

(1993) 04 SC CK 0059

In the Supreme Court Of India

Case No : Civil Appeal No's. 3607-11 of 1988

State of W.B. and Others

APPELLANT

Vs

Aghore Nath Dey and Others

RESPONDENT

Date of Decision : 02-04-1993

Acts Referred:

Constitution of India, 1950 — Article 309

Citation : (1993) 2 JT 598 : (1993) 2 LLJ 475 : (1993) 2 SCALE 365 : (1993) 3 SCC 371 : (1993) 2 SCR 919

Hon'ble Judges : P. B. Sawant, J;N. M. Kasliwal, J;J. S. Verma, J

Bench : Full Bench

Final Decision : Allowed

Judgement

J.S. VERMA, J.—These appeals involve for decision a common question, relating to fixation of seniority of certain Sub-Assistant Engineers appointed ad hoc temporary Assistant. Engineers for a specified period in the P.W.D. and the Irrigation and Waterways Department of the Government of West Bengal, vis-a-vis the direct recruits in the cadre of Assistant Engineers appointed regularly according to rules in these departments prior to the regularisation of the ad hoc appointees. The question was raised by the ad hoc appointees who were regularised subsequently, by filing writ petitions in the Calcutta High Court claiming revision of their seniority, reckoned from the date of their initial ad hoc appointment. These writ petitions were dismissed by a single bench of the High Court but the writ appeals were allowed by a division bench, resulting in grant of the relief claimed by the ad hoc appointees. It is these judgments, involving the common question of the merit of the claim of the ad hoc appointees for seniority, reckoned from the date of their initial ad hoc appointment, in the facts and circumstances of the case, which are challenged in these appeals.

2. Civil Appeal No. 3607 of 1988 is by the State of West Bengal while Civil Appeal No. 3610 of 1988 is by the adversely affected direct recruits who were respondents in the writ petition filed by the ad hoc appointees in the P.W.D. Civil

Appeal No. 3608 of 1988 is by the State of West Bengal while Civil Appeal No. 3611 of 1988 is by the adversely affected direct recruits who were respondents in the writ petition filed by the ad hoc appointees in the Irrigation and Waterways Department. Civil Appeal No. 3609 of 1988 is a similar matter, also relating to the Irrigation and Waterways Department.

3. The material facts are only a few, and may be stated with reference to the P.W.D., pointing out the minor difference on facts between the ad hoc appointments made in the PWD and Irrigation and Waterways Department, which are not significant on the conclusion reached.

4. In exercise of the powers conferred by the proviso to Article 309 of the Constitution of India, the Governor of West Bengal made Rules by Notification No. 94 dated 20th August, 1959 for the regulation of recruitment to the Engineering Services under the Department of Works and Buildings of the Government of West Bengal. In the present case we are concerned with the cadre of Assistant Engineers, for which the relevant rules are:

Rule-4:

There will be an examination held by the Public Service Commission, West Bengal, for recruitment to posts of Assistant Engineer. A certain proportion of such posts as may be determined by the Works and Buildings Department from time to time, will be filled up by candidates in order of merit, who will be given a higher initial pay of Rs. 325/- per month in the time-scale of pay for Assistant Engineers. In order to be eligible for such higher initial pay a candidate must secure 66 per cent or above of the total marks in the said examination.

Rule-9:

Recruitment to the permanent posts of Assistant Engineer shall be made as follows:

(a) Forty per cent of vacancies by direct recruitment on the results of a competitive examination to be conducted by the Public Service Commission, West Bengal, as mentioned in Rule 4 supra:

Qualifications:

(i) A degree in Civil Engineering of a recognised University or any other qualification in Civil Engineering excepting a candidate from appearing in Sections A and B of Associate Membership Examination of the Institute of Engineers (India).

(ii) One year's post graduate practical training or study or research or practical engineering experience.

(iii) Age not more than 27 years on the 1st August of the year in which the recruitment examination is held.

