

(2006) 11 KAR CK 0097
In the Karnataka High Court
Case No : Writ Petition No. 18511 of 2002

Sri K. Divakar

APPELLANT

Vs

The Commissioner, Bangalore Development Authority and
Others

RESPONDENT

Date of Decision : 21-11-2006

Acts Referred:

Constitution of India, 1950 — Article 14, 16 (1), 226, 309
Karnataka Civil Services Rules, 1992 — Rule 32, 68

Citation : (2007) 1 KarLJ 360 : (2007) 1 KCCR 388

Hon'ble Judges : Anand Byrareddy, J

Bench : Single Bench

Advocate : S.B. Mukkannappa, for the Appellant; K. Krishna and Deshraj and P. Changalaraya Reddy, for the Respondent

Final Decision : Allowed

Judgement

Anand Byrareddy, J.—The facts of the case are:

It is the petitioner's case that he was appointed as a Typist in Grade II by the first respondent namely, the Commissioner, Bangalore Development Authority, on 7.11.1974. There was a change in his cadre on his promotion to the cadre of Second Division Assistant with effect from 7.4.1987. The petitioner states that by an Official Memorandum dated 2.12.1991, he was promoted to the cadre of First Division Assistant on seniority-cum-merit basis against an existing vacancy. He was placed at Serial No. 3 in the seniority list. On the other hand, the petitioner contends that the second respondent had joined the first respondent as a peon on 2.3.1977 and was promoted as Second Division Assistant on 30.6.1982 and thereafter promoted as a First Division Assistant along with the petitioner under the Official Memorandum dated 2.12.1991 and he was placed at Serial No. 10 in the seniority list. There was an officiating period of one year in the cadre of First Division Assistant, which has been declared in respect of the petitioner in the year 1993, whereas it was not so declared in the case of the second respondent

Notwithstanding this, the second respondent has been placed in independent charge of the post of Accounts Superintendent by an Official Memorandum dated 13.8.1992, purportedly under Rule 32 of the Karnataka Civil Services Rules and was posted to the Accounts Section. This was done at the instance of the second respondent, who had made an application seeking promotion for the post of Accounts Superintendent on the ground that he had passed the Subordinate Accounts Service examinations ("S.A.S examination" for short). It is the petitioner's case that he has passed the Departmental examination in the year 1994, namely P.W.D. Higher I and II and S.A.S. Part I, II and III. The State Government, in exercise of the powers conferred by Sub-section (1) of Section 70 of the Bangalore Development Authority Act, 1976 (hereinafter referred to as "the Act" for brevity), had approved the Regulations relating to Cadre and Recruitment (Conditions of Service) Regulations, 1995 of the Bangalore Development Authority, pursuant to which the first respondent had published a seniority list of First Division Assistants in terms of the Notification dated 3.10.1996. Under the same, the petitioner was at Serial No. 44 and the second respondent was at Serial No. 51. By a Circular dated 2.12.1997, the first respondent had sought the option of the First Division Assistants working in the Department to work as Accounts Assistants as against 45 posts of First Division Accounts Assistants subject to conditions stipulated therein. Since the petitioner had the requisite qualifications, he had submitted his option to consider his case as First Division Accounts Assistant. Considering his seniority and merit, the first respondent had transferred the petitioner from the cadre of the First Division Assistant to the cadre of First Division Accounts Assistant by an office memo dated 3.2.1998. As things stood thus, the first respondent, by a Notification dated 9.11.2001, had published the provisional list of Accounts Officers and First Division Accounts Assistants. Under the provisional list, the petitioner was placed at serial No. 2. The petitioner had filed his objections to the said Notification. Thereafter, the first respondent had published the final seniority list of Accounts Officers and First Division Accounts Assistants by a Notification dated 3.4.2002. It was found that the second respondent, whose name did not figure in the provisional seniority gradation list published as on 9.11.2001, was inexplicably found in the final seniority list and he was placed above the petitioner at serial No. 1. In this regard, the petitioner had immediately submitted a representation, pointing out the mistake which was apparent. The fact that the second respondent was placed in charge of the post of Accounts Superintendent, appears to be the consideration on which the first respondent had recommended the second respondent for regular promotion to the post of Accounts Superintendent. This, on the face of it, is illegal and discriminatory.

