

(2010) 04 SC CK 0034

In the Supreme Court Of India

Case No : Civil Appeal No. 3512 of 2010 (Arising out of SLP (C) No. 8510 of 2009)

S. Sumnyan and Others

APPELLANT

Vs

Limi Niri and Others

RESPONDENT

Date of Decision : 20-04-2010

Acts Referred:

Constitution of India, 1950 — Article 309

Tamil Nadu State and Subordinate Services Rules, 1955 — Rule 10

Citation : (2010) 125 FLR 663 : (2010) 3 GLT 21 : (2010) 4 JT 207 : (2010) 4 SCALE 164 : (2010) 6 SCC 791 : (2010) 4 SCR 829 : (2010) 5 SLR 660 : (2010) 4 UJ 2241

Hon'ble Judges : Mukundakam Sharma, J;H. L. Dattu, J

Bench : Division Bench

Advocate : P.K. Goswami, Rajiv Mehta and A. Henry, for the Appellant; Ginny Jetley Rautray, Kanchan Kaur Dhodi and Anil Shrivastav, for the Respondent

Final Decision : Allowed

Judgement

Mukundakam Sharma, J.—Leave granted.

2. The present appeal is directed against the judgment and order dated 19.02.2009 passed by the Division Bench of the Gauhati High Court, whereby the High Court affirmed the judgment and order of the learned Single Judge allowing the writ petition filed by the private respondent No. 1 herein and holding that necessary correction be made in the seniority list of the Civil Engineers and recast the same by accepting the date of appointment of the respondent No. 1 as on 02.05.1989 and those of the appellants herein from their respective dates of regularization and that the ad-hoc period of service rendered by them as Assistant Engineers would not be counted towards their seniority in the rank of Assistant Engineer.

3. The appellants herein are aggrieved by the aforesaid directions issued by the learned Single Judge which were subsequently affirmed by the Division Bench of

the High Court, since by the aforesaid direction they are losing the benefit of service period of about two years rendered by them as Assistant Engineers on ad-hoc basis for the purpose of counting their seniority in the rank of Assistant Engineer.

4. The appellants herein were appointed on temporary and ad-hoc basis as Assistant Engineers [Civil] by the Government of Arunachal Pradesh in the Public Works Department on various dates between the years 1986 and 1988 on the condition that they would be regularized according to the Rules on the recommendation of a Selection Board constituted by the Government. The State of Arunachal Pradesh came to be constituted as a separate State of the Republic of India on 20.02.1987. Consequent to such constitution, Arunachal Pradesh Public Service Commission was also constituted under Gazette notification dated 29.03.1988.

5. The respondent No. 1 - Limi Niri herein was also appointed on ad-hoc basis in the year 1988 to the post of the Assistant Engineer with a specific condition that he would be regularized according to the relevant Rules on the recommendation of the Arunachal Pradesh Public Service Commission. Sometime in the month of May, 1988, an advertisement was issued inviting applications for filling up the posts of the Assistant Engineers [Civil] and the Assistant Engineers [Electrical] in the Public Works Department of the Government of Arunachal Pradesh. The respondent No. 1 submitted his application pursuant to the aforesaid advertisement. He was found suitable for such appointment as Assistant Engineer [Civil] and consequently he was issued an appointment letter dated 19.04.1989 for his appointment with a condition that he shall be on the post on probation for a period of two years and that his appointment shall not commence before 02.05.1989.

6. A provisional seniority list as on 31.08.1990 of Assistant Engineers [Civil] in the Arunachal Pradesh Public Works Department was issued and the appellants herein were shown as seniors to the respondent No. 1. In the year 1993, some of the appellants were promoted as Executive Engineers on ad-hoc basis and a provisional seniority list of Executive Engineers in the Arunachal Pradesh Public Works Department was circulated and the names of some of the appellants were shown in the said list of the Executive Engineers. In the year 1997, a further seniority list as on 31.03.1997 of the Assistant Engineers [Civil], which showed the position of various appellants as senior to the respondent No. 1, was circulated for claims and objections. Some of the appellants were thereafter promoted to the posts of the Executive Engineer and the Superintending Engineer and confirmed in the said posts and at least one of them is now occupying the post of the Chief Engineer.

