

(1998) 07 AP CK 0073

In the Andhra Pradesh High Court

Case No : Writ Petition No. 10801 of 1989

S.B. Prabhakar, Environmental Engineer, A.P. Pollution Control Board

APPELLANT

Vs

State of A.P. and Others

RESPONDENT

Date of Decision : 01-07-1998

Acts Referred:

Water (Prevention and Control of Pollution) Act, 1974 — Section 64

Citation : (1998) 4 ALD 639 : (1998) 5 ALT 478

Hon'ble Judges : A.S. Bhate, J

Bench : Single Bench

Advocate : Mr. J. Sudheer, for M.G. Mohan Rao, for the Appellant; Mr. A. Ramalijgaswamy, for the Respondent

Judgement

1. The petitioner was selected and appointed as Junior Engineer (for short the "J.E.") in the A.P.Pollution Control Board (hereinafter referred to as the "Board") by proceedings dated 15-7-1996. His appointment was in the Pay scale of Rs. 480-900. His services were regularised on 16-7-1976 as per G.O.(Rt).No.58, M.A. dated 18-1-1980. His Probation was declared completed satisfactorily with effect from 15-7-1978 by a proceeding dated 11-3-1983, It is said that as per the provisions of the relevant rules, the Appointing authority for the post of Junior Engineer in the Board was State Government.

2. It is contended by the petitioner that the relevant rules provide that the post of J.E. can be filled up either by transfer or by direct recruitment. There is no other mode of recruitment to the post of J.E. in the Board. The 3rd respondent was appointed as J.E. on Deputation to the Board from Panchayat Raj Department of the State Government by G.O.Rt.No. 677, Panchayati Raj (Estt.T) Department dated 29-7-1977- Respondent No.3 was till then working as J.E. in Panchayat Raj Engineering Department. His deputation was initially for a period of one year from the date of joining services of the Board. His deputation was extended from time to time thereafter. The petitioner submits that respondents

occupying post of J.E. in the Board on deputation was in total violation of the Rules of Recruitment in the posts of the Board. Rules are Statutory and cannot be by-passed ignoring the true legal position. The Board on its meeting dated 16-2-1981 of its own proposed for permanent absorption of third respondent in the services of the Board as J.E. The third respondent had joined services on deputation in the Board from 4-9-1977. The Board Resolution was understood to mean that services of the third respondent would be regularised/absorbed in the Board from the said date i.e. 4-9-1977. Surprisingly the Board in a later meeting dated 11-5-1982 decided to absorb the third respondent as I.E. by giving weightage for his past regular service in the Panchayat Raj Engineering Department. A Seniority List was prepared by the Board after Resolution dated 11-5-1982. The same was communicated to the petitioner by Memo dated 28-6-1982. The third respondent was given seniority above the petitioner and all others who were serving with the Board even prior to 4-9-1977 as J.Es. The petitioner raised objection to the said Seniority List and the objections were rejected on 1-6-1989 by the Board. The contention of the petitioner is that the decision giving respondent No.3 seniority above the petitioner is in utter violation of Statutory requirements as well as principles of natural justice. The petitioner was never given any opportunity before fixing the seniority of Respondent No.3 above him. The petitioner challenges the proceedings contained in Memo dated 28-6-1982 bearing No.191/ PCB/A2/B2-745 affirmed through Proceedings dated 1-6-1989 bearing No.191-A/PCB/B1/ 82-1323.

3. Though respondent were duly served, no counter was filed by any one of them, not even by respondent No.3. The argument raised on behalf of respondents 1 and 3 was similar. It is contended that respondent No.3 was appointed by the Board by way of transfer. It is alleged that the respondent No.3 was asked as to whether he was willing to be absorbed by the Board. He had never asked for absorption. The Respondent No.3 gave his willingness on the condition that his past service in the Parent Department was given due weightage. The Board accepted his condition and therefore, he consented to the absorption. His past services cannot be ignored and the decision taken by the Government is perfectly regular and in accordance with the principles of natural justice.

4. Before proceeding to consider the arguments advanced by the learned Counsel, it is necessary to see the Rules framed by the Governor of Andhra Pradesh after consulting the Board, by exercising the powers u/s 64 of the Water (Prevention and Control of Pollution) Act, 1974, (Central Act No. 6 of 1974) (hereinafter referred to as the "Act"). Rule 7 of the Act is relating to appointments mentioned in Column No.2 of the annexure. The Rule makes it clear that the appointments shall be made by the method made in the corresponding entry in Column No.3 thereof.

5. The relevant entry in the annexure of J.E. is as follows:

Sl. No.	Category	Method of Recruitment	Qualifications
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4. Junior Engineer (1) By transfer

or

(2) By direct recruitment (2)

Similar to those prescribed in the Special Rules of the A.P. Public Health and Municipal Engineering Subordinate Service.

