

SUPREME COURT OF INDIA

Union Of India

Vs

Dharam Pal

C.A. NO. 948 OF 2009

(S.B. Sinha and Dr. Mukundakam Sharma J.J)

12.02.2009

JUDGMENT

S.B. SINHA, J.

1. Leave granted.

2. Union of India is before us aggrieved by and dissatisfied with a judgment and order dated 13.7.2005 passed by the High Court of Punjab & Haryana at Chandigarh in Civil Writ Petition Nos. 8457/2000, 8458/2000 and 8489/2000.

3. Respondents herein joined the Railway services as Signal Khalasis in S & T Department, Delhi Division, Northern Railway in the year 1970. The next promotional post was the one of Material Checking Clerk (MCC). The terms and conditions of service are governed by Indian Railway Establishment Manual (IREM). Rule 174 of IREM regulates procedure for appointment to Class-III

(Group-C) posts i.e. Office Clerk. It provides that the vacancies in the said category are to be filled from two sources (i) 66-2/3% by direct recruitment through the agency of the Railway Recruitment Boards; and (ii) 33-1/3% by promotion by selection of specified Group 'D' staff. We are concerned with the second one.

4. Respondents, thus, could be appointed in the post MCC only in terms of the procedure of selection laid down therein. The selection procedure for appointment in the grade of Office Clerk is laid down in Chapter II, Section B of the IREM and as per Rule 219 therein, the selection procedure consists of written test and interviews. In the written test 50% of the questions are to be of objective type.

5. On and from 5.9.1986, the respondents and several other employees were allowed to officiate on ad hoc basis as MCC. Indisputably, for the said purpose, the mandatory procedure for promotion as contained in Rule 219 had not been followed. Even some of the employees, it is stated before us, had been working on officiating basis even prior to them. The appointment letter reads as under:

"Sub: Adhoc promotion as MCC grade 260-400 (Rs.) under SI (9)-SID/I, and UMB II and DI/D- I, SRE. The following senior most Khalasi grade 196-232 (Rs.) under the control of DST/UMB are hereby allowed to officiate as MCC Gr. 260-

400 Rs. on purely ad hoc basis against the existing vacancies.

1. Sh. Dharam Pal Kh. Under I/D-I/UMB.

2. Sh. Rakesh Kumar. Kh. Under SI (D)/II/UMB.

3. Sh. Ashok Kumar under SI/D/I/SRF They will draw Rs.260/- per month in grade 260-400 from the date of their resumption. They will not confer upon them/any right for future promotion. They will be reverted on arrival of selected candidates. Note:- This has approval of Sr. DSTE, New Delhi Sd/- for Senior Divisional Personnel Officer, New Delhi."

6. Those clerks appointed on officiating basis in an ad hoc manner made representations before the General Manager, Northern Railways for their promotion on regular basis. On or about 8.5.1987, a decision was taken that services of those who had completed three years' ad hoc appointment may be regularized on the basis of service record and viva- voce test as a one time dispensation and it was treated as a special case and not to be treated as a precedent. As the respondents had not

completed three years' ad hoc service at the relevant time, their cases were not considered. Another representation was made by them on 4.4.1990 on the premise that at that time they had completed three years of ad hoc service. The said representation was rejected.

An Original Application was filed by them before the Central Administrative Tribunal (for short "Tribunal") praying for issuance of a direction upon the appellant to regularize their services as MCC and to give the benefit of continuous ad hoc officiation towards seniority from the date they had been working as MCC and promote them further to the post of UDC from the date they became eligible therefor. It is stated that the employees of Ambala Division had also been given the benefit of the said concession.

7. Indisputably, respondents took part in the selection process for appointment in the post of MCC although they had completed more than three years of service. Viva-voce test was conducted. They were, thus, considered for appointment. Out of the employees who had appeared in the said viva-voce test, 12 persons became successful. On or about 24.10.1997, a provisional panel was prepared wherein their names were included. The services of the said 12 successful employees were regularized with immediate effect. Their services were later on directed to be regularized retrospectively with effect from 10.8.1988.

