

# SUPREME COURT OF INDIA

Ajay Kumar Singh

Vs.

The State of Uttar Pradesh

C.A.No.10829 of 2014

(Kurian Joseph and Sanjay Kishan Kaul, JJ.,)

09.08.2018

## JUDGMENT

**Sanjay Kishan Kaul, J.,**

1. This is one more of the perennial disputes between the promotees and the direct appointees - this time to the post of the 'Assistant Engineer (Electrical & Mechanical)' in the U.P. Development Authorities Centralised Services. Both the set of appointments were initially made on an ad hoc basis but were subsequently confirmed. The core dispute relates to the requirement of consultation with the Uttar Pradesh Public Service Commission (for short 'UPPSC') provided in Article 320(3) of the Constitution of India at the time when these ad hoc appointments were confirmed. It is the say of the direct appointees that no such consultation took place at the time when the ad hoc promotees-appointees were confirmed, in breach of a mandatory requirement and thus, their appointment is illegal. The sequitur this is the prayer made by the direct appointees that all such promotees, even if the service were to be regularised now through a consultative process with the UPPSC, would be liable to be placed below the direct appointees.

2. The factual matrix of the dispute arose much earlier but the culmination is stated to be the seniority list dated 15.5.2007 for the post of the 'Assistant Engineer', in terms whereof the promotees have been placed above the direct appointees. It is in the year 1985 that the U.P. Development Authorities Centralised Services was created by virtue of the U.P. Urban Planning & Development (Amendment & Validation) Act, 1985. The Amendment Act to amend the parent Act, i.e., U.P. Urban Planning & Development Act, 1973 (hereinafter referred to as the 'said Act') was enacted with a view to provide better development by the local authorities in the State of Uttar Pradesh, and in the process, a centralised service was created to man these authorities. To facilitate this, Section 5A was inserted by the Amendment Act to create the centralised services of all development authorities. The U.P. Development Authorities Centralised Services Rules, 1985 (hereinafter referred to as the 'said Rules') were enacted under the said Section 5A and were notified and came into effect on 25.6.1985. Rule 8 of the said Rules provides for the source of recruitment to various posts

mentioned in Schedules I to VI. Promotion to the post of 'Assistant Engineer' is enlisted in Schedule III. The relevant portion of Schedule III reads as under:

<b>Name of the Centralised Service</b>	<b>Name of the Post</b>	<b>Post from which Promotion to be Made</b>	<b>Minimum Qualifying Service Required for Promotion</b>
<b>Engineering</b>	<b>Sahayak Abhiyanta (Rs. 850-1720)</b>	<b>Avar Abhiyanta (Rs. 485-860)</b>	<b>Must possess the requisite qualifications of a qualified Junior Engineer and must have completed a minimum service of 10 years as qualified Junior Engineer on first July of recruitment year.</b>

**Sahayak Abhiyanta :: Assistant Engineer**  
**Avar Abhiyant :: Junior Engineer**

It may be noted that Schedule III provides for the post to be filled in by the Public Service Commission in the ratio of 50% through promotion and 50% through direct recruitment.

3. An advertisement was published on 11.7.1987 for direct recruitment to 9 posts of 'Assistant Engineer (Electrical & Mechanical)' with educational qualifications as a degree in Electrical or Mechanical Engineering. The appointment was so made as per Office Memorandum dated 25.8.1987 on the basis of a selection done on 13.8.1987 by a Selection Committee. The appointment is on "fully temporary and ad hoc basis." Clause 3 of the Office Memorandum states that such appointments are fully temporary for a period of maximum one year or up to the period until the regular candidates are selected by the Public Service Commission and are made available, whichever is earlier. It was also stated that the services could be terminated at any time without any prior information. We may note here that the two appellants in Civil Appeal No.10829/2014 and the one appellant in Civil Appeal No.10828/2014 are amongst the persons so appointed on an ad hoc basis, as direct recruits.