Rules framed under the Act Rule 9 of the Act is regarding commencement of service with the Board. It runs as follows:

"(1) Except as otherwise provided by or under these rules, service of an employee shall be deemed to commence from the working day on which an employee reports for duty in an appointment covered by these rules at the place and time intimated to him by the Member-Secretary provided that his service shall commence from the next following working day if he reports before noon.

(ii) Service includes the period during which an employee, is on duty as well as on leave duly authorised by the authority concerned but does not include any period during which an employee is absent from duty without permission or overstay his leave unless specifically ratified by the Board."

Rule 13 of the Rules framed under the Act is regarding seniority and is as follows:

"(i) Every person appointed to a category in the service by a direct recruitment shall be on probation for a total period of two years on duty within a continuous period of three years. In case of a person appointed by promotion or transfer, the period of probation shall be one year on duty within a continuous period of two years.

(ii) During the probation period, an employee shall be liable to be discharged without notice. But the appointing authority may, however, communicate lapses on the part of the probationer or unsuitability of the probationer in advance of the expiry of the prescribed period of probation before action is taken to discharge his services. The period of an employee as fixed at the time of his appointment may be extended by the appointing authority, but in no case shall the period of extension exceed one year."

These Rules were issued under G.O.Ms.No.3, M.A. dated 1-1-1979.

6. From the entry in the annexure it may be easily noted that appointment of J.Es in the Board can be made only by two methods. One is by transfer or second by direct recruitment. So the question that immediately arises for consideration is whether respondent No.3 was appointed in compliance with these Rules. The petitioner has contended that respondent No.3 was brought on deputation which is a mode not prescribed by the Rules for appointment to the said post. It is

argued that from the inception the appointment of respondent No.3 was void. The learned Counsel for respondent No.2 and the learned Counsel for respondent No.3 have contended that respondent No.3 was in fact appointed by Transfer in compliance with the Rules. It is necessary to see the order by which respondent No.3's services were placed at the disposal of the Board. The first order in that connection is G.O.Rt.No. 677, dated 29-7-1977.

The order reads as follows:

"Under Fundamental Rule 110(a) and 114 Government direct that the services of Shri K.Krishna Rao, Junior Engineer, Panchayati Raj Engineering Department be placed at the disposal of the A.P.State Board for Prevention and Control of Water Pollution for a period of one year from the date of his joining service under the Board subject to the terms and conditions prescribed in G.O.Ms.No. 204, Finance and Planning Department dated 21-5-1976,

2. The Chief Engineer (Panchayati Raj) is requested to arrange for the immediate relief of the individual under intimation to the Member Secretary, A.P. State Board for Prevention and Control of Water Pollution.

(By order and in the name of the Governor of Andhra Pradesh)

Gurudas,

Secretary to Government."

This order does not specifically say as to whether respondent No.3 was transferred by the appropriate authority from Panchayati Raj Department of the Board. It is not disputable that the Board is a separate entity and is not a part of the Government Organisation. The Order however, says that services of respondent No.3 were placed at the disposal of the Board for a period of one year from the date of his taking charge of the service under Board. Respondent No.3 in letter addressed to the Assistant Engineer of the Board on 9-9-1977 has informed that he reported to duty at the Board Office on 4-9-1977. It will thus be seen that the services of respondent No. 3 were placed at the disposal of the Board by the parent department only for a period of one year. This was obviously not a transfer. There is basic difference between "transfer" and "Deputation". Deputation is normally for some specific purpose and on most of the occasions for a particular period.

Transfer is not so. In transfer a person is only shifted from one place to another. It is not necessarily for any particular purpose or for any specific period. Moreover, "Transfer" takes place by the orders of the employer within its units. The Board was not a unit of the State Government nor was it department of the State Government though there might be statutory Supervisory powers vesting with the Government. The Board is an independent authority. The order cannot be construed as a transfer in the circumstances. The matter becomes further clear from the subsequent correspondence. On 16-9-1978 the Principal Secretary of the Board had requested the Chief Engineer of Panchayati Raj by a letter to

