
(2003) 04 AHC CK 0129
In the Allahabad High Court
Case No : C.M.W.P. No. 22646 of 2000

Mani Kant Gupta and Others

APPELLANT

Vs

State of U.P. and Another

RESPONDENT

Date of Decision : 04-04-2003

Acts Referred:

Constitution of India, 1950 — Article 14, 16

Citation : (2003) 3 AWC 1728

Hon'ble Judges : Prakash Krishna, J;M. Katju, J

Bench : Division Bench

Advocate : Dinesh Dwivedi, A.P. Sahi, S.D. Kautilya, G.K. Singh, V.K. Singh and R.N. Singh, for the Appellant; H.R. Misra and S.C., for the Respondent

Final Decision : Allowed

Judgement

This Judgment has been overruled by : Indu Shekhar Singh and Others Vs. State of U.P. and Others, AIR 2006 SC 2432 : (2006) 5 JT 260 : (2006) 5 SCALE 107 : (2006) 8 SCC 129 : (2006) SCC(L&S) 1916 : (2006) 1 SCR 497 Supp : (2006) AIRSCW 2582 : (2006) 5 Supreme 12

M. Katju, J.—This writ petition has been filed for a mandamus directing the respondents to give the benefit of past service to the petitioners rendered by them in the parent department and to consider the petitioners for promotion or promote them when their juniors were considered and promoted.

2. Heard learned counsel for the parties.

3. The petitioner Nos. 1 and 2 were appointed as Assistant Engineer in U. P. Jal Nigam on 5.2.1979 and 12.12.1978 and the petitioner No. 3 in 1978 and since then they are functioning as such. After appointment the petitioners were sent on deputation to the Ghaziabad Development Authority (G.D.A.) as Assistant Engineer vide Annexures-2A to 2B. The post of Assistant Engineer in G.D.A. is in the Centralised Services under the U. P. Planning and Development Act, 1973. The petitioner's post is transferable throughout U. P. It is alleged in para 9 of the

petition that since the petitioners' appointment in G.D.A. had been made on deputation, a decision was taken by the Government to absorb technical employees. The State Government submitted a proposal on the representation of the employees including the petitioners for absorption. The respondents by means of letter dated 27.8.1987, informed the petitioner No. 1 and by letter dated 28.11.1991 to the petitioner No. 2 that absorption in the centralised service can be done subject to certain restrictions, namely that his past service rendered in Jal Nigam will not be reckoned for the purpose of determination of seniority, and that the petitioners will be placed below officers who were appointed on regular basis in centralised service after the petitioner's absorption. As regards petitioner No. 2 he was not given any such proposal. True copies of the letters are Annexures-4 and 4A to the petition. The petitioners replies are Annexures-5 and 5A. By letters dated 18.3.1994 and 3.4.1987 the State Government absorbed the petitioners in the Centralised service as Assistant Engineer incorporating two conditions in the order, namely, that the petitioners will be deemed to be absorbed in the centralised services from the date of the order and further that their past services in the parent department will be ignored for the purposes of determining their seniority. True copy of the letters are Annexures-6A and 6B. Pursuance to the order, the petitioners made representation for the purposes of accepting their resignation and this letter was sent by the petitioners to the Superintending Engineer of the U. P. Jal Nigam vide Annexures-7 and 7B. In para 14 of the petition it is stated that the petitioners had been appointed in the centralised service on deputation in 1986. The above conditions were imposed in 1987 by the State Government for absorption and hence the petitioners had no option but to accept the same, otherwise they would be reverted back to their parent department. Subsequently it is alleged in para 15 of the petition that in two similar matters, the State Government had categorically taken a decision under Rule 37 (3) granting benefit of past service for all purposes rendered in the parent department or organisation. Copies of the orders dated 2.6.1994 and 6.11.1995 are Annexures-8 and 9. The petitioners made representation raising their grievance vide Annexures-10, 10A and 10B in which it is alleged that there is discrimination against the petitioner in this respect. It is alleged in para 20 of the petition that the above two clauses are totally arbitrary, unfair and in violation of Articles 14 and 16 of the Constitution. It is alleged that once a deputationist is absorbed in service his past services rendered by him in the parent department has to be counted for seniority and other matters. True copy of the order dated 8.5.1992 is Annexure-11. It is alleged in para 23 of the petition that ad hoc appointees were being given the benefit of their ad hoc temporary service, and hence there was no justification for denying the petitioners the benefit of their past service in their parent department. It is alleged in para 28 of the petition that one Shri S. C. Dwivedi was given the benefit of past service and hence the same benefit cannot be denied to the petitioners.