4. The said Rules were amended from time to time. As per the 3rd Amendment of the Rules by Notification dated 7.2.1992 a new Rule 20-A was inserted with the object of regularising ad hoc appointment of direct recruits, who were so recruited on or before 1.10.1986. However, this amendment did not come to the aid of the appellants as the cut-off date was 1.10.1986, while the appellants were recruited on 25.8.1987. It was only the 7th amendment to the 1985 Rules, published on 2.8.2001, which amended the cut-off date, under Rule 20-A, from 1.10.1986 to 29.6.1991 for regularisation of the ad hoc direct recruits, which facilitated

the regularisation of the appellants, who were recruited before 29.6.1991. The appellants were, thus, subsequently regularised in terms of the Office Memorandum dated 20.11.2001.

5. In the meantime, parallelly, another story was unfolding in respect of the promotees. The seed of the dispute was laid by the 4th amendment to the Rules notified on 8.9.1993 by which Rule 21, which laid down the procedure for recruitment by promotion, was amended to the extent that it did away with consultation with the UPPSC for certain posts. The relevant amendment showing the existing and amended Rules is extracted hereinunder:

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Existing rule	Procedure for recruitment by promotion	Rule as hereby substituted	Procedure for recruitment by promotion
	21. Recruitment by promotion shall be made on the basis of seniority subject to the rejection of unfit in accordance with the "Uttar Pradesh promotion by selection in consultation with Public Service Commission (Procedure) Rules, 1970" as amended from time to time		21. Recruitment by promotion shall be made by the State Government on the basis of seniority subject to the rejection of unfit and it shall not be necessary to consult the Uttar Pradesh Public Service Commission on the principles to be followed in making promotion or on the suitability of candidates for promotion to the posts of Apar Sachiv, Sanyukt Sachiv, Sampatti Adhikari, Varisht Kar evam Rajaswa Adhikshak, Mukhya Abhiyanta Adhishashi Abhiyanta, Lekha Adhikari, Mukhya Nagar Niyojak, Nagar Niyojak, Karyalaya Adhikshak and Niji Sachiv mentioned in Schedule-I.

It may be relevant to note that while doing away with the necessity of consultation with the UPPSC, the same was confined to the posts mentioned in the amended Rule, and the post of the 'Assistant Engineer' was not mentioned in the same.

6. The next development was on 7.9.1994, when the 13<sup>th</sup> Amendment to the Uttar Pradesh Public Service Commission (Limitation of Function) Regulations, 1954 (hereinafter referred to as the 'said Regulations') were brought into force which did away altogether with the consultative process with the UPPSC regarding suitability of candidates in making promotion to a post in the State Service. Taking into aid this amendment, a Departmental Promotion Committee for regular promotion of the Junior Engineers to the post of 'Assistant Engineer' was held on 27.5.1995, which specifically recorded that in view of this amendment, there was noneed to consult the UPPSC. However, the endeavour made to do away with the process of consultation regarding suitability for promotion to services and posts, across the board, did not meet with the approval of the Allahabad High Court, in the case of *Sushil Chandra Srivastava vs. State of U.P. and Ors*<sup>1</sup>., where it was held to be constitutionally invalid and the challenge to the aforementioned amendment was upheld, striking down as ultra vires the said Regulations regarding promotion to the State services and posts. The judgment took note of Article 320(3) of the Constitution, which reads as under: "320. Functions of Public Service Commissions. -

(3) The Union Public Service Commission or the State Public Service Commission, as the case may be, shall be consulted -

(a) on all matters relating to methods of recruitment to civil services and for civil posts; Provided that the President as respects the all-India services and also as respects other services and posts in connection with the affairs of the Union, and the Governor, as respects other services and posts in connection with the affairs of a State, may make regulations specifying the matters in which either generally, or in any particular class of case or in any particular circumstances, it shall not be necessary for a Public Service Commission to be consulted."