kindly sanction continuance of deputation of respondent No. 3 for one further year from 4-9-1978 to 3-9-1979. The reply of Panchayati Raj Department of the State Government was in GO.Rt.No. 1168 dated 29-11-1978. By the said GO., a specific sanction was given to the extension of the deputation of respondent No.3 with the Board for a period from 4-9-1978 to 3-9-1979. Again by GO.Rt.No. 284 dated 4-4-1980 the Government of Andhra Pradesh sanctioned further extension of "deputation" of respondent No.3 tin 3-9-1990. The Principal Secretary of the Board on 7th May, 1979 wrote to the Chief Engineer, Panchayati Raj Department (of State of Andhra Pradesh) vide Lr.No.191/ PCB/77/77. In the said letter it was stated clearly that respondent No.3 was working in the Board on deputation basis and there was proposal to absorb him. Even respondent No.3 in his letter dated 16-6-1979 whereby he gave conditional consent to absorption by the Board and stated that he had joined the Board on deputation. In the meantime by G.O.Rt. No.503 dated 5th May, 1981 issued by the Panchayati Raj of A.P.State, the deputation of respondent No.3 was extended further from 3-9-1980 to 3-9-1981. All these orders and correspondence clearly show that respondent No.3 was brought on deputation in the services of the Board. To contend that it was a "transfer" is untenable. The appointment of respondent No.3 was not by "direct recruitment" nor by a "transfer" but was by deputation. Deputation being not the mode of appointment to the post of J.E., the said appointment was illegal. It did not conform tq the Statutory Rules. On this sole ground, the petitioner's contention must be accepted that respondent No.3 cannot be given any seniority by the Board above the petitioner or any other J.E. validly appointed in the services of the Board.

7. Apart from the fact that respondent No.3's initial appointment was in total violation of Statutory Rules, even if it is assumed that he could have been appointed to the post of I.E. by order dated 29-7-1977, still then the petitioner must succeed and respondent No.3 cannot be given any seniority above the petitioner. Rule 13 extracted supra, shows that the seniority of a person in the service of Board shall be determined by the date of his first appointment to such service, (underlined to give emphasis). The seniority is necessarily to be counted in terms of the Rule only i.e. from the date of first appointment to the service of the Board of the concerned employee. Assuming for a moment that respondent No.3 was validly appointed to the post of J.E. by the Board, his date of first appointment to the Board would naturally be 4-9-1977 when he reported to the duty in the Board. The order of 29-7-1977, by which he was directed to join service of the Board for a period of one year, stated that the period of one year was to begin from the date of respondent No.3 having joined the service under the Board. Thus under no circumstances, respondent No.3's service for purpose of seniority could have been counted prior to 4-9-1977, which was the date of his first appointment to the post of Junior Engineer in the Board. By the impugned proceedings, the Board has given him weightage for determining his seniority, from the date when he joined service in the Panchayati Raj Department. This was clearly impermissible under Rule 13 extracted supra. Seniority of respondent

No.3 could be counted only from the date of his joining service of the Board and not before. I have already stated that in fact appointment by deputation was not according to the Rules. Even a valid deputationist cannot claim seniority over and above the persons working in the same cadre in the department where the person is deputed. It is a well known principle that a person going on deputation cannot claim seniority above the persons, who are already working in a similar post in the department where the person is so deputed.

8. In *C.M.Naidu v. State of Karnataka* 1977 (1) SLR 194, the Supreme Court had the occasion to deal with some what similar point. In the said case the question of recruitment to the post of Senior Health Inspectors was subject-matter. The mode of recruitment to the said cadre was either by promotion from the category of Junior Health Inspectors" or by "deputation" from the State Directorate of Health Services. A quota for recruitment by these modes was 50% for each of the mode. No other mode of recruitment was permissible under the relevant Recruitment Regulations. The fact that the Regulations provided 50% recruitment by deputation, that did not empower the regularisation of those deputationists to the posts of Senior Health Inspectors.

The Supreme Court said:

"It is difficult to see how in the face of this provision which has admittedly statutory effect, the posts of Senior Health Inspector could be filled in by absorption of deputationist Senior Health Inspector from the Karnataka State Civil Service, Senior Health Inspectors from the State Directorate of Health Services could only be on deputation to the extent of one half of the number of posts of Senior Health Inspectors on the Corporation establishment and they could not be absorbed as permanent Senior Health Inspectors under the Corporation without violating the aforesaid Statutory provision."

The Supreme Court further observed:

"The conclusion must irresistably follow that the Resolution of the Corporation dated 30th December, 1974 read with the Government order dated 6th May, 1975 did not operate to put an end to the status of the appellants (who were deputationists.) as Government servants and to create the relationship of master and servant between the Corporation and the appellants and in the circumstances, it was competent to the State Government to pass the order dated 25th August, 1975 withdrawing the sanction granted by it under the earlier order dated 6th May, 1975." It may be stated that the order which was withdrawn by the Government was sanctioning of the absorption of the deputationists by the Corporation. The clear effect of this judgment is that the deputationists until absorbed continues to be in the parent department and cannot claim any seniority in the department where he is deputed over and above the persons, who were already working there. A more pertinent case can be found in *Director of Administrative Training v. S.C.Misra* 1995 (5) SLR 426. It was clearly laid down there that deputationists have no right to be absorbed in

the borrowing department and seniority of such deputationists has to begin from the date on which they are absorbed by the borrowing department. A question of estoppel was also raised there. It was contended there that the Officers of the borrowing department had made a representation to the deputationists and therefore, the borrowing department cannot go back on such promise. It was pointed out that there cannot be any estoppel against statutory provisions.

