

(1976) 08 KAR CK 0010
In the Karnataka High Court
Case No : W.Ps. No's. 2870 and 2880 of 1974

S. Rama Murthy

APPELLANT

Vs

Karnataka Electricity Board and Others

RESPONDENT

Date of Decision : 26-08-1976

Acts Referred:

Mysore State Electricity Board Employees (Seniority) Rules, 1960 — Rule 2, 2A, 2B
Mysore State Electricity Board Employees Service Regulations — Regulation 9 (40), 9 (47)

Citation : (1976) 2 KarLJ 230 : (1977) 2 LLJ 347

Hon'ble Judges : K. Jagannatha Shetty, J

Bench : Single Bench

Judgement

1. These two petitions under Art. 226 of the Constitution, raise a short, but an important question relating to the relative seniority of the petitioners and respondents 2 to 80. The matter arise in this way : (The petitioners were initially appointed as temporary Junior Engineers in the Karnataka Electricity Board (hereinafter called "the Board"). By an industrial award dated 17th October, 1967, they were entitled to have their services absorbed into the permanent cadre. Accordingly, with effect from 26th May, 1968 they were absorbed as permanent candidates against the existing vacancies. On 7th November, 1967, respondents 2 to 80 were appointed as probationary junior engineers. In November, 1969, their services were regularised after the period of satisfactory completion of probation. The Board while preparing the gradation list dated, 17th September, 1969, ranked the petitioners below respondents 2 to 80. The same was repeated in the latest gradation list dated 5th April, 1976. The contention of the petitioners was that they should have been ranked above respondents 2 to 80 since they were regularly recruited against clear vacancies earlier to the regularisation of the said respondents; whereas for the Board and also for respondents 2 to 80 it was contended to the contrary. The decision on the question turns of the principles to be followed for determining the relative seniority of the permanent incumbent and a probationer in a common cadre of

service.

The rival contentions could be resolved only after reference to the relevant provisions (i) The Mysore State Electricity Board Employees (Probation), Rules, 1960. (shortly called "the Probation Rules"), (ii) The Mysore State Electricity Board Employees (Seniority) Rules, 1960 (briefly called "the Seniority Rules") and (iii) The Mysore State Electricity Board Employees' Service Regulations (called shortly as "the Service Regulations").

2. Before I refer to the relevant provisions of the above rules, it may be necessary to state a few more facts. After the award dated 12th October, 1967, the petitioners along with several other were screened and selected in terms of the award and were absorbed against existing vacancies with effect from 26th May, 1968. Respondents 2 to 80 were recruited as junior engineers on 7th November, 1967. Their appointment was on probation for a period of two years with effect from the date of their reporting for duty. During the period of probation, they were allowed to draw Rs. 250 p.m. being the minimum pay of the post in addition to the allowances admissible as per rules. The appointment was subject to the service Regulations of the Board, the Cadre and Recruitment Rules of Board issued from time to time, and the CCA Rules in force. Their inter se seniority has been determined strictly in the order of merit in accordance with the rankings fixed by the appointing authority in the order of appointment. On 29th July, 1970, the Chief Engineer, Electricity (General) of the Board issued an Official memorandum declaring that respondents 2 to 80 have completed their probationary period satisfactory and qualified in passing the departmental tests prescribed and regulation their services with effect from the dates noted against their names. Different dates have been given against different junior engineers. By and large, most of them have been regularised with effect from November, 1969, and only a couple of them have been regularised from December, 1969.

3. On 17th September, 1969, the Board prepared a provisional gradation list of Graduate Junior Engineers (Electrical, with an opportunity to the aggrieved officials to make their representations. In that list, the petitioners were ranked below respondents 2 to 80. Challenging the validity of those rankings, the petitioners along with two other junior engineers approached this Court with applications under Art. 226 of the Constitution in WPs. 3619 and 1464 of 1970. When those petitions came up for final hearing on 4th September, 1973. I thought that those petitions were premature as the petitioners therein had an opportunity to make representations against their provisional rankings. I, therefore, dismissed these petitions with liberty to them to make representations to the Board.

In accordance with the observation made thereunder, the petitioners made representation to the Board to revise the gradation list and assign them rankings above respondents 2 to 80. But the Board did not take any action.

4. The Board continued its silence in spite of reported reminders from the

petitioners. The Board also did not take any steps to finalise the gradation list. It went on promoting persons on the basis of the provisional gradation list. The petitioners, therefore, have been compelled to approach this Court again complaining the inaction of the Board and praying for the following reliefs :

(i) Issue a writ of mandamus directing the 1st respondent to prepare and publish a final gradation list in accordance with law by directing fixation of the rankings of the petitioners above those of respondents 2 to 80 :

(ii) Issue a writ of certiorari to quash Exts. L, M and N by which some of the respondents have been promoted to the cards of Assistant Engineers; and

(iii) Issue a writ of mandamus directing the 1st respondent not to make any further promotions on the basis of the provisional gradation list, until a final gradation list in accordance with law is prepared.