8. By reason of a judgment and order dated 11.2.2000, the Tribunal allowed the Original Application filed by the respondents opining that despite the fact that ad hoc appointments were de hors the recruitment rules but in view of the purported policy decision taken by the appellant herein, their services were required to be regularized, stating:

"9. As is evident from the principle cited verbatim above, as laid down by the Apex Court, even if the initial officiating appointment was de hors the recruitment rules in the wake of regularization of such appointments, the entire period of the officiating service becomes eligible for other service benefits, like the fixation of seniority and pay. Though the learned counsel for the respondents has strenuously sought to draw a distinction between ad hoc appointments on the one hand and the officiating appointments on the other, he has failed to produce any material based on the provision of either the Indian Railway

Establishment Manual or the rules of appointments applicable generally to different Departments of the Government of India that for the purpose of reckoning the service rendered by an employee such a distinction does, indeed, exist or is recognized by those provisions. A mere recourse to the dictionary meaning of an officiating appointment, which, were nevertheless not, merely says that it amounts to discharging the official duties of a post, does not come to the help of the respondents in any meaningful manner. It is not denied by the respondents that the applicants had, indeed, been discharging all the duties normally attached to the posts of MCCs. In that view of the matter we fail to understand how in this context officiating appointments as MCCs would have been different from an ad hoc appointment as MCCs.

10. For the reasons discussed by us at some length above, we are unable to agree with the contentions urged on behalf of the respondents that the applicants are not eligible for counting the ad hoc period of their service between 1986 and 1988 for the purpose of normal service benefits like seniority, fixation of pay etc."

9. Appellant challenged the aforesaid decision by filing writ petitions before the High Court, which by reason of the impugned judgment, have been dismissed.

10. Mr. Qadri, learned counsel appearing on behalf of the appellant would urge:

i The impugned judgment of the High Court cannot be sustained insofar as it failed to take into consideration the financial implication in directing regularization of services of the respondents on completion of three years' from their respective dates of officiating.

ii Such an order would affect the seniority of other employees who having not been impleaded as parties, the seniority issue could not have been determined.

iii. There are also other employees who had been selected later on and may claim seniority on the said basis.

iv. Respondents having been appointed on an ad hoc basis without any right whatsoever, their services could not have been directed to be regularized.

11. Mr. D.R. Sharma, learned counsel appearing on behalf of the respondents, on the other hand, would contend that having regard to the fact that some employees of Ambala Division had been given similar benefits and keeping in view the fact that the respondents had been working since 1987, this Court may not exercise its discretionary jurisdiction under Article 136 of the Constitution of India.

Drawing our attention to a decision of this Court in T. Vijayan & ors. vs. Divisional Railway Manager & ors. [(2000) 4 SCC 20], it was urged that as grant of ad hoc promotion is permissible in terms of the Rule 216 of IREM, the High Court was within its jurisdiction to pass the impugned judgment.

12. Before advertng to the rival contentions raised hereinbefore, we may notice the relevant Rules:

"213. Promotion.-- (a) A Railway servant may be promoted to fill any post whether a selection post or a non-selection post only if he is considered fit to perform the duties attached to the post. The General Manager or the Head of Department or Divisional Railway Manager may prescribe the passing of specified departmental or other test as conditions precedent to a Railway servant being considered fit to hold specified post; such rules should be published for the information of the staff concerned.

(b) Unless specifically provided otherwise, the promotion shall be made without any regard for communal or racial consideration."

"214. (a) Non-selection posts will be filled by promotion of the senior most suitable Railway servant. Suitability whether an individual or a group of Railway Servants being determined by the authority competent to fill the posts on the basis of the record of service and/or departmental tests if necessary. A senior Railway servant may be passed over, only if he/she has been declared unfit for holding the post in question. A declaration of unfitness should ordinarily have been made sometime previous to the time when the promotion of the Railway servant is being considered.

(b) When, in filing of a non-selection post, a senior Railway servant is passed over the authority making the promotion shall record briefly the reason for such supersession.

(c) In respect of promotion to non-selection post, the following principles should be followed:-

(i) Staff in the immediate lower grade with a minimum of 2 years service in that grade will only be eligible for promotion. The service for this purpose includes service, if any rendered on ad hoc posts followed by regular service without break. The condition of two years service should stand fulfilled at the time of actual promotion and not necessarily at the stage of consideration.

