
(2013) 07 MP CK 0353

In the Madhya Pradesh High Court

Case No : Writ Petition No. 8199 of 2003

Subhash Saxena

APPELLANT

Vs

State of MP and Others

RESPONDENT

Date of Decision : 22-07-2013

Acts Referred:

Madhya Pradesh Nagar Tatha Gram Nivesh Adhiniyam, 1973 — Section 64(1), 67(2), 85

Citation : (2013) 07 MP CK 0353

Hon'ble Judges : Sujoy Paul, J

Bench : Single Bench

Advocate : Prashant Sharma, for the Appellant; Sangita Pachauri, Dy. Government Advocate No. 1/State, Shri P.D. Bidua, Advocate for Respondent No. 2/Gwalior Development Authority in Writ Petition No. 8199/2003, Shri D.K. Katare and Shri H.D. Mishra, Advocates for the Respondents No. 3 and 4 in WP No. 8199/2003 and Respondents No. 2 and 3 in WP No. 189/2007, for the Respondent

Final Decision : Allowed

Judgement

Sujoy Paul, J.—Since these petitions are interconnected, with the consent of parties, matters are analogously heard and decided by this common order. Brief facts necessary for adjudication of these matters are as under:-

The petitioner was appointed on the post of Sub-Engineer in Special Area Development Authority (SADA) Malanjkhanda on 24.6.1982. On 12.1.1988 the petitioner was transferred by the State Government to SADA Chirimiri. The transfer order dated 12.1.1988 was subsequently modified on 20.12.1988 and the petitioner was transferred by the State Government to Gwalior Development Authority (GDA) Gwalior. On 29.12.1988 the petitioner joined at Gwalior. On 9.11.1995 the State Government passed an order directing that the petitioner shall be treated to be an employee of Housing and Environment Department because SADA, Malanjkhanda stood abolished on 22.6.1995. The petitioner contended that other similarly situated persons, who were transferred to GDA

like petitioner, have been promoted by GDA on 30.11.1995 (Annexure P/13). By placing reliance on the judgment of this Court, delivered in Misc. Petition No. 1905/1992 (S.C. Hiranandani and others vs. State of MP and others), it is contended that Madhya Pradesh Special Area Development Authority (Chairman and Officers and Servants Recruitment and Conditions of Service) Rules, 1976 (hereinafter called as "1976 Rules") shall govern the service conditions of the employees working under Development Authorities. The Rules are made in exercise of power conferred by Sections 67(2) and 85 of Nagar Tatha Gram Nivesh Adhiniyam, 1973 (hereinafter called as "Adhiniyam").

The State Government created State cadre by Annexure P/5 dated 30.5.1996 which included the petitioner's post of Assistant Engineer. On 6.2.1999 a seniority list was published showing the position as on 1.7.1995 which reflects the name of the petitioner. A seniority list (Annexure P/9) was issued wherein the petitioner's seniority was shown from 7.9.1987. The petitioner was satisfied with this seniority list but the private respondents were aggrieved with the said seniority list. Against this seniority list, B.B. Mathur and D.D. Mishra, Assistant Engineers of GDA preferred objection/representation to the State Government. In turn, the State Government passed the impugned order dated 30.7.2003 (Annexure P/10), whereby it is mentioned that from July 1995, M.P. Development Authorities Services are constituted. In the seniority list issued by GDA showing the position as on 30.6.1995 only such Assistant Engineers' names can be mentioned who were appointed by GDA before 30.6.1995. It is further mentioned that the GDA issued the seniority list showing the position as on 30.6.1995 which includes the name of Subhash Saxena, the present petitioner, who was not an employee of GDA as on 30.6.1995. In fact the petitioner was an employee of SADA Malanjkhand and was working on deputation to GDA. Accordingly, his seniority position needs to be mentioned in the concerned SADA and not in the establishment of GDA. It is further mentioned that GDA is not competent to decide regarding the service conditions of petitioner including his career advancement/promotion. This order is challenged in Writ Petition No. 8199/2003 with further prayer that the respondents be directed not to delete the name of petitioner from final gradation list, Annexure P/9, and consider his case for promotion in the next DPC. It is relevant to mention here that the petitioner is seeking enforcement of the gradation list with a prayer not to delete his name from final gradation list (Annexure P/9). This gradation list, Annexure P/9, gives seniority to the petitioner from 7.9.1987.