7. The High Court noticed the Constitution Bench judgment of this Court in *State of U.P. v. Manbodhan Lal*<sup>2</sup>, declaring that Article 320(3)(c) of the Constitution was directory in nature and making the following observations, which were extracted by the High Court as follows:

"If it had been intended by the makers of the Constitution that consultation with the Commission should be mandatory, the proviso would not have been there, or, at any rate, in the terms in which it stands. That does not amount to saying that it is open to the Executive Government completely to ignore the existence of the Commission or to pick and choose cases in which it may or may not be consulted."

8. The High Court observed that in the instant case, by the impugned amendment, the process of consultation had been completely taken away and, thus, it would fall within the caveat put by this Court itself in the latter part of the aforesaid observation. This judgment has become final.

9. The effect of the aforesaid judgment was, thus, clear that the process for promotion of Junior Engineers, would require consultation with the UPPSC. However, despite this, an Office Memorandum dated 29.12.1995 was issued promoting Junior Engineers to the post of 'Assistant Engineer'. To do so, reliance was placed on the amendment to Rule 21, carried out by the 4th Amendment to the Rules on 8.9.1993, and since the said amendment to the Rules had not been struck down, the process of consultation was not required. This, however, completely missed the aspect of the post of the 'Assistant Engineer' not being one of the posts covered under the said amendment, a position, which could not be seriously disputed before us. The regularisation of these promotees was, however, made in pursuance of the 14th Amendment to the Rules, inserting Rule 21A, providing for regularisation of services of ad hoc promotees working prior to 30.6.1998.

10. The effect of this was that the regularisation would take effect from the date of their promotion, i.e., 29.12.1995. We may add that insofar as the seniority claim for inter se promotees is concerned, the same is covered by sub-rule (8) of Rule 21A, which reads as under:

"(8) A person promoted under this rule shall be entitled to seniority only from the date of order of promotion after selection in accordance with these rules and shall, in all cases, be placed below the persons promoted in accordance with the procedure for

promotion contained in sub-rule (5) prior to the promotion of such person under these rules."

11. The gravamen of the dispute, thus, is that if the promotees have been promoted in accordance with law, in pursuance of the Office Memorandum dated 29.12.1995, then they would rank as senior to the appellants who were regularised only on 20.11.2001 in pursuance of the 7th Amendment dated 2.8.2001. It was in this background that the impugned seniority list of the 'Assistant Engineer' was published on 15.5.2007 with the promotees being put above the direct appointees. It is this seniority list that has been assailed in the writ petition, which has been dismissed by the impugned order.

12. Learned counsel for the appellants sought to contend before Us that in the absence of consultation with the UPPSC, the appointment of the private respondents cannot be stated to be regular and, in fact, suffers from an inherent legal defect. The fact that consultation with the UPPSC was dispensed with initially under the umbrella of the 13th Amendment to the said Regulations, notified on 7.9.1994, and that umbrella having been lifted by the said Amendment being struck down by the Allahabad High Court vide judgment dated 19.10.1995, clearly made the appointment of the private respondents illegal. The endeavour to then bring the same within the 4th Amendment to the said Rules, notified on 8.9.1993, is to no avail as the post of 'Assistant Engineer' was not mentioned as one of the posts for which consultation with the UPPSC had been dispensed with. Thus, while the blanket lifting of consultation with the UPPSC, as mentioned aforesaid, was struck down, the other amendment to the said Rules did not cover the case of the private respondents.

13. On the other hand, the State Government sought to rebut this argument on the ground that at best this was an irregular appointment and not an invalid appointment as there could always be ex post facto consultation with the UPPSC. This was, of course, an argument in the alternative, however, after not being able to really establish that the 4th Amendment to the Rules dated 8.9.1993 did not specifically cover the post of the 'Assistant Engineer'. We may add that there can be no real quibble with the proposition that such consultation, even as per the State Government's answer to the RTI query raised by the appellants, was required wherever posts come within the purview of the Commission and thus, consultation is necessary insofar as the case of the promotion from 'Junior Engineer' to 'Assistant Engineer' is concerned.