The age limit shall in the case of candidates who have been in the employ of the

Central or the State Government or of the Damodar Valley Corporation or any other statutory body recognised for the purpose by the Government and are not out of such employment for more than a year on the said date be releasable to the extent of the actual period spent (continuously) in such employment. This relaxation of age limit will not be permitted to a candidate who had already appeared in the examination thrice. No candidate will be allowed to take more than three chances.

Departmental candidates are eligible to apply provided they fulfil the requisite qualifications.

(b) Forty per cent by selection from amongst directly recruited temporary Assistant Engineers who have rendered two years satisfactory service, selection wing made by the Public Service Commission, West Bengal.

(c) Twenty per cent by promotion of confirmed Overseer EstimatOrs.

Rule-10:

Recruitment to temporary posts of Assistant Engineer shall be made as follows:

(a) Eighty per cent of the vacancies are to be filled by direct recruitment on the results of a competitive examination referred to in Rule 9(a) above.

(b) Twenty percent by promotion of confirmed Overseer EstimatOrs.

Rule-11:

Notwithstanding anything contained in these rules the Governor may in case of emergency fill up vacancies in the posts of Assistant Engineer both permanent and temporary by advertisement and interview, through the Public Service Commission, West Bengal.

Rule-12:

An Overseer Estimator shall not be promoted as a temporary Assistant Engineer unless he has rendered 10 years services. To be eligible for promotion he must pass a written and oral examination which will be conducted by the Public Service Commission, West Bengal, and will be of the same standard as Professional Examination referred to in Chapter VI of the Service (Training and Examination) Rules, West Bengal, Overseer Estimators who have been confirmed in their posts and have tendered 8 years' service including temporary service in that post shall be eligible to sit for such examination, a panel of Overseer Estimator fit for promotion as temporary Assistant Engineers shall be maintained in consultation with the Public Service Commission, West Bengal.

5. Under these Rules, recruitment to the permanent posts of Assistant Engineers was required to be made under Rule 9, while Rule 10 governed recruitment to the temporary posts of Assistant Engineers. Rule 11 provided for emergency appointment by advertisement and interview through the Public Service Commission. It is clear from these Rules that appointments to all the posts,

permanent and temporary were to be made according to the prescribed procedure, on the basis of a competitive examination conducted by the Public Service Commission; and even the appointments made in an emergency governed by Rule 11 were to be made 'by advertisement and interview through the Public Service Commission'. Any appointment to a permanent or temporary post of Assistant Engineer, which was not made in accordance with Rule 9 or 10 or 11 was, therefore, not in accordance with these Rules.

6. The writ petitioners in all these matters were duly appointed Sub-Assistant Engineers who were earlier called overseer Estimators as described in the Rules, and though initially diploma holders, having obtained the prescribed degree, were eligible for appointment as Assistant Engineers. The writ petitioners (respondents in these appeals) were appointed temporary Assistant Engineers on ad hoc basis, initially for a period of six months in the PWD between 1974 to 1976 and in the Irrigation and Waterways Department between 1972 to 1978. According to writ petitioners themselves, their claim for seniority is based on direct recruitment to the post of Assistant Engineer, and not as promotee from the next below cadre of Sub-Assistant Engineers in the promotion quota specified for them, in the Rules. It is, therefore, the claim of the writ petitioners for seniority from the date of their initial ad hoc appointment, as direct recruits and not as promotees in the promotion quota, which has to be considered. The ad hoc appointment, of all the writ petitioners was in identical terms and, therefore, it is sufficient to refer merely to the relevant part of one such notification dated 10 May, 1974, as illustrative of the nature of their ad hoc appointment. The relevant part of the notification is as under:

The Governor is pleased to appoint the following Sub-Assistant Engineers of the P.W.D. now posted in the Directorates/offices mentioned against each as Tempy. Assistant Engineers in the West Bengal Service of Engineers under the E.P.W. Department, on ad hoc basis, for a period of 6 (six) months with effect from the dates of joining or until further orders whichever is earlier.