In Writ Petition No. 189/2007, the petitioner has prayed for a direction to assign proper seniority to the petitioner in the seniority list dated 29.11.2006, wherein the petitioner's seniority is counted from 20.12.1994. It is prayed that the petitioner's seniority be counted from 7.9.1987 as Assistant Engineer in GDA. If the reliefs claimed in both the petitions are examined minutely, it is clear that the petitioner is claiming that his seniority as Assistant Engineer in GDA be counted from 7.9.1987.

2. The bone of contention of learned counsel for the petitioner is that although he was an employee of SADA Malanjkhanda, the said body stood abolished on 22.6.1995. The petitioner was transferred much prior to the said date to GDA in exercise of power by State Government under Rule 3(2) of 1976 Rules. The transfer order was acted upon by the petitioner and his name was mentioned in various seniority lists by assigning him seniority from 7.9.1987. This seniority position could not have been altered at a later point of time. The State Government continuously treated him as an employee of GDA. It is further contended that at no point of time and in none of the orders prior to Annexure P/10 dated 30.7.2003, it is mentioned that the petitioner is sent on deputation to GDA. By no stretch of imagination, Shri Prashant Sharma, learned counsel for the petitioner contends that his transfer order from SADA Malanjkhanda to GDA can be treated as deputation. There is no recital of the said fact in the transfer order nor the petitioner's or his parent department's consent was obtained by the respondents. No deputation allowance was also paid to the petitioner and, therefore, it cannot be treated as deputation. Thus, it is submitted that the petitioner's transfer to GDA is in consonance with Rule 3(2) of 1976 Rules by the competent authority, i.e., State Government in administrative exigency and, therefore, his seniority has to be counted from 7.9.1987.

3. The said prayer is opposed by Mrs. Sangita Pachauri, learned Deputy Government Advocate, Shri P.D. Bidua, learned counsel for GDA and Shri D.K. Katara and Shri H.D. Mishra, learned counsel for the private respondent.

4. Learned counsel for the respondents submitted that the petitioner was having lien on the substantive post in the office of SADA, Malanjkhanda. He was never appointed or promoted in the office of GDA, Gwalior and hence his services cannot be counted at GDA, Gwalior. The applicability of 1976 Rules are not questioned by the respondents but it is contended that Rule 3(2) aforesaid has no application in the present case. It deals with transfer from one SADA to another SADA and does not include a transfer from SADA to GDA. Thus, it is stated that the petitioner's transfer must be treated as "deputation" from 29.12.1988 in GDA.

It is further contended that by order dated 9.11.1995 (Annexure P/14) it was clarified by the State Government that the officers who hail from SADA and are not absorbed by the Development Authority, their names would be included in unified gradation list to be prepared as on 1.7.1995. The order of State Government dated 25.4.1981 (Annexure R/12) is relied upon wherein it is mentioned that for the purpose of promotion in various Development Authorities, recruitment and promotion rules applicable to PWD employees would be applicable. The petitioner was a diploma holder Sub-Engineer and could have been promoted from Sub-Engineer to the post of Asstt. Engineer only on completion of 12 years qualifying service. This is 8 years in cases of degree holder Sub-Engineers. The petitioner was appointed on 20.12.1982 as a diploma holder Sub-Engineer and, therefore, as per PWD Rules, he became eligible for

promotion as Asstt. Engineer on completion of 12 years of service on 20.12.1994. Thus, he is entitled for seniority from 20.12.1994 and not from 1987. The State Government's letter (Annexure R/15) dated 31.7.1996 was also relied upon wherein it is mentioned that if an officer was not eligible for promotion then his pay scale will not be reduced and he will continue to enjoy the same pay scale but would not be entitled for seniority for a period he was not entitled for consideration for promotion. Thus, it is the common ground that the petitioner being diploma holder is entitled to get seniority only from 20.12.1994 and this is the ground for rejection of his representation by Annexure P/10 dated 30.7.2003.