9. However, the learned Counsel for the respondents has brought to my notice the decision in *S.K. Mathur and Others Vs. Union of India and Ors*, . A cursory reading of the said judgment may show that it supports the claim of respondents that a person coming on deputation is entitled to claim seniority from the date on which his service in the parent department began. However, a close reading of the judgment shows that when recruitment is made from two different sources and an integrated seniority list was prepared of the persons so recruited, the benefit of service already rendered on a similar post in a similar organisation under the same employer will be given to the person appointed under the new post. (Underlined to give emphasis). This principle is enunciated in para-25 of the judgment. Therefore, for claiming the benefit of previous service prior to deputation, the employer must be one and the same in both the organisations. Moreover, the Organisations must be similar. In the present case the Organisations are neither similar nor the employer is the same. The parent employer was State Government while the employer in the borrowing department was the Board. Hence the said case does not apply to the facts of the present case. On the other hand, the second judgment relied upon by the learned Counsel for the respondents i.e. in *Union of India and Another Vs. Onkar Chand and Others*, is very much against the respondents contention. The ratio of the said case is that when there is a dispute regarding seniority between the promotees in the department and the persons brought on deputation, the deputationists cannot claim seniority over the departmental candidates by reckoning their service in the parent department. This is very much against the contention of the respondents. The net result of all this discussion is that in the first place the very appointment of respondent No.3 to the Post of I.E. in the Board, on deputation was not in accordance with the Statutory provision. Second is that even if respondent No.3's appointment is held valid, the decision of respondents Nos. 1 and 2 to give respondent No.3 a seniority by counting his service in the parent-department was utterly unsustainable. In fact the Board was aware of the true position of the deputationists. In the proceedings dated 1-6-1989 it has been mentioned that respondent No.3 had not requested the Board to absorb him and that it was the Board which had asked for his willingness for absorption and therefore, his past regular service has to be taken into account. The report of the Sub-Committee constituted by the Board dated 9-6-1987 is also worth noting. In the said report there is a reference regarding principles to be followed in determining the seniority of persons, who are absorbed vis-a-vis personnel working in the Board. It is referred in this report that the Government wanted to know whether Sri Krishna Rao (respondent No.3)

was prepared to take last rank among the J.Es working in the Board. It was the Board which brought to the notice of the Government that the absorption of respondent No.3 was not at his request but at the instance of the Board. To this the Government had replied with specific objections. One of the objection was that the Board's action of absorbing respondent No.3 was unilateral. Another objection was that the Board had not asked respondent No.3 to state whether he was agreeable to take last rank as per Government instruction in force. Again the matter was placed before the Sub-Committee of the Board. The Sub-Committee has observed:

"It is true that Sri Krishna Rao applied for deputation at his own accord."

At another place the report says:

"It is not known why the Board has made such a move particularly when technical persons were available and quite a few of them have already been directly recruited by then. Besides they have agreed to give weightage to the past service rendered by him without realising the consequential adverse effects on the other personnel working in the organisation."

In spite of all this a strange decision was taken on the ground that it was not correct after lapse of so many years to repatriate respondent No.3 to the Panchayati Raj Department. It was further observed that repatriated respondent No.3 would not receive weightage of service rendered in the Board and respondent No.3 cannot ask for re-absorption in the Panchayati Raj Department. It was for all these reasons that the appeal preferred by the petitioner against fixing of seniority was rejected by the Sub-Committee. It is thus clear that the Sub-Committee, dealing with the appeal in which the petitioner had taken objection to the seniority was fully aware of the true legal position and yet merely out of some sympathetic consideration, the valid objections of the petitioner were rejected. May be that it was not fault of respondent No. 3. I am not saying that there was no fault of respondent No.3 but assuming that there was no fault on his part that does not mean that a bonus has to be given to him at the cost of petitioner and other similarly situated persons, who were not at fault in any way. The fault was of the Board and respondent No.3, who put untenable conditions for absorption.

10. For all the foregoing reasons, the writ petition deserves to be allowed. However, in view of the fact that lot of time has elapsed since respondent No.3 has joined the services of the Board even though his appointment was not in order, he may not be made to refund the benefits received by him to the Board as he had in fact discharged work for all these years. Respondent Nos. 1 and 2 shall however, give the petitioner his appropriate seniority above respondent No.3 from the date in the seniority list which was prepared on 11-5-1982. The petitioner shall be entitled to all consequential benefits as a result of such seniority.

11. The writ petition is allowed to the extent aforesaid. The petitioner shall be

entitled to costs of Rs. 1,000/- from the Board.