

(2011) 06 MAD CK 0194

In the Madras High Court

Case No : Writ Petition No. 1459 of 2008 and 5405 of 2009 and M.P. No. 1 of 2008

P. Balakrishnan

APPELLANT

Vs

The Commissioner Puducherry Municipality, The
Commissioner Commune Panchayat, The Director Local
Administration Department Government of Puducherry and
The Secretary to Government Local Administration
Department

RESPONDENT

Date of Decision : 06-06-2011

Acts Referred:

Constitution of India, 1950 — Article 14
Pondicherry Municipalities Act, 1973 — Section 115, 115(2)
Pondicherry Municipalities Rules, 1973 — Rule 115(2)
Pondicherry Village and Commune Panchayat Act, 1973 — Section 73(3)

Citation : (2011) 06 MAD CK 0194

Hon'ble Judges : P. Jyothimani, J

Bench : Single Bench

Advocate : V. Ajaykumar, for the Appellant; Vijaynarayan for R. Parthiban, for R1 and Mustafa, Govt. Pleader (Pondy) for R2 to R4, for the Respondent

Final Decision : Dismissed

Judgement

P. Jyothimani, J.—These writ petitions are filed for direction against the Respondents 1, 3 and 4, to fix the inter-se seniority of the Petitioner

at the appropriate place of fitment for Senior Assistant in the seniority list drawn by the Puducherry Municipality by taking into consideration the

Petitioner's initial appointment on 05.10.1989 at Thirunallar Commune Panchayat and give him due promotion as Office Manager/Assistant

Revenue Officer in the first Respondent Municipality with consequential benefits and also challenging the order of the Deputy Director of Municipal

Administration, Local Administration Department, Government of Puducherry,

third Respondent in WP. No. 5405 of 2009, dated 03.08.2005, by which the third Respondent accorded approval for absorption of the Petitioner as Senior Assistant in the Puducherry Municipality, who came on transfer from Thirunallar Commune Panchayat stating that the past services rendered by him may be counted for the purpose of increment, leave, pension and other benefits, except for seniority, which shall not affect the seniority of other Assistants already serving in the Puducherry Municipality.

2. The Petitioner was appointed as a Senior Assistant on 05.10.1989 by direct recruitment in Thirunallar Commune Panchayat and on 10.10.1996, on deputation, he was transferred to Puducherry Municipality as Assistant under Nehru Rozgar Yojana Scheme and on 11.10.2001, he was repatriated to the parent Department. It is stated that, again he was transferred and posted as Senior Assistant in Pondicherry Municipality on 26.11.2001 and on 20.05.2002 he was repatriated to Thirunallar Commune Panchayat. Again, on 05.08.2002, he was transferred and posted in the Puducherry Municipality as Senior Assistant, as per the orders of the Puducherry Government and therefore, as per the service particulars, from 1996 onwards he has been working in the Puducherry Municipality, except with small break and so, he made a representation to the Government of Puducherry and Puducherry Municipality for permanent absorption in the post of Senior Assistant in the Puducherry Municipality.

3. On 7.5.2005, the Government of Puducherry has approved his absorption as Senior Assistant in the Puducherry Municipality in the same capacity. Subsequently, on 03.08.2005, he was issued with another order to the effect that he has been absorbed to the Puducherry Municipality as Senior Assistant and his previous service will be taken for all purposes except for seniority. By virtue of the said order, which is impugned in these writ petitions, the valuable services rendered by the Petitioner from the date of his original appointment on 05.10.1989 by way of direct recruitment in Thirunallar Commune Panchayat for a period of 16 years were ignored by the Puducherry Municipality, which is arbitrary.

4. It is also stated that when the Petitioner was appointed by way of transfer to Puducherry Municipality, his previous service has to be taken into consideration for the purpose of seniority as per the judgment of the Apex Court.

There has been some anomaly in the sense that on 05.09.2007, the Puducherry Municipality has issued an order redesigning the post of Senior Assistant as Upper Division Clerk (UDC) in all Municipalities, whereby the Petitioner and 36 others were redesignated as UDC from 15.06.2007 and in the said order the Petitioner was placed in Serial No.

12, whereas one Samuel Felix, who became a Senior Assistant only after 1994, was placed above him.

5. The Petitioner belongs to Scheduled Caste category and therefore, he is also entitled for reservation. As per the regular appointment as Senior

Assistant, he should have been placed above Mr. Samuel Felix. Even as the redesignation of the post of Senior Assistant as UDC has been

considered for seniority list, in W.P. No. 1459 of 2008, he sought for seniority from the date of his original appointment.

