

SUPREME COURT OF INDIA

Md. Israils

Vs.

State of W.B.

C.A.No.879 of 1998

(G.B. Pattanaik and Y.K. Sabharwal JJ.)

07.01.2002

JUDGMENT

G.B.Pattanaik, J.

1. Never ending dispute of inter se seniority between the direct recruits and the promotees in a cadre has cropped up in this appeal, arising out of the judgment of the Division Bench of Calcutta High Court. The cadre in which the inter se seniority is required to be determined is the cadre of Employment Officer in the Directorate of National Employment Service in the State of West Bengal. The Governor of West Bengal has framed a set of Rules in exercise of power conferred under proviso to Article 309 of the Constitution providing the method of recruitment and the qualification required for the Gazetted post in *the Directorate of National Employment Seniority) Rules, 1981* (hereinafter referred to as "Seniority Rules"), with due regard to the recommendation of the West Bengal Public Service Commission. The Seniority Rules of 1981 have been framed by the Governor in exercise of power conferred under proviso to Article 309 of the Constitution. Rule 6 is the relevant provision for determining relative seniority of direct recruits and promotees. The aforesaid Rules is extracted herein below in extenso:-

"6. Relative seniority of direct recruits and promotees –

(1) The relative seniority between a promotee and a direct recruit shall be determined by the year of appointment or promotion of each in the post, cadre or grade irrespective of the date of joining.

(2) The promotees shall be en-bloc senior to the direct recruits of the same year." Rules to be quoted.

2. The West Bengal Public Service Commission approved the promotion of respondents 36 to 630 to the post of Employment Officer with effect from 29th June, 1988 and in pursuance to the same Government of West Bengal in Labour Department issued letter on 18.8.1988 by which letter the Governor was pleased to decide that the appointment of 63 officers to the West Bengal Employment Service as Employment Officer be approved with effect from 29th

June, 1988. On 30th March, 1989, consequently an affidavit was filed on behalf of the State in the pending Writ Petition and a prayer was made that the State Government be allowed to prepare a gradation list including all the Employment Officers treating the ad hoc employees since regularised with effect from 29th June, 1988, on the basis of their continuous officiation. The appellants direct recruits filed a reply to the said affidavit filed on behalf of the State Government and respondents 6 to 30 also had filed a Supplementary Affidavit. The Writ Petition was dismissed by a learned Single Judge on a conclusion that the seniority of ad hoc promotees has to be counted from the initial date of appointment on promotion and not from the date of their regularisation, after obtaining approval of the Public Service Commission, as contended by the Writ Petitioner. The direct recruits thereafter approached the Division Bench in appeal, and that appeal having been dismissed, the present appeal has been preferred on grant of Special Leave.

3. Mr. Bhaskar Gupta, learned senior counsel appearing for the appellants contended, that the ad hoc promotion of respondents 3 to 30 not being in accordance with the relevant statutory provisions contained in the Recruitment Rules read with the West Bengal Public Service Commission (Consultation by Governor) Regulation of 1995 as well as the Exemption Regulations, the services rendered prior to the approval by the Public Service Commission cannot be counted for reckoning the seniority in the cadre and, therefore, the High Court was in error in holding that the ad hoc promotees would be entitled to count their seniority from the initial date of their ad hoc promotion. Mr. Gupta further contended that under the Seniority Rules, more specifically Rule 6 thereof, the relative seniority between the promotee and direct recruit being required to be determined by the year of appointment or promotion of each of the promotee in the post, cadre or grade. It necessarily stipulates the year of regular promotion having been made in accordance with the Rules and not any ad hoc promotion made de hors the Rules, and therefore, the High Court committed error by directing that even period of ad hoc promotion could be counted for reckoning the seniority in the cadre. The learned counsel urged that in view of unequivocal stipulation in the letter of appointment in case of ad hoc promotees that appointment and posting is purely on an ad hoc basis subject to the approval of the Public Service Commission and is liable to be terminated at any time without any notice and further the appointment initially having been made for a period of 6 months or until further order, which ever is earlier, it is highly illegal to count such period of service as a regular service in the cadre for the purpose of seniority, and consequently, the High Court committed grave error in directing that the said period would be reckoned for the purpose of seniority in the cadre of Employment Officer.