(ii) The number of eligible staff called for consideration should be equal to the number of existing vacancies plus those anticipated during the next four months due to normal wastage (i.e. retirement/superannuation), likely acceptance of request for voluntary retirement, staff approved to go on deputation to other units, staff already empanelled for the ex-cadre posts, creation of additional posts already sanctioned by the competent authority, and staff likely to go out on transfer

to other Railways/Divisions.

(iii) Where non-selection posts are filled from different categories of staff, no hard and fast limits need be prescribed as to the number of the candidates to be admitted from each eligible category. In cases where posts are to be filled on the quota basis it should be ensured that each category is adequately represented within the overall number of candidates called up. Employees passing the suitability test should only be placed in the select list. Employees not qualifying in the test should not be taken merely to make up the quota fixed.

(iv) An employee who has passed a suitability test once need not be called for the test again and should be eligible for promotion as and when vacancies arise.

(v) A suitability test should be held at the interval which should not be less than six months. All the eligible candidates as per their seniority including those who failed at the last test should be called. The period of six months is reckoned from the date of announcement of the result.

(vi) If an employee fails in a suitability test but is called up again, a suitability test, after a time lag of six months and he passes the same, he should be given preference over his junior who had passed the suitability test earlier than him but is still waiting to be promoted for want of a vacancy."

xxx xxx xxx

216.A. Ad hoc promotion against selection and non-selection posts.-- (i) Ad hoc promotions should be avoided as far as possible both in selection and non-selection posts, and where they are found inescapable and have to be made in the exigency of service, they should be resorted to only sparingly and only for a short duration of 3 to 4 months. The ad hoc promotion should be ordered only from amongst the seniormost suitable staff. As a rule a junior should not be promoted ignoring his senior.

(ii) The following further guidelines should be adhered to while ordering ad hoc pro- motions:

(a) In case of non-selection posts which are filled on the basis of seniority cum suitability while there is no provision for any lengthy waiting list. The processing involved being not unduly cumbersome or time consuming the post shall be filled after following the prescribed procedure

quickly. When these posts are to be filled by trade test, this should be conducted systematically. Necessity for ad hoc promotion is thus obviated.

(b) In regard to selection posts, it is essential that all the selection should be conducted regularly as per extant instructions. While there is no objection to ad hoc promotions being made in leave vacancy and short duration vacancy, ad hoc promotion against regular promotion should be made only after obtaining Chief Personnel Officer's approval. Proposal sent to Chief Personnel Officer for ad hoc promotion against regular vacancy should indicate detailed justification as to why regular selection could not be held. Chief Personnel Officer should keep record of having accorded approval to such ad hoc promotion and review the progress made in filling up these posts by selected persons every month. Chief Personnel Officer should also review selection to all posts afresh, whether such posts are controlled either at the Divisional level or at extra Divisional level. He should also keep the record of the categories where he has to approve ad hoc promotions and these records should be available to the Board's Officer on their visit to Railways. (Board's letter No. E(NG) II/81/RC-1/1 dated 1.4.1981)

(c) Notification for ad hoc promotions against selection posts should specifically include a remark to the effect that the person concerned has not been selected for promotion and that his temporary promotion gives him no right for regular promotion and that his promotion is to be treated as provisional. For the purpose of drawing his pay which should not be drawn for more than three months without General Manager's specific sanction. The General Manager should issue provisional sanction for periods exceeding six months at a time and these powers should be exercised by the General Managers/Additional General Managers personally or by his senior Dy. General Manager. (Board's letter No. E(NG) 1-73-PM-1/222 dated 23.2.1974; E-55/PM-1/19/3 dated 11.1.1955; E(NG) 1-79-PM 1-105 dated 26.4.79 & E (NG)1-77-PM 1-117 dated 17.10.77)

(iii) In any case no second ad hoc promotion shall be allowed. (Board's letter No. E(NG) 1-85/PM/5-III dated 23.8.1985)

xxx xxx xxx

"302. Seniority in initial recruitment grades.-- Unless specifically stated otherwise, the seniority among the incumbents of a post in a grade is governed by the date of appointment to the grade. The grant of pay higher than the initial pay should not, as a rule, confer on a railway servant seniority above those who are already appointed against regular posts. In categories of posts partially filled by direct recruitment and partially by promotion, the criterion for determination of seniority should be the date of regular promotion after due process in the case of promotees and the date of joining the working post after due process in the case of direct recruit, subject to maintenance of inter-se seniority of promotees and direct recruits among themselves. When the dates of entry into a grade of promoted railway servants and direct recruits are the same they should be put in alternate positions

the promotes being senior to the direct recruits, maintaining inter-se seniority of each group.