7. The authorities after promoting the appellants to the posts of Executive Engineers in between the period from 1991 to 2001 regularized the ad-hoc promotions in the post of the Executive Engineer by an order dated 15.02.2001. A final seniority list of the Superintending Engineers and the Executive Engineers

as on 29.08.2001 was published. Regularization of some of the appellants by order dated 15.02.2001 and final seniority list [as on 29.08.2001] of Superintending Engineers [Civil] and Executive Engineers circulated on 31.08.2001 were never put in challenge by anyone.

8. In the year 2001, the respondent No. 1 herein filed the aforesaid writ petition against the seniority position ascribed and shown in the seniority list dated 15.03.1999 and sought for a direction that he is senior to the appellants herein as he was regularly selected in 1989 by the Arunachal Pradesh Public Service Commission. The appellants and the State Government filed their counter affidavit in the said writ petition contending, inter alia, that the appellants were appointed prior to the constitution of the Arunachal Pradesh Public Service Commission on 29.03.1988. The appointment of Group-B post in the Public Works Department of Arunachal Pradesh was guided by the Arunachal Pradesh Administration [Public Works Department] Group-B Post Recruitment Rules, 1983 and the appointment of the appellants was made as per the said Recruitment Rules in the absence of the Arunachal Pradesh Public Service Commission at the relevant time. Their services also were regularized in terms of the said Rules which provided that a minimum service period of two years, known as period of probation, was necessary for rendering service in the capacity of Assistant Engineer for all appointments made by Government to these posts since 1980. The services of the appellants were regularized as stated hereinabove giving them the benefit of service from the actual date of their joining the service.

9. Before the constitution of the Arunachal Pradesh Public Service Commission such regularizations were given by convening meetings of the Departmental Promotion Committee. However, by the time the cases of the appellants could be taken up for consideration for regularization of their services on completion of two years period of probation, the Arunachal Pradesh Public Service Commission came to be constituted and therefore the cases for regularization of the services of the appellants were considered by the Arunachal Pradesh Public Service Commission, which recommended the regularization of the services of the appellants from the date of their initial appointment. It was also pointed out that not giving retrospective effect to regularization of the services of the appellants by Arunachal Pradesh Public Service Commission would have been a deviation from the past practices and that would have caused prejudice and grievance amongst the appellants as also disparity in application of the Service Rules. It was also pointed out that the appellants and the respondents were inducted into the Government service through two separately and different modes of recruitment, one taking place before the constitution of the Arunachal Pradesh Public Service Commission and the other after the constitution of the Arunachal Pradesh Public Service Commission.

10. The learned Single Judge of the Gauhati High Court took up the aforesaid writ petition for hearing and by its judgment and order dated 29.04.2005 allowed the writ petition and directed the Government of Arunachal Pradesh to make

necessary changes in the seniority list by recasting the same by accepting the date of appointment of the respondent No. 1 as on 02.05.1989 and those of the appellants from the respective dates of their regularization and that the ad-hoc period of service rendered by them would not be counted towards the seniority in the rank of Assistant Engineer.

11. Being aggrieved by the aforesaid judgment and order, an appeal was filed before the Division Bench of the High Court which was heard accordingly and by a judgment and order dated 19.02.2009 the Division Bench dismissed the writ appeal filed by the appellants and confirmed the judgment and order passed by the learned Single Judge. Being so aggrieved, the present appeal was filed by the appellants herein which was entertained and on completion of the pleadings, we have heard learned Counsel appearing for the parties.

12. Counsel appearing for the appellants submitted before us that since the appellants herein were appointed prior to the respondent No. 1 in point of time and they were also regularized from an earlier date, they had been rightly shown by the concerned Department to be senior to the respondent No. 1. The counsel for the appellant further submitted before us that therefore in any view of the matter the appointment of the appellants having been made by the State Government prior to the constitution of the Arunachal Pradesh Public Service Commission and their regularisation on the recommendation of the State Public Service Commission after successful completion of two years probationary service, having not been challenged by any party, including the respondent No. 1 herein, the High Court was not justified in interfering with the seniority position and the length of service rendered by the appellants in counting the said ad-hoc period of service for the benefit of their seniority.