14. The second limb of the submission of Mr. P.N. Mishra, learned Senior Counsel appearing for the State Government, rested on the support derived from the Constitution Bench judgment of this Court in *Direct Recruit Class II Engineering Officers' Association v. State of Maharashtra & Ors*<sup>3</sup>. In the concluding paragraph number 47, laying down the propositions in respect of inter se seniority of promotees and direct appointees, it was stated in sub-paragraph (B) as under:

"(B) If the initial appointment is not made by following the procedure laid down by the rules but the appointee continues in the post uninterruptedly till the regularisation

of his service in accordance with the rules, the period of officiating service will be counted."

15. Since the challenge has been laid to the seniority list, it was contended that even the officiating period of the promotes was liable to be counted for their seniority in the promoted post. To further support this argument Rule 28(4) was specifically referred to, which deals with seniority and reads as under:

"28. Seniority -

(4) Notwithstanding anything in sub-rule (1) the inter se seniority of persons appointed by direct recruitment and by promotion shall be determined from the date of joining the service in the case of direct recruits and from the date of continuous officiation in the case of promotees and where the date of continuous officiation of promotee and the date of joining of the direct recruit is the same, the person appointed by promotion shall be treated as senior;

Provided that where appointments in any year of recruitment are made both by promotion and direct recruitment and the respective quota of the source is prescribed, the inter se seniority shall be determined by arranging the names in a combined list in accordance with Rule 17 in such manner that the prescribed percentage is maintained."

16. Mr. Amarendra Sharan, learned Senior Counsel for the private respondents, also sought to canvass the proposition that even otherwise, consultation with the UPPSC was not mandatory in view of the provisions of Article 320(3) of the Constitution of India, as further enunciated by this Court in its Constitution Bench judgment in *State of U.P. v. Manbodhan Lal*<sup>4</sup>. Learned counsel also sought support from the 14th Amendment, which incorporated Rule 21A (sub-rule (8) extracted aforesaid) to state that the seniority of promotees has to be counted "only from the date of order of promotion after selection in accordance with these rules." We may, however, note that this sub-rule is really in respect of inter se seniority amongst the promotees.

17. We have examined the submissions of the learned counsel for the parties.

18. The dispute, in our view, is a result of the ad hocism, which took place at the inception when the amendment was made to the said Act, with a view to provide better development by the authorities in the State of U.P. The regular process was not undertaken and a stop gap arrangement was made both in terms of promotees and direct appointees. This stop gap arrangement, however, acquired a more permanent feature by continuation over a long period of time, without the regular process being followed. This was in both the channels. The appointment of the appellants themselves was not through a regular process of UPPSC, but was made through a selection done by a selection committee appointed vide Office Memorandum dated 25.8.1987. The appointment was on a fully temporary and ad hoc basis and was to continue for a maximum period of one year or up to the period until regular

candidates were selected through the Public Service Commission. Yet, such a regular process never took place, but on the other hand such ad hoc appointments were sought to be regularised qua persons, who were recruited on or before 1.10.1986 as per the 3rd Amendment to the said Rules dated 7.2.1992. Even this amendment was not to the benefit of the appellants as, though they had been recruited on 25.8.1987, i.e., before the aforesaid amendment to the Rules, yet the cut-off date was kept as 1.10.1986. It is only subsequently, through the 7th Amendment to the said Rules dated 2.8.2001, that the bar was further shifted to 29.6.1991 to regularise persons like the appellants, and the appellants were regularised in terms of the Office Memorandum dated 20.11.2001. These amendments were carried out in consultation with the Governor, who was pleased to amend the Rules.

19. The object of discussing the aforesaid process of the appointment of appellants is to highlight that it is not as if the appellants are persons who have been appointed through a normal process, but were appointments made by a stop gap arrangement, which was regularised.