Note.- In case the training period of a direct recruit is curtailed in the exigencies of service, the date of joining the working post in case of such a direct recruit shall be the date he would have normally come to a working post after completion of the prescribed period of training."

13. A policy decision taken by the authorities of the Railway to regularize the services of those MCCs who had been appointed on ad hoc basis was a one time measure. It was not to be followed as a precedent. It was, therefore, not necessary to follow subsequently.

14. Indisputably, Rule 216 provides for ad hoc promotion against selection and non-selection posts. In T. Vijayan (supra), this Court opined:

"18. The above para indicates that ad hoc promotion is permissible pending regular selection. Once ad hoc promotion is found to be permissible under the Rules and Respondents 4 to 143 were promoted on ad hoc basis in the exigencies of service, pending regular selection, which, incidentally, took sufficient time as Respondents 4 to 143 who were on official duty "online" were not available at one point or at one time to facilitate the selection, the entire period of ad hoc service will have to be counted towards their seniority, particularly as all the respondents (4 to 143) were duly selected and their services were also regularised with effect from 16-12-1991 by order dated 18-1-1992. The employees concerned, including Respondents 4 to 143 had already been alerted for the process of selection which had been started in 1988 (sic 1987). While making direct recruitment against posts which were advertised in 1985, it was given out to the present appellants that their absorption and seniority was subject, inter alia, to the finalisation of the selection to the post of First Fireman which was in progress. The appellants, as stated earlier, were selected in 1988 and were put on two years' training as Apprentices whereafter they were absorbed by order dated 18-7-1990 and were issued separate and individual appointment letters in which, it was clearly mentioned that their seniority was subject to the finalisation of the selection for promotion to the post of First Fireman which was in progress. The appellants, in this situation, cannot claim seniority over Respondents 4 to 143 who had already been appointed to the posts of First Firemen on ad hoc basis and were after due selection regularised on those posts."

Apart from the fact that in T. Vijayan (supra), the effect of Rule 302 of the Rules had not been taken into consideration, the question as to whether the seniority of the employees could have been reckoned only on the basis of their date of initial appointment irrespective of the fact as to whether in doing so the mandatory procedure laid down in the rules have been followed or not, had not been taken into consideration. It proceeded on the premise that as IREM permits ad hoc promotion, the date on and from which the employee concerned was promoted on an ad hoc basis would be relevant. It was decided keeping in view the peculiar fact situation obtaining therein. Respondents therein were promoted on ad hoc basis in a situation where regular promotion was not immediately

possible. There was a huge time gap. A question as to whether the respondents therein were entitled to the benefit of ad hoc service rendered by them for the purpose of reckoning their seniority fell for consideration in the aforementioned situation. The direct recruits were appointed on probation in 1988 and were put to two years' training as Apprentice whereafter only they were absorbed in the service of the Railways with effect from 18.7.1990 subject to the finalization of the selection for promotion. It is in the aforementioned situation, the question of inter se seniority between the direct recruits and the promotees came up for consideration.

Even otherwise, the decision in T. Vijayan (supra) has no application to the fact of the present case. We have noticed hereinbefore that the question in regard to inter se seniority amongst the promotees on the one hand and the direct recruits on the other, are governed by Rule 302 of the Rules. It is now a well settled principle of law and in respect whereof there is absolutely no quarrel that in view of the decision of this Court in Direct Recruit Class-II Engineering Officers' Association & ors. vs. State of Maharashtra & ors. [(1990) 2 SCC 715] an employee appointed to a post according to rule would be entitled to get his seniority reckoned from the date of his appointment and not from the date of his confirmation. It is, however, also well settled that where the initial appointment is only ad hoc, not according to rules and made a stop-gap arrangement, the period of officiation in such post cannot be taken into account for considering the seniority.