2. During the pendency of the present writ petition, the first respondent, by an Office Memorandum dated 3.7.2001, had promoted the petitioner as well as the second respondent to the post of Accounts Superintendent. Notwithstanding the same, the counsel for the petitioner would contend that the final gradation list of Accounts Officers and First Division Accounts Assistant published by the first

respondent on 3.4.2002, is illegal and contrary to law. He would point out that the petitioner was senior to the second respondent as well as to the other respondents. The justification and placing the second respondent above the petitioner in the final gradation list is on the footing that the date of entry into the cadre by the said respondent was as on 13.8.1992. This is misconceived. The counsel would contend that the second respondent was placed in independent charge of the post of Accounts Superintendent under Rule 32 of the Karnataka Civil Services Rules (hereinafter referred to as "the Rules" for brevity). Such placement in independent charge, cannot be equated to promotion. The pay scale applicable to the promotional post, is not available to the person put in independent charge of the post. The second respondent, while in such independent charge, was only entitled to charge allowance in addition to his normal pay scale under Rule 68 of the Karnataka Civil Service Rules. Therefore, the first respondent was not justified in placing the second respondent above the petitioner. And, the final gradation list to that extent, is not sustainable. Secondly, he would contend that the second respondent before completing his officiating period of one year in the cadre of First Division Assistant, was placed in independent charge of Accounts Superintendent and since he has not completed the minimum period required in the cadre of First Division Assistant, he was not eligible for promotion for the post of Accounts Superintendent in accordance with the Cadre and Recruitment Regulations and Conditions of Service Regulations of 1995 of the Bangalore Development Authority. The second respondent, therefore, had no legal right to claim seniority above the petitioner. The first respondent having placed the second respondent as an Accounts Superintendent on independent charge with effect from 13.8.1992, ought to have reviewed the same after coming into force of the Cadre and Recruitment Regulations, 1995. Further, the first respondent having fixed the pay scale of the second respondent with effect from 2.12.1996, which pay scale is not available even under the Cadre and Recruitment Rules of 1995 for the post of Accounts Superintendent, the same could not have been fixed on a deeming fiction that the second respondent had completed his service of five years as First Division Assistant. And, therefore, would seek the quashing of the final gradation list at Annexure "N" and for an appropriate direction to re-do the final gradation list of First Division Assistants in accordance with the Regulations of 1995 and to quash Annexure "D" consequently.

3. Per contra, the counsel for the first respondent, would submit that the averments as regards the service particulars of the petitioner and the second respondent are not in dispute. In so far as his grievance that he is not shown as senior over and above the second respondent is concerned, he would submit that the second respondent had been placed in independent charge as Accounts Superintendent under Rule 32 of the Rules, as stated. That though the second respondent had not completed one year period of officiation in the cadre of First Division Assistant as on 13.8.1992, Section 50 of the Act confers power on the Commissioner in the matter relating to appointment and promotion, amongst

other things. And, he would submit, that Section 70 of the Act enables the Authority to frame Rules and Regulations in the matter of appointment and conditions of service of officers and servants of the Authority and in exercise of the said power, the Bangalore Development Authority (Cadre and Recruitment) Rules and Conditions of Service Regulations came to be framed in the year 1995 and was published in the official gazette on 23.9.1995 and therefore, in the absence of these Regulations as on the date when the second respondent was placed in independent charge by the Commissioner in exercise of power u/s 50 of the Act, there is no irregularity or illegality in the same. The counsel would further submit that the cadre of Accounts Superintendent is a promotional post and the feeder cadre is the First Division Accounts Assistant. The eligibility prescribed for promotion from First Division Accounts Assistant to the Accounts Superintendent is that of feeder cadre, should have passed the S.A.S. examination and must have put in three years of service in the cadre of First Division Assistant. While admitting that if such a condition were to be applied, the second respondent would not be entitled to be placed under Rule 32 of the Rules in the cadre of Accounts Superintendent for want of three years of minimum service in the cadre of First Division Assistant. Having regard to the fact that the Commissioner having exercised his power u/s 50 of the Act, is presumed to have relaxed the requirement of three years experience in the cadre of First Division Assistant and having found that the second respondent being the only eligible person having passed the SAS examination, was found fit to be promoted and was accordingly placed in independent charge u/s 32 of the Rules and hence, it would not suffer from any illegality. And, even if it could be said that the order dated 13.8.1992 is not in accordance with law, the defect, if any, stood cured on completion of the one year officiation in the cadre of First Division Assistant on 2.12.1992 and as such, the second respondent is certainly eligible to be placed under Rule 32 of the Rules from 3.12.1992 onwards. The petitioner having been fully aware of these circumstances as early as in the year 1992, has not chosen to raise any such objection and hence, would be precluded and estopped from questioning the same at this remote point of time. The other aspect that requires consideration is that, the petitioner, who was promoted from the cadre of Second Division Assistant to the cadre of First Division Assistant on 2.12.1991 had requested to be posted as legal consultant in the Law Department on the ground that he is a Law Graduate and considering such a request, by an order dated 6.6.1992, he was posted as legal consultant. Subsequently he had requested for continuation in such position as a legal consultant and he was so continued in the Law Section, pending approval of the C & R Rules. The Rules eventually came into force as aforesaid in the year 1995 and as on the date of commencement of the said Rules, the petitioner continued to work in the Law Section. Therefore, the fact that the petitioner having been appointed in the Legal Section on his request and the second respondent having been placed in independent charge as Accounts Superintendent, were events which occurred during the "no rule zone period" and it is only by an order dated 3.2.1998 the petitioner was posted as First Division Accounts Assistant. Therefore, the date of