4. Mr. Tapas Ray, learned senior counsel appearing for the State of West Bengal, on the other hand submitted, that the Statutory Recruitment Rules do not require in terms that the Public Service Commission should be consulted for filling up the post of Employment Officer on promotion. In that view of the matter the Government itself having approached the Public Service Commission since December 1980 for the approval to the ad hoc promotion, such ad hoc promotees should not suffer merely because Public Service Commission kept the matter pending for more than 8 years. The counsel next urged that the promotion being made according to the Recruitment Rules there is no rhyme or reason not to consider the ad hoc service for the purpose of seniority in the cadre and continuous length of

service from the date of appointment should be the criteria for determining the seniority in the cadre, the High Court, therefore did not commit any error. Mr. Ray lastly urged that the Writ Petition itself not having contained any prayer for determination of inter se seniority and the only prayer being that the ad hoc promotee should not be permitted to continue in the cadre without the approval of the Public Service Commission, and that approval having been accorded the Writ Petitions were rendered infructuous and, therefore the question of seniority ought not to have been considered.

5. Mr. Venkatramani, learned senior counsel appearing for respondents 36 to 30 argued with vehemence that the ad hoc promotees having got the essential pre requisites for being promoted, and they having been promoted after being duly consulted/selected, non approval of the Public Service Commission would not render the services rendered as void, and therefore, the High Court was fully justified in directing that the period of ad hoc service has to be counted for the purpose of seniority. Mr. Venkataramani further urged that there is no fetter on the power of the Appointing Authority from regularising the ad hoc services from an anterior date after consultation with the Public Service Commission with effect from the date when the vacancy in the promotee quota was available, and in the case in hand there being no case that the promotees were in excess of the 50% quota available for them, the High Court was fully justified in directing that the ad hoc services also has to be counted for reckoning their seniority in the cadre of Employment Officer. According to the learned counsel, the services rendered by ad hoc promotees without consultation with the Public Service Commission cannot be treated as non est and can be regularised from the date of the promotion, so long as substantive vacancy in the cadre within the promotee quota was available and that being the position, there is no error in the impugned judgment in the matter of determining the inter se seniority between the direct recruit and the promotees in the cadre of Employment Officer. In support of this contention the learned counsel relied upon several observations of this Court in the case of *Suraj Prakash Gupta vs. State of J & K*.¹ According to Mr. Venkataramani, the promotee Employment Officers having rendered continuous service in the cadre of Employment Officer, after being duly selected by the Appointing Authority, and such promotion having been made in the exigency of public service, even without consultation with the Public Service Commission as it could not brook any delay, it will be wholly inequitable to ignore the services from the date of promotion till 1988, the date on which the Public Service Commission accorded the approval. The rival submissions require a careful scrutiny of the relevant Rules and decisions of this Court indicating the principle on which seniority could be counted. But the moot question would be as to whether promotion to the post of Employment Officer being required to be made in consultation with the Public Service Commission under the Recruitment Rules, the period rendered prior to such approval can be counted for seniority? It may be stated that in the supplementary affidavit that was filed on behalf of the State Govt. in the High Court, though it was stated that the appointment of ad hoc officers were regularised after obtaining the approval of the Public Service Commission with effect from 29th June, 1988 by the Government order dated senko 18.8.1988, but a prayer was made to permit the Government to prepare a single Gradation List treating the former ad hoc officers who were then regularised as regular officers with effect from the dates of their continuous officiation.

6. A combined reading of the Recruitment Rules and the *West Bengal Public Service Commission (Consultation by Governor) Regulation 1955* as well as the Exemption Regulation of 1955 would unequivocally indicate that the post of Employment Officer could be filled up by promotion to the extent of 50% of the vacancies available in the cadre, after due consultation with the Public Service Commission. In fact the very appointment letter in favour of the respondents clearly indicated that the appointment is being made purely on ad hoc basis subject to the approval of the Public Service Commission. Then again the State Government being the Appointing Authority for the post of Employment Officer and the said post being a gazetted post with a pay scale of more than Rs.750/- per month, appointment by promotion could not be made without the approval of the Public Service Commission. It is in this context the questions raised are required to be answered.