4. We have perused the counter-affidavit. In para 3 it is alleged that there was a

clear stipulation in the terms and conditions of absorption that the petitioners shall not be extended any benefit of their past services and they would be treated as substantively appointed from the date of passing the order. Having accepted the terms and conditions of absorption prior to their absorption in the service of the G.D.A., it is not open for the petitioners to claim the relief of extension of the benefit of the past services rendered by them in their parent department for the purposes of their seniority or otherwise. As regard the case of S. C, Dwivedi, it is stated that he was given the benefit of the past services but subsequently the order was cancelled on 3.2.1997 against which a writ petition has been filed. In para 13 of the counter-affidavit it is stated that that writ petition is pending. As regard Brij Mangal Goel, he was not given benefit of past service. It is alleged that the petitioners are guilty of laches.

5. In *S. I. Roop Lal v. Lt. Governor*, AIR 2000 SC 594, the Supreme Court has held when the employee of one department goes on deputation to another department and he is subsequently absorbed in that department, he has to be given the benefit of the service in the parent department for the purpose of seniority, etc. The Supreme Court has in that decision in fact gone to the extent of saying that if there is any executive order stating that the benefit of past service in parent department will not be given to a person who goes on deputation (and is subsequently absorbed), that executive order will be violative of Articles 14 and 16 of the Constitution. From this decision, it follows that if benefit of past service is not given, it will violate Articles 14 and 16.

6. In *Basheshar Nath v. C.I.T.*, AIR 1959 SC 149, it was held by the Supreme Court that the fundamental right cannot be waived.

7. In *Olga Tellis and Others Vs. Bombay Municipal Corporation and Others*, it was held by the Supreme Court that although an undertaking was given by the appellants before the High Court on behalf of the hut and pavement dwellers that they did not claim any fundamental right to put huts on pavements or public roads and that they will not obstruct the demolition of the huts after a certain date, they could not be estopped from contending before the Supreme Court that the huts constructed by them on the pavements cannot be demolished because of their right to livelihood under Article 21 of the Constitution. From this decision also, it follows that a fundamental right cannot be waived, and there can be no estoppel,

8. In *Shree Mahavir Oil Mills and Another Vs. State of Jammu & Kashmir and Others*, it was held that there can be no question of any acquiescence in matters affecting constitutional rights.

9. Hence in view of the above decisions, we are of the opinion that the petitioners cannot be denied the right for claiming the benefit of their past services in U. P. Jal Nigam even though they may have accepted the conditions imposed by the State Government for absorption in service of the G.D.A.

10. Moreover, the State Government had passed an order granting benefit of

past service in favour of S. C. Dwivedi and B. M. Goel. No doubt it has been mentioned in the counter-affidavit that these orders were cancelled by the State Government but the writ petition against the cancellation order filed by S. C. Dwivedi being Writ No. 198 (S/B) of 1997 by a Division Bench of this Court was allowed on 23.5.2002 and the cancellation order was quashed. Hence, there is discrimination against the petitioners as the petitioners have not given the same benefit as given to S. C. Dwivedi.

11. For the reasons given above, this writ petition is allowed. The respondents are directed to give the benefit of past service in U. P. Jal Nigam to the petitioners for the purposes of seniority and other consequential benefits. The petitioners will be considered for promotion, etc. retrospectively from the date when their juniors were promoted, and shall get consequential benefits including arrears etc.