5. With these facts, let me now turn to the provisions of the relevant Rules. I will first take up the Seniority Rules.

Rules 2(a) provides :

"Officers appointed substantively in clear vacancies shall be senior to all persons appointed on officiating or any other basis on the same cadre of service or class of post."

Rule 2(b) provides :

"The Seniority inter se of officers who are confirmed shall be determined according to dates of confirmation, but where the date of confirmation of any two officers is the same, their relative seniority will be determined by their seniority inter se while officiating in the same post and if not, by their seniority inter se in the lower cadre."

Rules 5 provides :

"The decision regarding the seniority of direct recruits to a service or to a class of post shall be made by the appointing authority at the time of their first appointment in one of the modes mentioned below :

(a) When the recruitment is made on the result of a competitive examination or tests the order of seniority will be in order of merit; or

(b) When the recruitment is made by selection, the order of seniority will be determined by the order in which the candidates are ranged in the order of merit by the appointing authority or other authority making the selection.

The decision once taken shall be final and shall not be open to revision."

The Rules under the Probation Rules which have got a bearing on the question are as follows :

"2(i) "Appointed on probation" means, appointed on trial in or against a

substantive vacancy.

(ii) "Probationer" means a Board employee appointed on probation. A Board employee so appointed (and continuing in service) remains a probationer until he is confirmed."

Rule 6 provides :

"6(i) Except when the receipt of the special orders of the Board on a recommendation made under sub-rule (2) of Rule 4 is awaited, the appointing authority may at any time discharge from service a probationer on grounds arising out of the specific condition laid down by the Rules or in the order of appointment, e.g., want of vacancy failure to acquire prescribed special qualifications or to pass the prescribed tests or on account of his unsuitability for the service; but the order of discharge (except when passed by the Board) shall not be given effect to, till it has been submitted to and confirmed by the next higher authority."

Rule 9 reads as follows :

"A probationer shall not be confirmed until he has served on probation for the period prescribed in the rule referred to in Rule 3, passed any test or examination, the passing of which may by Rules or Order be prescribed as a condition of confirmation in the service or post in which it is proposed to confirm him, and been declared by the appointing authority to be fit for confirmation."

To make the picture complete, I may set out the relevant provisions from the Service Regulations chapter II of the Service Regulations contains definitions.

Regulation a 9(17) defines "duty" to mean :

"Service rendered as a probationer or period of successful training of an apprentice provided that such periods are continuous and are followed by regular employment."

A Note appended thereunder reads :

"The terms "Probationer" in this Rules does not cover an employee who holds a temporary or permanent post in a cadre and is merely appointed on "probation" to another post. Such an employee is not a probationer and the service rendered by him while on probation counts as duty for all purposes of these rules with out any restriction or limitation."

Regulation 9(40) defines "Probationer" to mean :

"An employee appointed on probations in or against a substantive vacancy in any cadre of the Board."

Note thereunder provides that the status of a probationer is to be considered as having the attributes of a substantive status except where there rule prescribed otherwise. Regulation 9(47) describes substantive appointment to mean, "the

appointment of an employee against a vacant permanent post on a permanent basis."

6. All these Rules, however, do not deal with the question whether the period of probation should count for seniority as against other employees. Note under Regulation 9(40) provides that the status of a probationer is to be considered as having the attributes of a substantive status except where the rules prescribed otherwise. But the probation Rules do provide otherwise. It is seen that the probationer has no right to hold the post although he has been appointed against a substantive vacancy. His services could be discharged by the appointing authority at any time for failure to acquire special qualifications or to pass the prescribed tests or on account of his unsuitability for the service. There lies no appeal against such an order of discharge, unless the discharge was preceded by an enquiry for misconduct. He has no right to have his service confirmed until he has served on probation for the prescribed period and until he has passed the prescribed tests or examination or until the appointing authority declares that he has satisfactorily completed the period of probation. These rules indicate that his appointment during the period of probation is provisional. In *V. B. Badami v. State of Mysore*, C.A. 1359 to 1365/73 dt. 17-9-75, the Supreme Court observed :

"..... During the said period they were required to undergo training and probation for a period of two years. During the said period their appointments were provisional and liable to termination on one month's notice, as was the case of recruitment of probationers"

Therefore, it is apparent that respondents 2 to 80 did not have a substantive status before they were regularised. Assuming that they had the attributes of such a status, it was not the same thing as to have the status itself. This was also the view taken by the Punjab and Haryana High Court while dealing with a similar question in *Jugraj Singh v. State of Punjab* (1969) 35 SLR 622. It is, therefore, clear that respondents 2 to 80 get a right to their posts only when their services were regularised with effect from November, 1969.