6. In the Government of Puducherry, when a person appointed in one Municipality was transferred to another Municipality, it has to be considered

as continuity of service and for the purpose of seniority, the service rendered in one Municipality has to be considered and for that, he has given

example of one S. Mahalingam, Electrician of Mahe Municipality who was transferred to Puducherry Municipality to officiate in the same capacity

and the period of service rendered by him in the Mahe Municipality was counted for all purposes in the Puducherry Municipality, according to

Section 115(2) of the Puducherry Municipalities Act, 1973.

7. The impugned order not considering to give seniority to the Petitioner from the date of his original appointment, viz., 05.10.1989 has been

challenged on various grounds, including that the same is against the Rules, precedent without jurisdiction and violation of the judgments of the

Supreme Court.

8. In the counter affidavit filed by the Puducherry Municipality, viz., the first Respondent in both the writ petitions, it is admitted that the Petitioner

entered into the services of the Thirunallar Commune Panchayat on 05.10.1989 and was deputed to Puducherry Municipality to work as Senior

Assistant in the SJSRY Government of India Scheme on deputation basis with effect from 1.10.1996 with deputation allowance. After the Scheme

was over, the Petitioner was repatriated to Thirunallar Commune Panchayat with effect from 11.10.2001. He was again posted on deputation for a

period of six months without deputation allowance in the Puducherry Urban Development Agency under the SJSRY Scheme and he was relieved

of his duties with effect from 20.05.2002 to report for duty before the Commissioner, Thirunallar Commune Panchayat. Thereafter, the Petitioner,

at his own request wanted transfer to Puducherry Municipality and that was ordered on 05.08.2002 by the Local Administration Department and

subsequently by the Puducherry Municipality dated 12.08.2002 he was appointed on transfer basis at his own request with a specific condition

that he may be at any time repatriated to the Thirunallar Commune Panchayat once the vacant post of the Senior Assistant in the Puducherry

Municipality is filled up on regular basis by promotion from among the Junior Assistants of the Puducherry Municipality.

9. It is stated that the Petitioner was absorbed in the Puducherry Municipality on 04.07.2005 in the same capacity as Senior Assistant on specific

condition that his absorption is effective from the date of issue of order by the Local Administration Department, viz., 04.07.2005, in respect of

which another memorandum was issued on 3.08.2005, ordering the Commissioner, Puducherry Municipality to appoint the Petitioner as Senior

Assistant in the Puducherry Municipality against anyone of the existing vacancies meant for direct recruitment taking into consideration the past

services rendered by him for the purpose of pay, increment, leave, pension and other benefits except seniority. The averment by the Petitioner that

his valuable service for more than 16 years has been ignored by the first Respondent is absolutely untenable and unsustainable for the reason that

the Petitioner, who is anative of Mannadiapet, Puducherry always exerted much pressure to serve in Puducherry rather than continuing the service

in his original place of appointment, viz., Thirunallar Commune Panchayat and at his request, he was transferred and the first Respondent has

mercifully accommodated him in anyone of the vacancies in the Municipality, taking into consideration his past services, and therefore, the

Petitioner has no right to seek seniority against the seniors already working in the Puducherry Municipality. The seniority drawn by the first

Respondent Municipality is in accordance with law. On absorption to the Puducherry Municipality, the Petitioner was given clear instruction that

his seniority earlier acquired will not be counted, since he was inducted into service against the direct recruitment quota and the Petitioner was not

entitled for reservation and therefore, he cannot compare himself with Mr. Samuel Felix.

10. In respect of Mr. Mahalingam from Mahe Municipality, it is stated that the first Respondent has taken him into service for all benefits, including seniority, since no employee was aggrieved and therefore, he was transferred from Mahe Municipality to Puducherry, under peculiar circumstances, giving him the seniority also.

11. In respect of W.P. No. 1459 of 2008, in the counter affidavit, the first Respondent Municipality has reiterated what has been stated in the counter affidavit filed in the other writ petition to the effect that the Petitioner's transfer to the Puducherry Municipality was at his request and his past service in the Thirunallar Commune Panchayat will be counted for the purpose of pay, increment, leave and pensionary benefits except for seniority and on that specific condition only the Petitioner has accepted himself to be posted to Puducherry Municipality. The Petitioner is now in Serial No. 12 in the seniority list and if the contention of the Petitioner that his service rendered in Thirunallar Commune Panchayat is to be taken for seniority also, he will become No. 1 in the seniority list and 11 persons will be affected and inasmuch as the 11 persons who are above him have not been impleaded as parties in the present writ petition, the writ petition is not maintainable and the same is liable to be dismissed on the ground of non-joinder of necessary and proper parties.