entry into service of the petitioner in the cadre of First Division Accounts Assistant is 3.2.1998 and since the second respondent continued to work in the Accounts Department from 13.8.1992 onwards as Accounts Superintendent, the above circumstances would demonstrate that the second respondent has entered into the cadre of First Division Accounts Assistant six years prior to that of the petitioner and it is these circumstances which required the second respondent to be placed over and above the petitioner in the seniority list. Therefore, no infirmity can be found in the seniority list. In so far as the contention that the second respondent's name was not found in the provisional gradation list, would have no bearing in view of the fact that it was a provisional list, and did require reconsideration before finalisation and the case of the respondent has been appreciated in placing him above the petitioner in the final list. The other contention that in terms of the 1995 Regulations, the cadre of Accounts Superintendent is to be filled up to an extent of 50% from the cadre of First Division Accounts Assistants of the B.D.A. and such a First Division Accounts Assistant must have put in five years of service in the cadre of First Division Accounts Assistants, and since the second respondent, who was placed in independent charge under Rule 32 in the cadre of Accounts Superintendent as on 13.8.1992, therefore he did not have the minimum five years experience prescribed under the Regulations is concerned, the second respondent continued in the post of Accounts Superintendent from 13.8.1992 when the Regulations prescribing the same came into force. But however, excluding the services rendered by the second respondent in the cadre of Accounts Superintendent till such time he completes five years in the cadre of First Division Accounts Assistant, the financial benefits came to be conferred in pursuance of the Karnataka Civil Services RPP Rules and Rule 2 (3) of the said Rules which provides for promotion, reads as follows:

Promotion of a civil servant may be made with effect from retrospective date.

1) xx xxx xxxx

2) xx xxx xxxx

3) ...If while being eligible according to his seniority in the list that was in force and otherwise fit for promotion according to C and R Rules he had only been placed in independent charge of the post by the competent authority and has discharged the duties of the said post.

And hence, the case of the second respondent would fall within the above said rule and would not call for interference in the present writ petition and that the petition be dismissed.

4. The counsel for the second respondent, would, while resisting the petition, reiterate the contentions put forth by the counsel for the first respondent and would emphasis that the Commissioner, by his order dated 7.8.1992, has opined that the second respondent was eligible for regular promotion as Accounts Superintendent after completion of three years, while placing him in independent

charge under Rule 32 of the Rules. And, in terms of the said order, the second respondent was entitled for regular promotion immediately after completion of three years, namely, as on 13.8.1995. The first respondent having published the provisional gradation list, the second respondent had filed his objections to reiterate the terms of the order passed by the Commissioner on 10.8.1992 and had also referred to the relevant case law in support of his contentions and it is this, which resulted in the first respondent placing the second respondent over and above the petitioner, who was certainly not qualified on the date of posting of the second respondent in independent charge as Accounts Superintendent. In any event, the final seniority list does contain the reasons as to how the second respondent is to be placed at serial No. 1 and therefore, the petition does not merit consideration.