7. This takes me to the nature of the petitioners' appointment. For them to succeed, it must be proved that they were substantively appointed in clear vacancies as provided by Rule 2(a) of the Seniority Rules. They were initially appointed as temporary employees. A dispute arose as to their right to confirmation or continuance. One of the points of dispute referred to for adjudication was, whether the temporary employees who have put in a service of 240 days and more should be made permanent. The Additional Industrial Tribunal to whom the dispute was referred, made an award dated 17th October, 1967 directing that the daily-rated employees working under the Chief Electrical Engineer (General) will be absorbed according to their seniority into the permanent cadre provided they have put in 240 days service in one calendar year and they are found suitable by the Management in a phased programme. The award also directed that 50 per cent of the daily rated employees as well as

the tentative clerical staff and supervise shall be absorbed into the permanent cadre within a period of six months from the date of the award and the remaining 50 per cent of those employees shall be absorbed within a period of six months thereafter. The award thus conferred a right on the petitioners to have their services absorbed in the permanent cadre. As a part of the implementation of the award, the Chief Engineer of the Board made an order dated 14th November, 1968 absorbing the petitioners and other against existing vacancies with effect from 26th May, 1968. The petitioners were thus appointed with effect from 26th May, 1968, against clear vacancies in a permanent cadre. It was nothing but a substantive appointment as defined under Regulation 9(47). The substantive appointment means an appointment of an employee against a vacant permanent post on a permanent basis. The petitioners' appointment against available posts in a permanent cadre was, therefore, on a permanent basis, although the word "absorption" was used in the powder of appointment. But the services of respondents 2 to 80 were regularised with effect from November, 1969. It was only from that month they got a right to the posts. They could be said to have been appointed on a permanent basis only from the date of regularisation of their services and not before. Since all these were appointed or absorbed in a common cadre, Rule 2(a) of the Seniority Rules steps in to regulate their relative seniority. It states that officers appointed substantively in clear vacancies shall be senior to all persons appointed on officiating or any other basis in the same cadre of service or class of post. The petitioners, therefore, should have been ranked above respondents 2 to 80.

8. There, however, remains another aspect of the question. The inter se seniority of respondents 2 to 80 was determined by the order of their appointment dated 7th November, 1967, and the contention of Mr. Eshwarappa, learned counsel for the Board was that that date of 7th November, 1967 should not be postponed to any other date, whether for determining the inter se seniority or respondents 2 to 80 for the relative seniority of the said Respondents as against the other recruits. In other words, his contention was that the date of the initial recruitment, that is, 7th November, 1967 under no circumstances, be postponed to the determinant of respondents 2 to 80 for determining the seniority. In my view, it is too wide a proportion. The order of appointment of respondents 2 to 80, did not confer any such right on them. The order was made in accordance with Rule 5 of the Seniority Rules. The said rule provides that decisions regarding the seniority of direct recruits shall be made by the appointing authority at the time of their first appointment. The said order governed only their interviews seniority. It has no reference to the relative seniority of the recruits with any other officer appointed in the same cadre. The relative seniority of the officers appointed on two different dates cannot be determined either by Rules 5 of the Seniority Rules or by the terms of the order of appointment of respondents 2 to 80. It has to be determined only in accordance with Rule 2 of the Seniority Rules which directs that an officer appointed substantively in clear vacancy shall be senior to all persons appointed on officiating or any other basis in the same

cadre. It must also be pointed out, that since the petitioners are entitled to have their seniority determined in accordance with Rule 2(a) of the Seniority Rules, the Board has no right to determine their sincerity in any other method.

9. My view finds support from the observation of this Court in *Seenambhat Joshi v. State of Mysore*, (W.P. 3360/70, dated 30-10-75. While rejecting the contention similar to the one urged for respondents 2 to 80 before me, this Court observed :

"I find it difficult to accede to the contention that when a person is appointed on probation and another person is appointed substantively in a clear vacancy, for determining relative seniority between the two, the period of probation of the former should also be taken into consideration. It is the date of his (the former's) confirmation as a full member of the service in the class or category for which he was selected that is relevant and not the date of his initial appointment on probation."

10. This takes me on to the question of the relief to be granted to the petitioners. Firstly, the petitioner has asked for a mandamus to direct the Board to prepare and finalise the Gradation List of the Junior Engineers (Electrical). The second relief asked for by the petitioner is to quash the promotions of some of the respondents made on the basis of their rankings in the provisional gradation list dated 17th September, 1969. The third relief prayed for by the petitioners was for a writ of mandamus directing the Board not to make any other promotions on the basis of the provisional Gradation List.

In my view, instead of granting these separate reliefs, it is sufficient if I direct the Board to prepare and publish a final gradation list in the right of the observation made in this order, and review the irregular promotions hitherto made. Once the final gradation list is prepared, it would be easy to work out the right of the petitioners. The Board also then should review the promotions.

11. In the result, the rule is made absolute. A direction shall issue to the Board to prepare and publish the final gradation list of the officers in the petitioners' cadre within four months and review the irregular promotions hitherto made and consider the cases of the petitioners for promotion with effect from the date or dates on which they were eligible for promotion.

12. The petitioners are entitled to their costs. Advocate's fee Rs. 250. One set.