4. The appointment is purely on ad hoc basis and he will have to revert to the post of S.A.E. if he is not selected for regular appointment as Assistant Engineer through the P.S.C.

7. The initial ad hoc appointment was extended periodically, on the same terms, during the entire period upto 26.2.1980. During this period, several opportunities were given to these persons to appear before the Public Service Commission to satisfy the condition attached to their ad hoc appointment, but none of the writ petitioners complied with the requirement, declining throughout to appear before the Public Service Commission. Strangely, the State Government requested the Public Service Commission to permit regularisation of the services of these ad hoc appointees as Assistant Engineers, without being selected for regular appointment by the Public Service Commission, but the Public Service Commission firmly turned down that request. The PSC's letters dated 4.5.1978, 10.10.1979 and 22.11.1979 contain such refusal.

8. The Government, even then, took the decision on 26th February, 1980 to regularise these persons as Assistant Engineers, and, consequently, took three simultaneous steps on 26.2.1980 : the requirement in the rules of consultation with the P.S.C. was dispensed with, for the; they were absorbed as temporary Assistant Engineers; and rule under Article 309 was made, providing for their seniority as temporary Assistant Engineers, with effect from the same date i.e. 26.2.1980. This rule clearly provided, that all persons appointed regularly in accordance with rules', prior to 26.2.1980, as Assistant Engineers would rank above the ad hoc appointees so absorbed with effect from 26.2.1980. This decision of the Government has also been implemented.

9. Surprisingly, the grievance, even then, of the writ petitioners is, that their seniority should be reckoned not only from 26.2.1980, as has been done, but from the date of their initial ad hoc appointment made temporarily in the above manner, notwithstanding the conditions attached to that appointment under the rules, and their failure to fulfil the same.

10. It is sufficient to refer to certain portions of the PSC's reply dated 4th May, 1978 to the State Government's proposal for regularisation of ad hoc appointments, reiterating the strong objection of the PSC that 'the appointments had been ab initio irregular, illegal and unconstitutional.' Relevant extract from the reply is as under:

2. It appears that the cases of 27 of 36 ad hoc appointments of Assistant Engineer (29 in the Civil Branch and 7 in the Electrical Branch) under the Public Works Department as made between May, 1974 and June, 1975 were earlier reported to the Commission in January, 1975. The Commission informed Government that the appointments had been ab initio irregular, illegal and unconstitutional and requested Government to make regular recruitment to the posts after advertisement (vide Secretary's D.O. No. 370-PSC dated the 8th March, 1975). The Commission also brought the irregularity to the notice of the Chief Secretary whose reply in this regard was as follows (vide Chief Secretary's letter No. 938/75-CS dated the 22nd August, 1975 issued by Public Works (Estt.) Department):

...The ad hoc appointments in question were made by the Public Works Department in the exigencies of public service pending recruitment of Assistant Engineers through the Public Service Commission, West Bengal and on the express condition that the concerned officers would have to revert if they failed to be selected by the Public Service Commission for appointment as Assistant Engineers.

3. It appears that of the 29 ad hoc Assistant Engineers (Civil) only 3 applied in response to the Commission's subsequent advertisement. None of them however appeared at the preliminary written test held by the Commission in that connection. As regards the 7 posts of Assistant Engineers (Electrical) it appears that all the 7 ad hoc appointees applied in response to the Commission's

advertisements issued in 1975 but that none of them was able to obtain even the pass mark at the interviews. In the above context it is not clear how Government can now sponsor a proposal for regularisation of the appointment of these ad hoc appointees.

11. In this reply it was finally said that the illegality of these ad hoc appointments could not be cured. It was after the strong stand taken by the PSC, that the State Government took the aforesaid action on 26.2.1980 to dispense with the requirement of consultation with the PSC, and regularise appointments of ad hoc appointees with effect from 26.2.1980. The Rules for seniority made by the notification dated 26.2.1980 issued in exercise of the power conferred by the proviso to Article 309 of the Constitution, are as under:

1. These rules may be called the Seniority Rules for the Assistant Engineers recruited in the Public Works Department otherwise than through the Public Service Commission, West Bengal during the period from May 1974 to June, 1976.