13. It was also submitted that not only their services rendered as temporary and ad-hoc service were recognized and counted towards their seniority while regularizing their service as Assistant Engineer with a retrospective date of their initial appointment, but even some of the appellants, in the meantime, depending on their seniority in the post of the Assistant Engineer were considered and promoted during the period from 1991 to 2001 to the post of the Executive Engineer and the Superintending Engineer and one of them was even promoted to the post of the Chief Engineer. However, despite the aforesaid situation, no objection or challenge was made till 2001. It was further submitted that the High Court acted illegally and without jurisdiction in setting aside the benefit given to them as far back as 20.07.1989, although, in the writ petition filed by the respondent No. 1, the said order was not challenged. It was also submitted that the respondent No. 1 himself not having raised any grievance against the initial appointment of the appellants as temporary and ad-hoc Assistant Engineers and also having not protested their regularization of service on the recommendation of the Arunachal Pradesh Public Service Commission from the date of their initial appointment and the said order having become final and binding no interference was called for from the High Court on the basis of a

writ petition.

14. The counsel appearing for the respondent No. 1, however, submitted that though the initial appointment of the appellants has not been challenged by the respondent No. 1, he is aggrieved by the appellants having been given the benefit of seniority for the period of service which was rendered on temporary and ad-hoc basis. The counsel for the respondents also submitted that since the initial appointment of the appellants was irregular and de hors the relevant Rules, they are entitled to get their seniority only from the date when they were regularized by the competent authority and therefore the judgment and order passed by the High Court is just and proper. It was also submitted by the counsel for the respondents that had the appellants so desired, they could have, as he (respondent No. 1) had done, submitted their application for being considered as a regular appointee pursuant to the advertisement issued by the Public Service Commission. The counsel for the respondents further emphasized the fact some of the appellants had availed the said opportunity, which fact would indeed show that they were fully conscious of the fact that their initial appointment was not in accordance with the existing rules and that the same was required to be regularized by following a proper procedure and therefore their seniority could be counted only from the date they were so regularized in the service on the basis of the recommendation of the Arunachal Pradesh Public Service Commission.

15. In the light of the aforesaid submissions and averments made by the counsel appearing for the appellants, the respondents and the State of Arunachal Pradesh and after examining the documents placed on record before us, we find that there is no dispute with regard to the fact that the appellants were appointed as Assistant Engineers on purely temporary and ad-hoc basis. Few of the letters dated 2nd April, 1986 issued in the case of some of the appellants are placed on record.

16. A close perusal of the said letters issued shows that a few of the appellants had been appointed on 2nd of April, 1986 as Assistant Engineers purely on temporary and ad-hoc basis as per the relevant terms and conditions. In Clause 3 thereof, it was provided that the appointments would be on purely temporary and ad-hoc basis until regular appointments are made according to the Rules on the recommendation of a Selection Board constituted by the Government and that aforesaid ad-hoc appointments as Assistant Engineer would not entitle any seniority in the cadre of regular Assistant Engineer.

17. Clause 8 of the said appointment letter, on the other hand, stated specifically that his appointment as an Assistant Engineer would be governed by the relevant Rules and Orders of the Government issued from time to time. There is also no dispute with regard to the fact that at the relevant time when the aforesaid appointment letters were issued, the service condition of the appellants were governed by the Arunachal Pradesh Administration [Public Works Department] Group-B Post Recruitment Rules, 1983, which is a set of rules issued in exercise of the powers conferred under Article 309 of the Constitution of India. The said

Rules also regulate the method of appointment to the Group-B posts in the Public Works Department and also govern the recruitment process of the Assistant Engineers [Civil] in the Arunachal Pradesh Public Works Department. The said Rules provide both direct recruitment and promotion as methods of recruitment. The said Rules further provide that in case of a failure to recruit by the aforesaid methods, transfer on deputation shall be employed and that the period of probation for such appointment would be for two years. The Rules laid down further that the Union Public Service Commission was not required to be consulted in making the recruitment.