12. It is the contention of Mr. Ajay Kumar, learned Counsel appearing for the Petitioner that, when once the Petitioner has been transferred to Puducherry Municipality by protecting his pay and other service conditions, there is no reason to deny the seniority, which has been acquired by the Petitioner in the Thirunallar Commune Panchayat for a period of 16 years. According to him, the transfer is u/s 115 of the Pond cherry Municipalities Act, 1973 and as per Section 73(3) of the Pond cherry Village and Commune Panchayats Act, 1973 such power is given to the Government that when such transfer is effected, it is the duty on the part of the first Respondent Municipality to take into consideration the service rendered in the Thirunallar Commune Panchayat for the purpose of seniority also. He would also submit that when it is admitted that in respect of one Mahalingam, who was transferred from Mahe Municipality to Puducherry

Municipality, his earlier services were considered for seniority also

as a special case, that has been denied to the Petitioner and according to him, it is in violation of Article 14 of the Constitution of India and

discriminatory in nature. To substantiate his contentions, he would rely upon the judgment of the Supreme Court in S.I. Rooplal and Another Vs.

Lt. Governor Through Chief Secretary, Delhi and Others, apart from the judgment in U.P. State Electricity Board v. Pooran Chandra Pandey and

Ors. 2007 (12) SCALE 304.

13. On the other hand, it is the contention of the learned Government Pleader for Puducherry that as the transfer of the Petitioner to Puducherry

Municipality was at his request, now he cannot claim benefits u/s 73(3) of the Pond cherry Village and Commune Panchayats Act, 1973 as if the

Government has transferred him or by the Director of Municipality as per Section 115(2) Pond cherry Municipalities Act, 1973.

14. It is contention of Mr. Vijaynarayan, learned senior counsel appearing for the first Respondent Municipality that the impugned order passed by

the Municipality has been accepted by the Petitioner and having accepted the same, he cannot file a writ petition and to that effect further order

was passed on 11.08.2005 and accepting the transfer order he has joined and having joined, after two years he challenged the order, which is not

permissible. He would rely upon the judgments of the Supreme Court in Indu Shekhar Singh and Others Vs. State of U.P. and Others, and

Surendra Singh Gaur Vs. State of M.P. and Others, .

15. I have heard Mr. Ajay Kumar, learned Counsel appearing for the Petitioner and the learned Government Pleader for Puducherry Government

as well as Mr. Vijaynarayan, learned senior counsel appearing for the first Respondent Municipality.

16. It is not in dispute that the order dated 03.08.2005, passed by the Government of Puducherry, which is impugned in W.P. No. 5405 of 2009,

has been accepted by the Petitioner and he has joined as Senior Assistant in Puducherry Municipality. Even though the Petitioner's original

appointment was in Thirunallar Communal Panchayat in October, 1989, which was the direct recruitment, it is seen that, at the request of the

Petitioner, the Thirunallar Communal Panchayat in the order dated 10.10.1996, transferred him on deputation to the Puducherry Municipality. In

the proceedings of the Puducherry Municipality dated 02.11.1996, which is as follows:

In pursuance of the memorandum first cited read with order and joining report second and third cited, Thiru P. Balakrishnan, Senior Assistant,

Thirunallar Commune Panchayat is appointed as "Assistant" under Nehru Rozgar Yojana Scheme in the Pond cherry Municipality with effect from

the forenoon of 11.10.1996 on deputation basis without deputation allowance. His pay is fixed at Rs. 1,480/- per months in the scale of pay of Rs.

1400-40-1800-BB-50-2300 with effect from the forenoon of 11.10.1996....

it is made clear that while working in Puducherry Municipality on deputation, considering him as a Senior Assistant of Thirunallar Commune

Panchayat, he was again retained in Puducherry Municipality in another scheme, viz., Nehru Rozgar Yojana Scheme, on deputation basis and the

period of deputation was extended from time to time, at his request. Since the said Scheme has come to an end, as per the report of the Project

Director of the Scheme dated 13.10.2000, as it is seen in the letter of the Government of Puducherry dated 11.10.2001, the Petitioner was

relieved from Puducherry Municipality and directed him to join in Thirunallar Communal Panchayat. Further, under another Scheme called SJSRY

Scheme in Puducherry Urban Development Agency, as a Senior Assistant in Thirunallar Commune Panchayat, on deputation, he was sent to

Puducherry Municipality without deputation allowance for 11 months.