2. The Assistant Engineers under Public Works Department who were recruited otherwise than through the Public Service Commission, West Bengal during the period from May 1974 to June 1976 and who were excluded from the purview of the Public Service Commission, West Bengal under this department notification No. 1299-F dated 26.2.1982, shall be deemed to be junior to any Assistant Engineer who was selected by the Public Service Commission, West Bengal and was appointed on a date prior to 26th February, 1980. The inter-seniority in respect of the Assistant Engineers who are covered by the said notification shall be determined on the basis of select list, if any. In the absence of any such select list the inter-se seniority should be determined on the basis of their length of service as Assistant Engineer in the Public Works Department.

(emphasis supplied)

12. These ad hoc appointees having obtained the benefit of regularisation with effect from 26.2.1980 without being selected by the PSC, and being given the benefit of seniority from the date of their regularisation on 26.2.1980, have challenged the Government's action and claimed seniority with effect from the date of their initial ad hoc appointment, of this nature. It may, here be mentioned, that in case of the ad hoc appointees in the Irrigation and Waterways Department, even a rule for seniority being given to them from 26.2.1980 was not made, as was done for the ad hoc appointees in the P.W.D., and yet they have also been given the same benefit. They make the same grievance, inspite of this.

13. On behalf of the appellants, State of West Bengal and the direct recruits aggrieved by the judgment of the division bench of the High Court, it has been urged that the claim of the writ petitioners (respondents in these appeals) for seniority being given to them retrospectively from the date of their initial ad hoc appointment, made contrary to the rules, in spite of their regularisation being

made expressly from 26.2,1980, is wholly untenable and against the decisions of this Court, particularly the Constitution bench decision in The Direct Recruit Class-II Engineering Officers' Association and others Vs. State of Maharashtra and others, . On this basis it was submitted that the division bench of the High Court committed an error in reversing the judgment of the single bench, by which the writ petitions had been dismissed.

14. In reply Shri G.L. Sanghi appearing for the writ petitioners (respondents in all these appeals) submitted, that the initial ad hoc appointment of the writ petitioners was made by a mode permissible under the rules; that appointment was made in relaxation of the rules by the Government which is implicit in the action taken; the initial ad hoc appointment must, therefore, be equated with a regular appointment made under the rules; and on this equation there is no justification for discrimination between the initial ad hoc appointees and regular appointees coming in by direct recruitment thereafter in accordance with rules. It was submitted that the initial ad hoc appointment being, therefore, in the nature of regular appointment, made during an emergency, after selection by a Committee consisting of five Chief Engineers, these persons are entitled to count their entire service including the ad hoc period prior to 26.2.1980, for the purpose of their seniority. Shri Sanghi relied on the decisions of this Court in A. Janardhana Vs. Union of India (UOI) and Others, and Narender Chadha and Others Vs. Union of India and Others, to support this submission. Shri Sanghi further submitted, that the case of the writ petitioners fell squarely within the ambit of conclusion (B) of the summary in Maharashtra Engineers' case in para 44 of the SCR : para 47 of SCC.

15. The question, therefore, is whether Shri Sanghi is right in his submission that this case falls within the ambit of the said conclusion (B) in Maharashtra Engineers case. The submission of the other side is that this case falls, not within conclusion (B) but the corollary mentioned in conclusion (A), of that decision Conclusions (A) and (B), which alone are material, are as under:

(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.

The corollary of the above rule is that where the initial appointment is only ad hoc and not according to rules and made as a stop-gap arrangement, the officiation in such post cannot be taken into account for considering the seniority.

(B) If the initial appointment is not made by following the procedure laid down by the rules but the appointee continues in the post uninterruptedly till the regularization of his service in accordance with the rules, the period of officiating service will be counted.