5. The first respondent seeks to place reliance on a judgment in the case of P.S. Sadasivaswamy Vs. State of Tamil Nadu, to support his contention that though there is no period of limitation prescribed for courts to exercise powers under Article 226, it would be a sound and wise exercise of discretion for the courts to refuse to exercise such extraordinary power in the case of persons who do not approach it expeditiously for reliefs and to stand by and allow things to happen and then to put forward stale claims and try to unsettle the settled matters. He would submit that the petitioner, in the case on hand, has stood by and allowed the matters to pass without raising any objections and therefore, he is not entitled to any relief before this Court.

6. The counsel for the second respondent, would place reliance on the following judgments:

M.S. Mahadeviah Vs. Bangalore City Corporation, : That in situations where an official is continued in charge or additional charge arrangements in the higher cadre and not filling up such vacancy in the higher cadre for a long period without any justification, would undoubtedly result in infraction of the fundamental rights guaranteed under Articles 14 and 16(1) of the Constitution of India. Continuing such an official in the higher cadre by way of such an incharge arrangement, would amount to denial of his right to be considered for promotion and that such an official's case for promotion with effect from the date on which he was placed in additional charge, should be considered.

Ram Sarup Vs. State of Haryana and Others, . The appellant in the said case was appointed as a Statistical Officer and he was confirmed in that position. Thereafter he was appointed to the post of Chief Inspector of Shops and he worked there for almost a year, when he was appointed as Labour-cum-Conciliation Officer. He was transferred to the post of Labour-cum-Conciliation Officer, since the Government had taken a decision that the posts of Statistical Officer and Labour-Cum-Conciliation Officer should be treated as interchangeable. But unfortunately, the Service Rules which were statutory rules made in exercise of power conferred under the proviso to Article 309 of the Constitution, were not amended in conformity with the said decision. The

appellant had continued in the post Labour-cum-Conciliation Officer for almost ten years thereafter, when an order was passed reverting him to the post of Statistical Officer. It was this which was in question. The appellant having unsuccessfully challenged the action before the High Court, was before the Supreme Court. The Supreme Court held that the appointment of the appellant was irregular, since he did not possess one of the three requisite qualifications. But as soon as he acquired the necessary qualification of five years' experience of the working of labour laws in any one of the three capacities mentioned in Clause (1) of Rule 4 or in any higher capacity, his appointment was to be regarded as having been regularised. Therefore, his appointment became regularised when he completed five years after taking into account the period of service rendered, and hence, he could not be reverted to the post of Statistical Officer and that by a deemed fiction, the appellant's appointment must be treated as having become regular.

Delhi Water Supply and Sewage Disposal Committee and Others Vs. R.K. Kashyap and Others, : Wherein, the case of the appellants was that the inter se seniority in the cadre of Executive Engineers, after their regularisation, should reflect the corresponding rankings in the feeding cadre of Assistant Engineers. The contesting respondents, who were also Executive Engineers contended to the contrary. It was their case that the continuous officiation in the post till regularisation, should be the basis for determining the seniority. In deciding these rival contentions, the Supreme Court held that where there was ad hoc appointments followed by regularisation of service, such persons should get their service in the ad hoc appointment for determining seniority in the absence of any specific rule to the contrary. If ad hoc appointment or temporary appointment is made without considering the claims of seniors in the cadre, the service rendered in such appointment should not be counted for seniority in the cadre. The length of service in ad hoc appointment or stop-gap arrangement made in the exigencies of service without considering the claims of all the eligible and suitable persons in the cadre ought not to be reckoned for the purpose of determining the seniority in the promotional cadre. To give the benefit of such service to a favoured few would be contrary to the equality of opportunity enshrined in Articles 14 and 16 of the Constitution. But if the claims of all eligible candidates were considered at the time of ad hoc appointments and such appointments continued uninterruptedly till the regularisation of services by the Departmental Promotion Commission or the Public Service Commission, there is no reason to exclude such service for determining the seniority. Of course, if any statutory rule or executive order provides to the contrary, the rule or order will have supremacy. In the absence of any rule or order the length of service should be the basis to determine the seniority.