17. It is seen that, while working on deputation, the Petitioner has in fact made are presentation to the Director of Local Administration

Department, Puducherry on 13.05.2002, requesting for transfer in the Puducherry Municipality by absorbing him as Senior Assistant in the said

Municipality. However, the Government has passed an order on 20.05.2002, stating that on expiry of the deputation period, the Petitioner has to

be repatriated to parent Local Body, Thirunallar Commune Panchayat with effect from 20.5.2002. However, again on his representation

dated 18.5.2002, he was posted in the available vacancy as Senior Assistant in Puducherry Municipality without giving him any TA and DA.

18. In the proceedings of the Puducherry Municipality dated 27.08.2002, which is as follows:

In pursuance of the Memorandum first cited read with reference second and third

cited, Thiru P. Balakrishnan, Senior Assistant Thirunallar

Commune Panchayat transferred from Thirunallar Commune Panchayat to Pond cherry Municipality on his own request is appointed as Senior

Assistant in the Pond cherry Municipality with effect from the forenoon of 12.08.2002. He is posted in Revenue Office-I of the Pondicherry

Municipality.

it is made clear that, it was on the request of the Petitioner, he was appointed as Senior Assistant in the Puducherry Municipality with effect from

forenoon of 12.08.2002 by way of transfer from Thirunallar Commune Panchayat to the Puducherry Municipality, stating that he will be repatriated

to Thirunallar Communal Panchayat once the Senior Assistant post in the Puducherry Municipality post has been filled up on regular basis on

promotion from among the senior most Assistants of Puducherry Municipality. When the procedure for filling up the direct recruitment of Senior

Assistant was taken up by the Puducherry Municipality, the Petitioner has made a representation while working in the Puducherry Municipality on

transfer on temporary basis on 10.11.2004, requesting the first Respondent Puducherry Municipality to consider him by way of absorption in the

vacant post of Senior Assistant. There are records to show that he has been making representation to the Hon'ble Minister also and ultimately the

request of the Petitioner was considered and the Government of Puducherry has passed orders on 04.07.2005, according approval for absorption

of the Petitioner as Senior Assistant in Puducherry Municipality, and thereafter, under the impugned order dated 03.08.2005, the Government of

Puducherry has granted benefits to the Petitioner regarding his past services rendered by him in respect of pay, increment, pension, leave etc.,

except seniority.

19. Section 115 of the Puducherry Municipalities Act, 1973, which is as follows:

115. Power of Government to transfer officers and servants of municipalities.-

(1) Notwithstanding anything contained in this Act, the Government shall have power to transfer any officer or servant of a municipality to the

service of any other municipality.

(2) The Government shall have power to issue such general or special directions as it may think necessary for the purpose of giving due effect to

transfers made under Sub-section (1).

empowers the Government to pass transfer orders, transferring a person from one Municipality to another Municipality. It is seen that pursuant to

the said power, one S. Mahalingam, who was working as Electrician Grade II in Mahe Municipality was transferred to the Puducherry

Municipality by the Government and the relevant portion of the transfer order is as follows:

In exercise of powers conferred upon by Sub-rule (2) of Rule 115 of the Pond cherry Municipalities Act, 1973, Government direct that the

transfer of Thiru S. Mahalingam, Electrician Gr.II of Mahe Municipality to Pond cherry Municipality to officiate in the same capacity ordered vide

order referred to above may be treated as a permanent transfer and the period of service rendered by him in Mahe Municipality shall count for all

purposes in the Pond cherry Municipality.

20. Certainly, the Petitioner's case cannot be equated with that of the said Mahalingam. In that case, the Government by invoking its power u/s

115 of the Puducherry Municipalities Act, 1973, has conferred all the benefits in respect of previous service, including the seniority. That apart, as

stated in the counter affidavit, by virtue of such conferment, there was nobody going to be affected.

21. It was held by the Hon"ble Apex Court in Indu Shekhar Singh and Others Vs. State of U.P. and Others, that claim of seniority reckoning the

past service is not a matter of right and the deputation is not a fundamental right. The Supreme Court has held in categorical term that the claim of

seniority is not a fundamental right and the past services rendered can be taken into consideration only when the rules permit. The paragraphs

which are gainful to the case of the Petitioner, are reproduced hereunder:

22. Seniority, as is well settled, is not a fundamental right. It is merely a civil right. (See Bimlesh Tanwar v. State of Haryana, SCC para 49 and

also Prafulla Kumar Das v. State of Orissa.)