16. It is not necessary to deal at length with the decisions of this Court in A. Janardhana and Narender Chadha in view of the later Constitution bench judgment in Maharashtra Engineers' case, wherein all the relevant earlier

decisions have been considered before summarising the conclusions in para 44 of SCR : para 47 of SCC.

17. We may, however, briefly refer to the decisions in A. Janardhana and Narender Chadha, since Shri Sanghi has strongly relied on them. It may be mentioned that both these decisions related to inter-se seniority of direct recruits and promotees, the two channels for appointment to the posts, where there was a quota prescribed for the two channels leading to rota for confirmation, and the seniority was based on the date of confirmation, according to rules. The dispute arose as a result of promotions being made in excess of the promotees quota, in the case of the surplus promotees. It was in that context, that the question of taking into account longer period of continuous officiation for the purpose of fixing inter-se seniority of direct recruits and promotees, came up for consideration. Those cases are clearly distinguishable. In the present case, there is no dispute between promotees and direct recruits, the claim of the writ petitioners being based only as direct recruits in the cadre of Assistant Engineers, and not as promotees from the lower cadre of Sub-Assistant Engineers to which they had earlier belonged. The present is, therefore, not a case of a dispute relating to the surplus promotees, who were given promotion regularly in accordance with rules, but in excess of the quota fixed for them under the rules. In the present case, all the writ petitioners are persons who were given ad hoc temporary appointments for a fixed period, which was extended from time to time till their regularisation on 26.2.1980, and that too by relaxation of the condition of selection by the Public Service Commission, which was an express condition of their ad hoc appointment and a requirement for regular appointment under the Rules. Assuming the relaxation made in their case by the State Government on 26.2.1980 to be valid, as the same is not disputed before us, they could be treated as regularly appointed only with effect from 26.2.1980 when the relaxation was given to them, and an order was made simultaneously absorbing them in the cadre of Assistant Engineers, also framing a rule at the same time under Article 309 providing for fixation of their seniority only from that date. Accordingly, there is no foundation for the claim that they could be treated at par with the direct recruits, regularly appointed prior to 26.2.1980.

18. The Admitted facts, which are the foundation of the claim of the writ petitioners, are sufficient to negative their claim. It is obvious that prior to the steps taken by the State Government on 26.2.1980 for their regularisation in this manner, there was no basis on which the writ petitioners could claim to be regularly appointed as Assistant Engineers; and, therefore, the manner in which they were regularised, including the mode of fixation of their seniority with effect from 26.2.1980, is decisive of the nature of their regular appointment. This alone is sufficient to negative their further claim. They can make no grievance to any part of that exercise, made only for their benefit.

19. The Constitution bench in Maharashtra Engineers' case, while dealing with

Narender Chadha, emphasised the unusual fact that the promotees in question had worked continuously for long periods of nearly fifteen to twenty years on the posts without being reverted, and then proceeded to state the principle thus:

We, therefore, confirm the principle of counting towards seniority the period of continuous officiation following an appointment made in accordance with the rules prescribed for regular substantive appointments in the service.

20. The Constitution bench having dealt with Narendra Chadha in this manner, to indicate the above principle, that decision can not be construed to apply to cases where the initial appointment was not according to rules.

21. We shall now deal with conclusions (A) and (B) of the Constitution bench in the Maharashtra Engineers' case, quoted above.

22. There can be no doubt that these two conclusions have to be read harmoniously, and conclusion (B) cannot cover cases which are expressly excluded by conclusion (A). We may, therefore, first refer to conclusion (A). It is clear from conclusion (A) that to enable seniority to be counted from the date of initial appointment and not according to the date of confirmation, the incumbent of the post has to be initially appointed 'according to rules'. The corollary set out in conclusion (A), then is, that 'where the initial appointment is only ad hoc and not according to rules and made as a stop-gap arrangement, the officiation in such posts cannot be taken into account for considering the seniority.' Thus, the corollary in conclusion (A) expressly excludes the category of cases where the initial appointment is only ad hoc and not according to rules, being made only as a stop-gap arrangement. The case of the writ petitioners squarely falls within this corollary in conclusion (A), which says that the officiation in such posts cannot be taken into account for counting the seniority.