Rule 216 of IREM in no uncertain terms provides that such an appointment should be made for short duration vacancy only. Such orders of promotion are required to be made only upon obtaining the approval of Chief Personnel Officer. In the instant case, such an approval was not obtained. Approval was obtained only at the Divisional level. Even while extending the period of three months, the circular letter of the Board dated 23.2.1974 laying down for sanction of the General Manager, therefore, had not been complied with.

When an ad hoc appointment is made, the same must be done in terms of the rules for all purposes. If the mandatory provisions of the rules had not been complied with, in terms of Direct Recruit (supra), the period shall not be taken into consideration for the purpose of reckoning seniority. Furthermore, it is one thing to say that an appointment is made on an ad hoc basis but it is another thing to say that inter se seniority would be determined on the basis laid down in another rule.

This aspect of the matter has been considered by this Court in Swapan Kumar Pal & ors. vs. Samitabhar Chakraborty & ors. [(2001) 5 SCC 581], wherein this Court keeping in view the provisions of IREM held as under:

"...The next case relied upon by Mr Rao is the case of Suraj Parkash Gupta v. State of J&K. In the aforesaid case, on consideration of the relevant rules governing the service conditions of the Assistant Engineers of the Jammu and Kashmir Government, the Court had observed that ad hoc or temporary service of a person, appointed by transfer as an Assistant Engineer or by promotion as an

Assistant Executive Engineer can be regularised through the Public Service Commission and Departmental Promotion Committee from an anterior date in a clear vacancy in his quota, if he is eligible and found suitable for such transfer or promotion, as the case may be, and his seniority will count from that date. The aforesaid conclusion was drawn because of the provisions of Rule 23 and Rule 15 of the Jammu and Kashmir Rules but in the case in hand, there is no provision, which has been brought to our notice, which enables the appointing authority to regularise a promotion from an anterior date, though the suitability test is held at a later date. In the absence of any such provision in the Rules in question, the ratio of the aforesaid decision, on interpretation of the relevant rules of the Jammu and Kashmir Engineering Rules will have no application. In the aforesaid premises, we have no hesitation in coming to the conclusion that merely because a suitability test had not been held at regular intervals an employee promoted on ad hoc basis can claim that it is a regular promotion after due process of selection. As such the seniority of promotees in the cadre of Senior Clerk can be counted only from the date of regular promotion, after due process of selection."

In State of W.B. & ors. vs. Aghore Nath Dey & ors. (1993) 3 SCC 371, this Court held:-

"20. The Constitution bench having dealt with Narendra Chadha in this manner, to indicate the above principle, that decision can not be construed to apply to cases where the initial appointment was not according to rules.

21. We shall now deal with conclusions (A) and (B) of the Constitution bench in the Maharashtra Engineers' case quoted above.

22. There can be no doubt that these two conclusions have to be read harmoniously, and conclusion (B) cannot cover cases which are expressly excluded by conclusion (A). We may, therefore, first refer to conclusion (A). It is clear from conclusion (A) that to enable seniority to be counted from the date of initial appointment and not according to the date of confirmation, the incumbent of the post has to be initially appointed 'according to rules'. The corollary set out in conclusion (A), then is, that 'where the initial appointment is only ad hoc and not according to rules and made as a stop-gap arrangement, the officiation in such posts cannot be taken into account for considering the seniority.' Thus, the corollary in conclusion (A) expressly excludes the category of cases where the initial appointment is only ad hoc and not according to rules, being made only as a stop-gap arrangement. The case of the writ petitioners squarely falls within this corollary in conclusion (A), which says that the officiation

in such posts cannot be taken into account for counting the seniority.

23. This being the obvious inference from conclusion (A), the question is whether the present case can also fall within conclusion (B) which deals with cases in which period of officiating service will

be counted for seniority. We have no doubt that conclusion (B) can not include, within its ambit, those cases which are expressly covered by the corollary in conclusion (A), since the two conclusions cannot be read in conflict with each other.

24. The question, therefore, is of the category which would be covered by conclusion (B) excluding therefrom the cases covered by the corollary in conclusion (A).