23. The High Court evidently proceeded on the premise that seniority is a fundamental right and thereby, in our opinion, committed a manifest

error.

24. The question which arises is as to whether the terms and conditions imposed by the State in the matter of absorption of Respondents 2 to 4 in

the permanent service of the Ghaziabad Development Authority is ultra vires Article 14 of the Constitution of India.

25. The State was making an offer to the Respondents not in terms of any specific power under the Rules, but in exercise of its residuary power

(assuming that the same was available). The State, therefore, was within its right to impose conditions. The Respondents exercised their right of

election. They could have accepted the said offer or rejected the same. While making the said offer, the State categorically stated that for the

purpose of fixation of seniority, they would not be obtaining the benefits of services rendered in the U.P. Jal Nigam and would be placed below in

the cadre till the date of absorption. The submission of Mr. Verma that the period for which they were with the Authority by way of deputation,

should have been considered towards seniority cannot be accepted simply for the reason that till they were absorbed, they continued to be in the

employment of the Jal Nigam. Furthermore, the said condition imposed is backed by another condition that the deputed employee who is seeking

for absorption shall be placed below the officers appointed in the cadre till the date of absorption. Respondents 2 to 4 accepted the said offer

without any demur on 3-9-1987, 28-11-1991 and 6-4 1987 respectively.

26. They, therefore, exercised their right of option. Once they obtained entry on the basis of election, they cannot be allowed to turn round and

contend that the conditions are illegal. (See R.N. Gosain v. Yashpal Dhir⁶, Ramankutty Guptan v. Avara⁷ and Bank of India v. O.P. Swarnakar.)

Furthermore, there is no fundamental right in regard to the counting of the services rendered in an autonomous body. The past services can be

taken into consideration only when the Rules permit the same or where a special situation exists, which would entitle the employee to obtain such

benefit of past service.

22. That was also the view expressed by the Supreme Court in Surendra Singh Gaur Vs. State of M.P. and Others, , which is as follows:

5. Therefore, the Appellant from the very beginning was fully aware that his past service in the Agriculture Department would not be counted in the

Irrigation Department in computing his seniority. The Appellant opted and applied for transfer and absorption in the Irrigation Department having

the knowledge that there would be greater chances of promotion in the Irrigation

Department. On his absorption in the Irrigation Department, the Appellant was released from the Agriculture Department and consequently, he had lost his lien to the post previously held by him in the Agriculture Department. Now, the Appellant upon absorption in the Irrigation Department had to be governed by the conditions of service in the Irrigation Department.

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17. The Appellant argued that there is no provision in the rules for transfer of an employee from one department to another on personal request of

a government servant. The Appellant sought transfer to the Irrigation Department in his own interest, but just because he was not extended the benefit of past service he cannot be permitted to take a total somersault.

23. In the absence of any rule under the Government of Puducherry permitting the consideration of past services rendered in another Municipality

for the purpose of seniority, it is not possible to accept the case of the Petitioner. Moreover, as correctly submitted by the learned Government

Pleader, when by virtue of the claim for seniority by considering the past service rendered by the Petitioner in Thirunallar Communal Panchayat,

nearly 11 persons are going to be affected, such claim cannot be considered without impleading those persons, who are likely to be affected by the

claim of the Petitioner. The reliance placed by the learned counsel for the Petitioner, on the judgment in U.P. State Electricity Board v. Pooran

Chandra Panday and Ors. 2007 (12) SCALE 304 has no application to the facts of the case. It relates to the case of daily wagers, and while

considering the regularization of services, the Supreme Court has held that the judgment in Secretary, State of Karnataka and Others Vs. Umadevi

and Others, cannot be mechanically applied to reject the genuine claims.

24. Inasmuch as the Petitioner's services were not absorbed by the Government, as requested by the Petitioner who is aware of the

consequences, the judgment relied upon by the learned Counsel for the Petitioner rendered by the Hon'ble Apex Court in S.I. Rooplal and

Another Vs. Lt. Governor Through Chief Secretary, Delhi and Others, , has no application.

Therefore, looking into any angle, the Petitioner is not entitled to any order as prayed for. Accordingly, both the writ petitions fail and the same are

dismissed. No costs.