23. This being the obvious inference from conclusion (A), the question is whether the present case can also fall within conclusion (B) which deals with cases in which period of officiating service will be counted for seniority. We have no doubt that conclusion (B) can not include, within its ambit, those cases which are expressly covered by the corollary in conclusion (A), since the two conclusions cannot be read in conflict with each other.

24. The question, therefore, is of the category which would be covered by conclusion (B) excluding therefrom the cases covered by the corollary in conclusion (A).

25. In our opinion, the conclusion (B) was added to cover a different kind of situation, wherein the appointments are otherwise regular, except for the deficiency of certain procedural requirements laid down by the rules. This is clear from the opening words of the conclusion (B), namely, 'if the initial appointment is not made by following the procedure laid down by the rules' and the later expression 'till the regularisation of his service in accordance with the rules'. We read conclusion (B), and it must be so read to reconcile with conclusion (A), to

cover the cases where the initial appointment is made against an existing vacancy, not limited to a fixed period of time or purpose by the appointment order itself, and is made subject to the deficiency in the procedural requirements prescribed by the rules for adjudging suitability of the appointee for the post being cured at the time of regularisation, the appointee being eligible and qualified in every manner for a regular appointment on the date of initial appointment in such cases. Decision about the nature of the appointment, for determining whether it falls in this category, has to be made on the basis of the terms of the initial appointment itself and the provisions in the rules. In such cases, the deficiency in the procedural requirements laid down by the rules has to be cured at the first available opportunity, without any default of the employee, and the appointee must continue in the post uninterruptedly till the regularisation of his service, in accordance with the rules. In such cases, the appointee is not to blame for the deficiency in the procedural requirements under the rules at the time of his initial appointment, and the appointment not being limited to a fixed period of time is intended to be a regular appointment, subject to the remaining procedural requirements of the rules being fulfilled at the earliest. In such cases also, if there be any delay in curing the defects on account of any fault of the appointee, the appointee would not get the full benefit of the earlier period on account of his default, the benefit being confined only to the period for which he is not to blame. This category of cases is different from those covered by the corollary in conclusion (A) which relates to appointment only on ad hoc basis as a stop-gap arrangement and not according to rules. It is, therefore, not correct to say, that the present cases can fall within the ambit of conclusion (B), even though they are squarely covered by the corollary in conclusion (A).

26. In view of the above, it is clear that the claim of the writ petitioners (respondents in all these appeals) for treating their entire period of service prior to 26.2.1950 as regular service for the purpose of seniority, and fixation of their seniority accordingly, is untenable. The submission of Shri Sanghi that their initial ad hoc appointment must be treated as having been made in accordance with the rules since the selection by an alternative mode, namely, by a committee of five Chief Engineers was resorted to on account of the emergency, cannot be accepted. Rule 11 of the 1959 Rules provides for appointments to be made during emergency, and lays down that such appointments during emergency can be made only 'by advertisement and interview, through the Public Service Commission, West Bengal.' Admittedly, this express requirement in Rule 11 was not followed or fulfilled subsequently, and, therefore, the initial ad hoc appointments cannot be treated to have been made according to the applicable rules. These ad hoc appointments were clearly not in accordance with the rules, and were made only as a stop-gap arrangement for fixed period, as expressly stated in the appointment order itself.

27. Thus there is no escape from the conclusion that the present cases fall squarely within the ambit of the corollary in conclusion (A), of Maharashtra

Engineers' case and, therefore, the period of ad hoc service of writ petitioners (respondents) on the post of Assistant Engineer prior to 26.2.1980, cannot be counted for reckoning their seniority.

28. Consequently, these appeals are allowed. The impugned judgments of the division bench of the High Court, are set aside, and those of the single bench dismissing the writ petitions are restored. No costs.