25. In our opinion, the conclusion (B) was added to cover a different kind of situation, wherein the appointments are otherwise regular, except for the deficiency of certain procedural requirements laid down by the rules. This is clear from the opening words of the conclusion (B), namely, 'if the initial appointment is not made by following the procedure laid down by the rules' and the later expression 'till the regularisation of his service in accordance with the rules'. We read conclusion (B), and it must be so read to reconcile with conclusion (A), to cover the cases where the initial appointment is made against an existing vacancy, not limited to a fixed period of time or purpose by the appointment order itself, and is made subject to the deficiency in the procedural requirements prescribed by the rules for adjudging suitability of the appointee for the post being cured at the time of regularisation, the appointee being eligible and qualified in every manner for a regular appointment on the date of initial

appointment in such cases." {See also M.K. Shanmugam & anr. vs. Union of India & ors. [(2000) 4 SCC 476]}

This Court in R.K. Mobisana Singh vs. Kh. Temba Singh & ors. [(2008) 1 SCC 747] following the principles laid down by this Court in Direct Recruit (supra) as also Swapan Kumar Pal (supra) held as under:

"39. Applying the principles of the aforementioned decisions to the facts of this case, we are of the opinion that although in terms of the office memorandum, no retrospective effect could be given to the order of regularisation passed in favour of the promotees, as in absence of any seniority rules operating in the field, the State was required to evolve a policy. It for its own reason did not do so.

40. The office memorandum of 1959 was applicable in a case of this nature. In some of the cases, promotion might have been given without following the rules. When promotion is given only in the exigency of situation without following the Rules, the period cannot be counted towards seniority.

41. If they had been given regularisation with retrospective effect, the same by itself may not be a ground to apply the said order ipso facto for determining the inter se seniority. Seniority although is not a fundamental right but a civil right. Such a right of the direct recruits could not have been taken

away without affording an opportunity of hearing to them.

42. It was obligatory on the part of the official respondents to take into consideration that the retrospective regularization could be granted only when there exists such a rule. If rules were not followed at the time of grant of promotion, question of grant of regularization with retrospective effect would not arise. Retrospective regularization whether in terms of the directions of the High Court or otherwise, thus, although could confer other service benefits to the officer concerned, but the same cannot be held to be of any assistance for reckoning seniority with retrospective effect."

15. We, therefore, are of the opinion that the Tribunal and consequently the High Court committed a serious error insofar it failed to take into consideration the binding authorities of this court. While saying so, we are, however, not oblivious of the fact that in a short judgment in *Raj Kishore Vishwakarma & ors. vs. Union of India & ors.* [(1997) 11 SCC 619], this Court held:

"4. Mr. Vikram Mahajan, learned counsel appearing for the Railways, has very fairly stated that the appellants were appointed in relaxation of the Rules in exercise of the powers under Rule 113. He has taken us through the counter filed before the Tribunal and also before this Court wherein it is clearly stated that the appellants were appointed in relaxation of the Rules. We are of the view that the appellants having been appointed in relaxation of the Rules their appointments have to be treated under the Rules. When the appellants were appointed under the Rules even the ad hoc period, which is continuous, has to be taken into consideration for the purpose of fixation of seniority in the cadre of Typists"

16. However, the factual matrix obtaining in the said case was absolutely different. In that case power of relaxation was invoked. Herein we are not concerned with any power of relaxation. In any view of the matter, it is now well settled that even power of relaxation even specifically provided in the appointing authority himself being created a statute cannot be exercised in an arbitrary and cavalier fashion.

In *Kendriya Vidyalaya Sangathan and Ors. v. Sajal Kumar Roy and Ors.* [(2006) 8 SCC 671], this Court held:

"11...The appointing authorities are required to apply their mind while exercising their discretionary jurisdiction to relax the age limits. Discretion of the authorities is required to be exercised only for deserving candidates and upon recommendations of the Appointing Committee/ Selection Committee. The requirements to comply with the rules, it is trite, were required to be complied with fairly and reasonably. They were bound by the rules. The discretionary jurisdiction could be exercised for relaxation of age provided for in the rules and within the four corners thereof. As

Respondents do not come within the purview of the exception contained in Article 45 of the Education Code, in our opinion, the Tribunal and consequently, the High Court committed a manifest error in issuing the aforementioned directions."

17. For the reasons aforementioned, the impugned judgment cannot be sustained, it is set aside accordingly. The appeal is allowed. However, in the facts and circumstances of the case, there shall be no order as to costs.