not been questioned. Further, under Section 4 of the Act, the State Government is empowered to lay down the matters where consultation with the Public Service Commission is not necessary. The State Government in exercise of its power has already provided that in certain classes of appointments it is not necessary to consult the Public Service Commission. Thus, it would mean that the State Government has overriding power to take a final decision where there is a difference of opinion between the Board and the Public Service Commission in the matter of regularisation of the services of the employee. Here, we find that in the facts and circumstances of the case, Government took the decision to overrule the advice of the Public Service Commission while accepting the reference made by the Board and passed order to regularise the services of the appellants with effect from the date of acquiring necessary qualification. The said order passed by the State Government in law has effect of regularising the services of the appellants in accordance with the provisions of the Act. Once it is held that the regularisation of services of the appellants were in accordance with the provisions of the Act, the services of the appellants prior to regularisation were required to be counted while determining their *inter-se* seniority in the cadre of Assistant Engineers under Rule 27 of The Kerala State and Subordinate Rules. The High Court fell in error in holding that the seniority of the appellants has to be counted from the date when their services stood regularised by the State Government i.e. on 12.5.1982.

Since the appellants are to succeed on the aforesaid view we have taken, we are not inclined to enter into the third argument advanced by the learned counsel for the appellants.

For the aforesaid reasons, we find that the appeals deserve to succeed. Consequently, the judgment and order of the High Court under appeal is set aside. The appeals are allowed. There shall be no order as to costs.

Appeals allowed.