18. The aforesaid appellants after their recruitment on temporary and ad-hoc basis worked on probation for a period of two years and on completion of the said period their cases were considered by the State Public Service Commission and by an order dated 20.07.1989, the appointment of the appellants was regularised as Assistant Engineer [Civil] against direct recruitment quota. In the said order, the initial date of joining of the appellant No. 1 to the post of Assistant Engineer [Civil] on temporary and ad-hoc basis was shown as 04.02.1986 and his date of regularization of appointment in the concerned Grade was shown to be as 04.02.1986, whereas, the other appellants were also given similar dates, but the fact remains that their appointment to the post of Assistant Engineer is shown to have been regularized with effect from the date of their initial appointment only.

19. Several seniority lists were published thereafter, showing the names of the appellants as senior to the respondent No. 1 and despite such publication, which were of course provisional in nature, no objection was raised by the respondent No. 1. A final seniority list of Assistant Engineers [Civil] in Arunachal Pradesh Public Works Department as on 01.03.1999 was published on 15.03.1999 through an Office Memorandum and in the said seniority list also the names of the appellants were shown senior to the respondent No. 1. In the said seniority list also not only the date of their initial appointment in the post of Assistant Engineer was shown but also the date of their confirmation in the Grade was also shown which was from the date of their initial appointment. When the aforesaid final seniority list was published, the respondent No. 1 finally filed a writ petition in 2001 challenging the seniority position given to the appellants.

20. On the 2nd of March, 2001, a Gazette notification had also been published which clearly indicates that not only the appellants were confirmed in the post of Assistant Engineer [Civil] but they were also confirmed in the post of the Executive Engineers [Civil] and at least some of them have since been promoted to the post of the Superintending Engineer and one of them is at least occupying become the post of the Chief Engineer. The respondents in their writ petition had neither challenged the initial appointment order of the appellants appointing them as Assistant Engineers [Civil] on temporary and ad-hoc basis under the 1983 Rules, nor had they challenged the subsequent order passed by the Government of Arunachal Pradesh on the recommendation of the Arunachal

Pradesh Public Service Commission regularising the services of the appellants as Assistant Engineers from the date of their initial appointment. Not only these orders were not challenged by the respondent No. 1 in the writ petition filed by him but the subsequent orders of promotion of these appellants to the post of Executive Engineers and their confirmation in the said post, on the basis of their seniority positions counting the ad-hoc period of service, were also not challenged. These orders are therefore final and binding on all concerned.

21. As noted earlier by us, several seniority lists, although provisional in nature, were published in the meantime, showing that the benefit of ad hoc period had been given to the appellants. But these were never challenged by the respondent No. 1 and it was only in the year 2001 when some of them were promoted to the post of Superintending Engineer and one of them to the post of the Chief Engineer that the respondent No. 1 filed the aforesaid writ petition.

22. The High Court without considering those facts have only dealt with one aspect which is that the initial appointment of the appellants to the post of Assistant Engineer was de hors the Rules. The said findings recorded by both the Single Judge as also the Division Bench were uncalled for and unjustified for the simple reason that the appointment order itself indicated that their appointment would be governed by the Service Rules then existing, i.e., the 1983 Rules.

23. The fact that their services were regularized from the date of their initial appointment on the recommendation of the Arunachal Pradesh Public Service Commission was also totally ignored by the High Court. Thus, these facts coupled with the fact that none of the aforesaid orders were challenged by the respondent No. 1, would indicate that the said orders are final and binding on all the persons concerned. The High Court ignored the fact that the respondent No. 1 himself was bound by the aforesaid orders. The respondent No. 1 was bound by his own appointment orders. The appellants had rendered two years of service as Assistant Engineers and at least some of the appellants including appellant No. 1 had successfully completed their probation period on 01.04.1988 whereas the respondent No. 1 was appointed as Assistant Engineer on regular basis and put on probation for two years on 02.05.1989. Therefore, when the respondent No. 1 was put on probation, the appellant No. 1 and some others had successfully completed their probation. Thus, for all purposes at all times, the appellants were senior to the respondent No. 1.