Y.V. Rangaiah and Others Vs. J. Sreenivasa Rao and Others, : The petitioners were Lower Division Clerks in the Department of Registration and Stamps, Andhra Pradesh. The Rule required that all first appointments to a service, State or Subordinate and all promotions in a service, otherwise than in accordance with

the Rules shall be made by the appointing authority or the authority specified in Sub-rule (c) as the case may be, from a list of the approved candidates and that such list was to be prepared in the prescribed manner by the appointing authority or any other authority empowered in the special rules in that behalf. While the rule imposed other conditions as well, the grievance of the petitioners was contrary to the rules and instructions a list of the approved candidates was not prepared and, instead it was considerably delayed and drawn up only much later, when an amendment to the Rules had been incorporated, whereby the original rules providing for consideration of Lower Division Clerks for appointment as Sub-Registrars Grade II were done away with and promotion or transfer to that category was to be made from amongst the Upper Division Clerks, employed in the said Department. It was their complaint that by delaying the preparation of list of approved candidates till after the rules were amended, their chance for consideration for appointment to the higher post were adversely affected. The Supreme Court held that the posts which fell vacant prior to the amended rules would be governed by the old rules and not by the new rules.

Buddhi Nath Chaudhary and Others Etc. Vs. Abahi Kumar and Others, : The appellants were selected by the Bihar Public Service Commission for appointment as Motor Vehicles Inspectors. When the process of selection was pending, a new rule was introduced in the recruitment rules, requiring the persons to be selected as Motor Vehicles Inspectors, to possess driving licence, which was not prescribed earlier. Pursuant to the selection by the Commission, the appellants were appointed as Motor Vehicles Inspectors and they continued to hold the said post till the date of the appeal. On the ground that the selected candidates did not possess the qualification or experience or they did not possess the driving licence, their appointments were challenged by some of the candidates who were not selected, in several writ petitions. The Single Judge of the High Court, who dealt with the writ petitions, did not examine the contentions raised on behalf of the writ petitioners in detail, but directed the Transport Commissioner to do that exercise. On appeal, a Division Bench of the High Court set aside the report sent by the Transport Commissioner pursuant to the order made by the Single Judge, which was received during the pendency of the appeal and directed fresh consideration of the matter by the Transport Commissioner. The Supreme Court held that the selected candidates who had been appointed are in employment as Motor Vehicle Inspectors for over a decade and now that they have worked in such posts for a long time, necessarily they would have acquired the requisite experience and therefore, the new exercise ordered by the High Court will only lead to anomalous results and the matters were disposed of on equitable consideration and for this exercise, the Supreme Court relied on several decisions namely Ram Sarup Vs. State of Haryana and Others, ; District Collector and Chairman, Vizianagaram Social Welfare Residential School Society, Vizianagaram and Another Vs. M. Tripura Sundari Devi, and H.C. Puttaswamy and others Vs. The Hon"ble Chief Justice of Karnataka High Court, Bangalore and others, .

7. By way of reply, the counsel for the petitioner would place reliance on the

following judgments:

T. Skair Sahib v. State of Mysore and Ors. 1970 (2) Mys. LJ. 321 : For the proposition that the qualification of a person for purposes of promotion which should be taken into consideration, is not with reference to the date of vacancy, but the date on which the vacancy is filled by promotion.

Puranjit Singh Vs. Union Territory of Chandigarh and others, : The petitioner, who was claiming seniority, was seeking to rely upon certain notings in the Department files. The Supreme Court held that although it was not known as to how the petitioner came in possession of such notings, it was wholly improper for him to produce the notings in Court proceedings, even if he had come into possession of them authorisedly. And that the notings did not create any rights in his favour. It is the orders issued by the competent authorities and received by him, which alone can create rights in his favour. This case is cited, since in the case on hand, the second respondent seeks to place reliance on certain notings made in the Departmental files.

UOI and Ors. v. Satish Chandra Mathur, 2001 (10) SCC 185 : The question therein was whether the service rendered by the first respondent as an ad hoc Programme Executive for a period of three years, after which his services stood regularised, could at all be considered for reckoning his seniority in the cadre of Programme Executive. The recruitment to the post of Programme Executive was governed by specific Rules. The Supreme Court, answering the question, held, Admittedly the appointment to the cadre was dehors the statutory rules and is not in accordance with the procedure, even though the respondent might have possessed the prescribed qualifications for being appointed. Possessing the prescribed qualifications itself would not constitute an appointment in accordance with the rules, particularly when the procedure prescribed was to be followed and therefore, the period of service rendered by an ad hoc appointment could not be counted for the purpose of seniority in the cadre.