7. In view of the rival stand of the parties, the first question that requires to be answered is whether the promotion to the post of Employment officer under the Recruitment Rules could be made by the State Government without consultation with the Public Service Commission? The Recruitment Rules merely provide that all the posts in the West Bengal National Employment Services excepting the post of Employment officer (Technical) could be filled up either by direct recruitment or by promotion, the feeder category being the post mentioned in Clauses(a) to (e) of Rule 3(A) of the said Rules. The post of Employment officer is undoubtedly a post borne in the West Bengal National Employment Service. The Recruitment Rules, unfortunately is totally silent as to how recruitment by promotion could be made to the said post of Employment officer borne in the West Bengal National Employment Service, though so far as direct recruitment is concerned, it is categorical that it would be by selection on the results of the West Bengal Civil Services examination for Group A services which is conducted by the Public Service Commission. The post in question being a gazetted civil post, under Article 320(3) of the Constitution the State Public Service Commission is required to be consulted for filling up the post by promotion unless in exercise of power under the proviso to Article 320(3) of the Constitution the Governor by way of making any Regulation specify the post for which it shall not be necessary for a Public Service Commission to be consulted. The Governor has framed a Regulation in exercise of such power in the State of West Bengal, called, 'The West Bengal Public Service Commission (Consultation by Governor) Regulation, 1955, and Rule 3 thereof provides that so far as clauses (a) and (b) of Article 320 (3) are concerned, if the Appointing Authority is not the State Government but is one subordinate to the State Government, then it shall not be necessary to consult the Public Service Commission. So far as the post of Employment officer is concerned, the Appointing Authority being the State Government, consultation with the Public Service Commission is required to be made while making promotion, as provided under Article 320(3)(b) and the same does not go out of the purview of consultation with the Public Service Commission in view of the provisions contained in Regulation 3 of the Consultation by Governor Regulation 1955. There has been another order issued by the Governor , called *The West Bengal Public Service Commission (Exemption from Consultation) Regulation, 1955* and Section 3A thereof unequivocally indicates that even if the State Government is the Appointing Authority in respect of the post, which is filled up by promotion, yet it will not be necessary to consult the Public Service Commission provided the maximum of the scale of pay of such post does not exceed Rs.750/- p.m. as per *West*

Bengal Services (Revision of Pay and allowance) Rules, 1970 and in the case of each post decision to exclude is taken in consultation with the Commission and a provision to that effect is incorporated in the relevant Recruitment Rules. Rule 3A of the Exemption Regulation is extracted hereinbelow in extenso:-

"Rule 3A.- It shall not be necessary to consult the Commission in regard to promotion to posts and services, the appointing authority of which is the State Government provided that the maximum of the scale of pay of such posts/services does not exceed Rs.750/- per month as per West Bengal Services (Revision of Pay & Allowances) Rules, 1970 and provided further that the decision to exclude such promotion in the case of each post/service is taken in consultation with the Commission and a provision to that effect is incorporated in the relevant recruitment rules."

8. A post of Employment Officer having a pay scale of more than Rs.750/- per month under the West Bengal Services (Revision of Pay & Allowances) Rules, 1970, and there being no decision to exclude the promotion to such post taken in consultation with the Commission, the conclusion is irresistible that for filling up the post of Employment officer by promotion requires consultation with the Public Service Commission. It is also apparent from Rule 3 of the Recruitment Rules, which says that all the posts in the West Bengal National Employment Services excepting the post of Employment Officer (Technical) is required to be made under the procedure prescribed under the said Rules and for the post of Employment Officer (Technical) Rule 4 has been specifically provided. In view of the aforesaid legal provisions, we unhesitatingly hold that the post of Employment Officer by promotion, under the Recruitment Rules required to be filled up only after consultation with the Public Service Commission. In fact the very appointment letters in favour of respondents 6 to 30 categorically indicate the same.

9. The next question that requires to be considered is, what would be the nature of services rendered by such promotees who were promoted on ad hoc basis prior to the consultation with the Public Service Commission, and whose appointment by promotion was approved by the Public Service Commission only on 29th June, 1988? In the Constitution bench decision of this Court in *Direct Recruit Class II Engineering Officers' Association vs. State of Maharashtra and others*², this Court after a thorough discussions of several earlier cases of the Court came to hold, that once an incumbent is appointed to a post according to the 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, where the initial appointment is only ad hoc and not according to the rules and made as a stop-gap arrangement, the officiation in such post cannot be taken into account for considering the seniority. According to Mr. Gupta, the learned counsel appearing for the appellant, the corollary would apply to the respondents 6 to 30 and, therefore, the officiation in the promoted post would not count for their seniority. According to Mr. Venkataramani, the corollary laid down in the case applies only to the case of a direct recruit and cannot have any application to the respondents 6 to 30. It is no doubt true, in the aforesaid case the question for consideration was whether in case of a direct recruit his seniority has to be counted from the date of his appointment or from the

date of his confirmation, and the Court answered the same that it should be from the date of the appointment.

10. In *Masood Akhtar Khan and Others vs. State of Madhya Pradesh & Others*³ which also dealt with the case of a direct recruit, the question for consideration was as to from what date the seniority in the cadre of an appointee could be considered? In that case also the very appointment letters indicate that the appointments are made for a period of 6 months, pending regular selection by Public Service Commission, and appointees, however, were allowed to continue beyond the period of 6 months and later on regularly selected by the Public Service Commission. This Court came to hold that the appointees, who have been allowed to continue beyond the period of 6 months and later on were regularly selected by the Public Service Commission can claim seniority from the date of their regular absorption in the cadre after being selected by the Public Service Commission, and services rendered from the date of their initial stop gap appointment till regular selection will not count for their seniority in the cadre.