24. Considering the said fact and also considering the precedents in the Department that all such employees were regularized from the date of their initial appointment, the Government of Arunachal Pradesh also regularized the services of the appellants in the post of Assistant Engineer from the date of their initial appointment and that was done on the recommendation of the Arunachal Pradesh Public Service Commission. The order of regularization having become final and binding on all concerned could not have been ignored and implicitly set aside by the High Court on a ground that the initial appointment of the appellants was de hors the Rules, which is totally a non-existent ground.

25. There is no denial to the fact that prior to the constitution of the Arunachal Pradesh Public Service Commission on 29th March, 1988 the appointment of Assistant Engineers in the State Public Works Department was always carried out in accordance with the Arunachal Pradesh Administration [Public Works Department] Group-B Post Recruitment Rules, 1983. The appointment of the appellants as indicated by their initial appointment letters issued in 1986 indicate that their appointments were governed as per the said Service Rules.

26. Under the said Rules, a minimum service period of two years, known as period of probation was considered necessary for rendering service in the capacity of Assistant Engineer for all appointments made by Government to these posts since 1980. In all cases since 1980 and prior to the constitution of the State of Arunachal Pradesh as an independent State, the services of the incumbents were regularised giving them retrospective effect from their actual/initial date of joining in the service and since at the stage of initial appointment of the appellants Arunachal Pradesh Public Service Commission was non-existent, the regularization of services of such employees were given through meetings of the Departmental Promotion Committees. By the time appellants completed their two years of probationary service period, the State of Arunachal Pradesh came to be constituted and since Arunachal Pradesh Public Service Commission had come into existence by that time, the cases of regularization of the services of the appellants were considered by the State Public Service Commission and on its recommendation their services were regularized after expiry of the two year period of probation giving retrospective effect to their regularization from the date of their initial appointment.

27. It is clearly stated by the State of Arunachal Pradesh that if such a retrospective effect to regularization of the services of the appellants by the State Public Service Commission would not have been given and if it had deviated from the past practice, the same would have caused prejudice and grievance and a disparity in the application of the Service Rules as compared to the past cases.

28. It is, thus, clearly established that the respondent No. 1 was inducted into Government service by a separate mode of recruitment than that of the appellants and therefore their cases cannot be equated. The statement of the Government of Arunachal Pradesh that the provisional seniority lists were regularly published by the Public Works Department Secretariat from time to time since 1990 to 1999, with ample time being given to the incumbents to reply against any anomaly in the seniority list and that the respondent No. 1 never submitted any representation in that regard is not disputed. The respondent No. 1, therefore, had challenged the established seniority position after about 10 years and that too without challenging the basic and the fundamental orders of giving the appellants the benefit of regularised service from their initial date of appointment as Assistant Engineers.

29. The challenge appears to us to be belated and in this regard we would

endorse the same view as expressed by this Court in the case of Shri L. Chandrakishore Singh Vs. State of Manipur and Others, at para 15 which is extracted hereinbelow:

15. It is now well settled that even in cases of probation or officiating appointments which are followed by a confirmation unless a contrary rule is shown, the service rendered as officiating appointment or on probation cannot be ignored for reckoning the length of continuous officiating service for determining the place in the seniority list. Where the first appointment is made by not following the prescribed procedure and such appointee is approved later on, the approval would mean his confirmation by the authority shall relate back to the date on which his appointment was made and the entire service will have to be computed in reckoning the seniority according to the length of continuous officiation. In this regard we fortify our view by the judgment of this Court in G.P. Doval and Others Vs. Chief Secretary, Government of U.P. and Others, .

30. The respondents have, in support of their case, referred to and relied upon the judgment of this Court in the case of K. Madalaimuthu and Another Vs. State of Tamil Nadu and Others, . In order to appreciate the contention raised by the counsel appearing for the respondents, we have carefully perused the said decision. However, on a careful scrutiny of the said judgment, we are of the considered opinion that the said decision is distinguishable on facts which are noted hereinbelow.

31. The aforesaid decision was rendered in a fact situation which is altogether different from the present one and this would be apparent on a bare perusal of the said decision. In the said case the recruitment of the respondents therein was admittedly de hors the relevant Recruitment Rules inasmuch as the said recruitment was particularly made under Rule 10(a)(i)(1) of the Tamil Nadu State and Subordinate Services Rules, 1955. The said provision is extracted hereinbelow for a proper appreciation of the situation:

10 (a) (i) (1): Where it is necessary in the public interest owing to an emergency which has arisen to fill immediately a vacancy in a post borne on the cadre of a service, class or category and there would be undue delay in making such appointment in accordance with these rules and the Special Rules, the appointing authority may temporarily appoint a person, who possess the qualifications prescribed for the post otherwise than in accordance with the said rules.