20. Insofar as private respondents 5-10 are concerned, they are promotees. They were Junior Engineers. In terms of the 50 per cent quota as per Rules, they were drawn and promoted as 'Assistant Engineers'. The Departmental Promotion Committee for promotion of the Junior Engineers to the post of the 'Assistant Engineer' was held on 27.5.1995. There is some merit in the contention raised by the learned Senior Counsel for the State Government that at the relevant time the 13th Amendment had done away with the requirement of the consultative process with the UPPSC altogether, and it was only subsequently, on 19.10.1995, that such amendments were struck down. It is, however, not in dispute that this judgement of the Allahabad High Court has become final. Not only that, the interpretation of Article 320(3) of the Constitution as enunciated in *State of U.P. v. Manbodhan Lal*<sup>5</sup> also makes it clear that while the intention of the makers of the Constitution may not be to provide for consultation with the Commission as mandatory, in view of the proviso, it would not amount to saying that it is open to the Executive Government to completely ignore the existence of the Commission, as was sought to be done in the present case by doing away with such consultation across the board.

21. Faced with the aforesaid position, the course of action was sought to be justified by resting it on the 4th Amendment to the 5 Supra. Rules, dated 8.9.1993, an aspect, which has found favour with the High Court, but runs contrary to the amendment itself. The amendment provides such of the posts for which consultation was not required. Undisputedly, the post of the 'Assistant Engineer' is not mentioned as one of the such posts. We, thus, fail to appreciate as to how the High Court could have taken aid of this amendment to justify the action of the concerned authorities. We, thus, have no hesitation in holding that such consultation was mandatory but was not done. The fact that consultation was done away as not necessary for certain posts itself implies that it would be required for the posts not so mentioned.

22. Simultaneously, we are also of the view that the learned Senior Counsel for the State Government is right in contending that this is an irregularity and not an illegality, and such irregularity can always be cured through prospective consultation.

23. We may also add, as noted above, that insofar as sub-rule (8) of Rule 21A of the said Rules is concerned, that would not aid the present dispute as it refers to the inter se seniority amongst the promotees.

24. Rule 28 of the said Rules, no doubt, stipulates that inter se seniority of the persons appointed by direct recruitment would be determined from the date of joining the service. Once again, as noticed above, the ad hoc appointment of the appellants was regularised from a subsequent date of 20.11.2001 and, thus, they can only claim appointment for inter se seniority from that date. This sub-rule, qua the promotees, stipulates that the date of continuous officiation in the case of promotees would be the relevant date. The private respondents have been officiating from various dates and those would be the relevant dates, and those dates are prior to the appointment of the appellants. The only irregularity is the non-consultation with the UPPSC.

25. We do find it rather ironic that the appellants who themselves were on an ad hoc basis originally and not through a regular process, seek to challenge the seniority list on the basis of this technical objection. Their appointment itself has never been through UPPSC, as envisaged under the Rules.

26. Be that as it may, in order to cure the defect which is apparent insofar as the confirmation of the private respondents/promotees is concerned, we consider it appropriate to direct that the State Government should move the UPPSC for consultation within a maximum period of two months from today, and dependent on the result of the consultative process, action be taken, and the seniority list should govern accordingly. This would imply that the promotees would continue to maintain their position in the seniority list so long as there is a favourable opinion of the UPPSC, and only in case of such candidates that the UPPSC advises otherwise, i.e., negatively, would that person not be eligible to form a part of the same seniority. We make it clear that with the consultation of the UPPSC, a quietus must be put to this dispute in terms of what we have observed and no further litigation should be entertained in this behalf, in case the UPPSC concurs.

27. The appeals are accordingly disposed of in terms aforesaid leaving the parties to bear their own costs.

Judgment Referred.

<sup>1</sup>(1996) All LJ 1171

<sup>2</sup>(1958) SCR 0533

<sup>3</sup>(1990) 2 SCC 0715

<sup>4</sup>(Supra)

<sup>5</sup>(Supra)