11. In the case of *M.K. Shanmugam and another vs. Union of India & Others*⁴ this Court came to hold that any ad hoc service does not count for seniority in the cadre and it can only count in those cases where the initial appointment, though ad hoc is made by the same process, as is applicable to the regular appointment and is not a stop-gap appointment. In this case also the promotions had been made purely temporary and on ad hoc basis and for a limited period and it had been made clear in promotion order that the promotion is subject to the approval of the Public Service Commission and would not confer any seniority. In the case in hand also the order of promotion in favour of respondents 6 to 30 categorically indicated that the promotion is purely on ad hoc basis and subject to the approval of the Public Service Commission. Consequently the services rendered on such ad hoc basis till the approval of the Public Service Commission is obtained, will not count for reckoning the seniority in the cadre. The only other decision which requires consideration is the judgment of this Court in *Suraj Prakash Gupta and Others vs. State of J& K and Others*⁵, on which Mr. Venkataramani, learned senior counsel appearing for the private respondents strongly relied upon. Question no. 3 in this case was, whether ad hoc, stop-gap promotion of Assistant Engineers could be made beyond 6 months and till regularisation, by the Government without consulting the Public Service Commission? And question 1(b) was whether the entire ad hoc service of Assistant Engineers, who were promoted without consultation of the Public Service Commission can be counted for the purpose of seniority? So far as question no. 3 is concerned, the Court answered by referring to Regulation 4(d)(iii) of J&K Public Service Commission (Limitation of Functions) Regulations, 1957 and Rule 23 of the *J&K Civil Services (CCA) Rules 1956*, that the State Government has the power to regularise the services from an anterior date, as provided under Rule 23, and therefore, when appointment is made without consultation with the Public Service Commission, entire service will not be wiped off. This conclusion was possible because of the existence of Rule 23. In the case in hand we do not have any Rule corresponding to Rule 23, and therefore the ratio of the aforesaid case will have no application. Mr. Venkataramani, however, vehemently urged that the observations made in the aforesaid case are of general nature and should apply to every case irrespective of existence of any Rule corresponding to Rule 23 of the J&K Civil

Services (CCA) Rules. We are, however, not persuaded to accept this submission of learned counsel for the respondents. In view of the analysis of different provisions of Recruitment Rules, the West Bengal Public Service Commission (Consultation by Governor) Regulation, West Bengal Public Service Commission (Exemption from Consultation) Regulation, we have no doubt that the initial appointment of respondents 6 to 30, purely on ad hoc basis without consultation with the Public Service Commission cannot be held to be a regular service in the cadre of Employment officer, and as such the same cannot be counted for the purposes of reckoning their seniority in the cadre.

12. The question of seniority is governed by a set of rules called 'The West Bengal Services Determination of Seniority Rules, 1981 and under Rule 6 thereof relative seniority of direct recruits and promotees is required to be determined. The expression 'relative seniority' between a promotee and a direct recruit shall be determined by the year of appointment or promotion of each in the post, cadre or grade, irrespective of the date of joining would obviously mean the year of regular promotion and not any ad hoc promotion which is made contrary to the statutory rule. That being the position, so far as respondents 6 to 30 are concerned, their year of promotion would be 1988, the year when the Public Service Commission approved their promotion w.e.f. 29th June, 1988 and the State Government issued the necessary order on 11th August, 1988.

13. It is true, as contended by Mr. Ray learned senior counsel appearing for the State Bengal, that in the Writ Petition filed by the direct recruits there was no prayer for determination of inter se seniority and the only prayer was not to allow the ad hoc promotee to continue in the cadre without approval of the Public Service Commission, but it is the State Government who filed an application seeking permission of the Court to draw up an integrated gradation list of direct recruits and promotees treating the ad hoc promotees to be in the cadre from their initial date of appointment and not from the date of their regular service after being approved by the Public Service Commission; and on this application the High Court considered the question of determination of inter se seniority between the direct recruits and ad hoc promotees. That being the position, it is difficult for us to accept the submission of Mr. Ray, learned senior counsel appearing for the State of West Bengal that the claim of inter se seniority need not be gone into in the present appeal.

14. In the aforesaid premises, the impugned judgment of the Calcutta High Court, both of the learned Single Judge and that of a Division Bench are set aside and the appeal is allowed. It is held that the inter se seniority of the direct recruits appellant and the promotees respondents 6 to 30 has to be worked out treating the services of the direct recruits from the date of their initial appointment and the services of the respondents promotees from the date of their service being approved by the Public Service Commission and notified by the State Government w.e.f. June 1988. The seniority list may accordingly be re-drawn up. There will be no order as to costs.

¹(2000) 7 SCC 561

²(1990) 2 SCC 715

³(1990) 4 SCC 24

⁴(2000) 4 SCC 476

⁵(2000) 7 SCC 561