(emphasis supplied)

32. It is clear from the judgment in the said case that the respondents therein had been appointed under Rule 10(a)(i)(1) which provides for recruitments in emergent circumstances and allows the appointing authority to make appointments otherwise than in accordance with the said Rules. It was in this context that this Court held that the respondents therein will get benefit of their seniority only from the date they were regularized in the cadre to which they had been appointed. In the case at hand, however, the fact situation is totally

different on account of the fact that the appointment letters issued to the appellants appointing them as temporary and ad-hoc basis as Assistant Engineers in the Public Works Department specifically mentioned that the appellants will be governed by the Service Rules and also that they would be regularized according to the Rules on the recommendation of a Selection Board constituted by the Government. We would like to extract both the aforesaid conditions formulating part of the terms and conditions contained in the appointment letters issued to the appellants:

3. This appointment will be on purely temporary and ad hoc basis until regular appointment are made according to rules on the recommendation of a selection Board constituted by the Government. (No increment in time scale will be permissible till their appointment is regularized. This adhoc appointment as Assistant Engineer will not entitle any seniority in the cadre of regular Assistant Engineer

8. His appointment will be governed by the relevant Rules and Orders of the Government issued from time to time

33. In that view of the matter there was not only a case of the appellants having a legitimate expectation that their cases would be considered for regularization by the competent authority but also a case where the Service Rules were also made applicable to the appellants. When the Arunachal Pradesh Public Service Commission ("the APPSC") considered the cases of the appellants for regularization on completion of their probationary period of two years, all the said factors weighed with the APPSC and consequently it was decided to regularize them from the date of their initial appointment. Therefore, in the facts of the present case, ratio laid down in the case of Shri L. Chandrakishore Singh (*supra*) would be squarely applicable.

34. We may here also appropriately refer to another decision of this Court in the case of G.P. Doval and Others Vs. Chief Secretary, Government of U.P. and Others, , wherein this Court held that regularization of the services of a person, whose initial appointment although not in accordance with the prescribed procedure but later on approved by an authority having power and jurisdiction to do so would always relate back to the dates of their initial appointment. Para 13 is, which is reproduced hereinbelow:

13. ...If the first appointment is made by not following the prescribed procedure but later on the appointee is approved making his appointment regular, it is obvious commonsense that in the absence of a contrary rule, the approval which means confirmation by the authority which had the authority, power and jurisdiction to make appointment or recommend for appointment, will relate back to the date on which first appointment is made and the entire service will have to be computed in reckoning the seniority according to the length of continuous officiation. That has not been done in this case....

35. We may also usefully refer to the judgment of this Court in The Direct Recruit

Class-II Engineering Officers' Association and others Vs. State of Maharashtra and others, , which reads as follows:

47. To sum up, we hold that:

(A) Once an incumbent is appointed to a post according to rule, his seniority has to be counted from the date of his appointment and not according to the date of his confirmation....

36. The other aspect of the matter which is to be noted is that when the respondents were appointed to the service as Assistant Engineers on the recommendation of the APPSC, the said appointment was on probation for a period of two years. Some of the appellants had successfully completed their probation period on 20.07.1989, after their cases had been taken up for regularization by the APPSC. Therefore, when considered from any angle there is no justification for denial of the benefit of seniority to the appellants from the date of their initial appointment which is also in tune with the legal principles laid down by this Court as referred to hereinbefore and in that view of the matter the aforesaid decision which is relied upon by the counsel appearing for the respondents is held to be not applicable to the facts and circumstances of the present case.

37. In view of the aforesaid discussion, we set aside the orders passed by the Single Judge as well as by the Division Bench of the High Court. Consequently, the Writ Petition filed by respondent No. 1 in the High Court would stand dismissed.

38. Accordingly, the present appeal is allowed. There will be no order as to costs.