8. By the said token of reasoning, he would submit that the second respondent having been placed in independent charge u/s 50 of the Act by the Commissioner, Bangalore Development Authority, on coming into force of the Regulations of 1995, the promotion made subsequently to the post of Accounts Superintendent, could have only been in accordance with the Regulations and not on the basis of the second respondent having continued on an incharge basis in the said post. It is therefore contended that the petition be allowed.

9. On these rival contentions, the contention on behalf of the respondents that the petition was belated and therefore did not warrant consideration, is not tenable. The second respondent has been placed in independent charge, as the Commissioner in exercise of his powers u/s 50 of the Act, placed the second respondent in independent charge conditionally. This did not afford any cause of action to the petitioner. Hence, there was no delay in the petitioner having challenged the seniority list, upon its publication and hence, it could not be said

that there was inaction on the part of the petitioner. In so far as the judgments relied upon by the counsel for the second respondent are concerned, in the case of Makadevaiah (supra) , the court has specifically held that consideration of a civil servant's case for promotion where he has been continued in independent charge in a higher cadre on ad hoc basis for a long period of time without being considered for promotion, would depend upon the facts and circumstances of each case and a valid obstacle or a justifiable ground should not come in the way. In Ram Sarup (supra), the appellant therein who did not satisfy the requirement of necessary qualification, the court came to the conclusion that he was deemed to have become regularised and was deemed to have been appointed to the post upon acquiring such qualification. In Delhi Water Supply's case (supra) the Supreme Court observed as under:

... There is, however, one other important and fundamental principle which should not be forgotten in any case. The principle of counting service in favour of one should not be violative of equality of opportunity enshrined in Articles 14 and 16 of the Constitution. If ad hoc appointment is made without considering the claims of seniors in the cadre, the service rendered in such appointment should not be counted for seniority in the cadre. The length of service in ad hoc appointment or stop-gap arrangement made in the exigencies of service without considering the claims of all the eligible and suitable persons in the cadre ought not be reckoned for the purpose of determining the seniority in the promotional cadre.

In the case of Y.V. Rangaiah and Others Vs. J. Sreenivasa Rao and Others, , the Supreme Court came to the conclusion that posts which fell vacant prior to amended rules, would be governed by old rules and not by the new rules.

10. Admittedly, the second respondent was placed in independent charge at a point when it was a "no rule zone period". In Buddhinath's case (supra), the court passed the order on equitable considerations and not so much on interpretations of the rule.

11. Having regard to the fact that the second respondent had continued in independent charge even after the 1995 Regulations were brought into force and the second respondent having been promoted after the Regulations were in force, the qualifications prescribed for Accounts Superintendent required that he possessed five years service experience in the cadre of First Division Accounts Assistant. And, having regard to these qualifications, which is prescribed, the promotion could not have been made on the footing that he had continued in independent charge from the year 1992. And, the reasoning of the first respondent that since the second respondent was placed under Rule 32 of the Karnataka Civil Service Rules, 1992 while he was in the cadre of First Division Accounts Assistant, but excluding the services rendered by Accounts Superintendent the financial benefits came to be conferred by the second respondent in pursuance of the Karnataka Civil Services (RPPP) Rules, the case of the second respondent would fall within the above rule and as such, the order

made in his favour was legal, is not tenable. It is in view of the judgment of the Supreme Court in the case of UOI and Ors. v. Satish Chandra Mathur, 2001 (10) SCC 185 which lays down that appointments made dehors the Rules and not in accordance with the prescribed procedure, even though the respondent might have possessed the prescribed qualifications for being appointed, this itself would not constitute an appointment in accordance with the rules and therefore, the petitioner's seniority could be counted only from the date that he was actually promoted and this was not in accordance with the rules.

12. Hence the petition deserves to be allowed. Annexure "N" is quashed. The first respondent is directed to re-do the final gradation list of First Division Accounts Assistant in accordance with the Cadre and Recruitment (Conditions of Service) Regulations, 1995 of the Bangalore Development Authority, after affording an opportunity to all concerned, to consider their case for promotion to the next higher grade and consequently Annexure "D" is quashed.