It is further stated that the gradation list in which the names of private respondents are shown above the petitioner was challenged by one Sudhakar Khedkar by filing Writ Petition No. 1/2003. The seniority list dated 8.8.2003 was affirmed by this Court, which includes the name of present petitioner also and, therefore, the said seniority list again cannot be examined in the present matter. It is further stated that writ appeal against the said order was also dismissed, and therefore, the seniority list dated 8.8.2003 has attained a finality.

It is further contended that SADA Malanjkhanda and GDA are different legal entities. The GDA has been constituted by a notification issued u/s 38(1) of Town and Country Planning Act, 1973 whereas SADA was established by notification issued u/s 64(1) and (2) of MP Nagar Tatha Gram Nivesh Adhiniyam, 1973. Since both the Authorities are two different legal entities, Rule 3(2) of 1976 Rules does not govern the transfer from one Authority to another different Authority. It is submitted that this position was clarified and was made clear by the State Government stating that such employees should be treated as working on deputation. Reliance is placed on the communication dated 9.11.1995 (Annexure P/14). It is submitted that the petitioner has not chosen to challenge the order dated 9.11.1995 (Annexure P/14). It is further contended that the answering respondent submitted representation against inclusion of the name of petitioner in the gradation list of GDA. The representation was accepted by the State Government by order dated 4.11.2003 which was duly communicated to the petitioner by GDA by Annexure R/2-1 (with the return of GDA). The petitioner has not challenged this order and, therefore, it has attained finality and is binding on the petitioner. Lastly, it is submitted that the State Government has also issued an order dated 27.5.1995 (Annexure R/2) making it clear that employee of any other Development Authority transferred to some other Authority and not absorbed would be treated to be an employee of the same Authority where he was appointed. Shri D.K. Katare, learned counsel for the other side submitted that earlier Writ Petition No. 189/2007 was allowed on 29.2.2008 by the Writ Court. However, MCC No. 253/2008 was filed by B.B. Mathur and MCC No. 325/2008 was filed by the State Government on the ground that the petitioner has suppressed about filing of Writ Petition No. 8199/2003. The MCCs were allowed on 23.4.2009. It is contended that the petitioner is not entitled for adjudication on merits in view of his conduct of suppression of

material fact of filing of WP No. 8199/2003.

In support of the aforesaid contentions, Shri Katare has also filed the written submissions.

5. I have heard learned counsel for the parties and perused the record.

6. I deem it proper to deal with the last objection of Shri Katare first, which goes to the root of the matter, i.e., regarding right of hearing on merits in view of the conduct of the petitioner because of which MCCs were allowed.

In the opinion of this Court, while allowing the MCCs this Court on 23.4.2009 directed the Registry to place both the writ petitions for hearing on merits. In Writ Appeal No. 201/2009 the Division Bench opined that in earlier petition the petitioner has claimed promotion by way of interim relief while in subsequent petition he is claiming seniority. Thus, even if both the reliefs are different, still they are interconnected. Hence, the writ court has rightly recalled the impugned order because the writ court wanted to examine the merits of both the cases together. A conjoint reading of the Single Bench and Division Bench orders makes it clear that the intention of the said Benches was to hear the matters on merits. In that situation, propriety demands that these matters be heard on merits and, therefore, I am not inclined to dismiss these petitions on the ground of alleged suppression of facts.

7. The petitioner is claiming seniority from 7.9.1987, the date of his promotion as Asstt. Engineer in SADA. The stand of the respondents is that the petitioner is entitled to count his seniority from 20.12.1994 because as per the State Government's letter (Annexure R/15) dated 31.7.1996 and other executive orders, recruitment rules of PWD were applicable. As per those rules, a diploma holder Sub-Engineer becomes eligible for promotion on completion of 12 years of service. Thus, the petitioner was rightly given seniority from 1994.

8. The pivotal question is whether petitioner's promotion as Asstt. Engineer was in accordance with rules giving him right to count seniority from 1987 and whether the executive instructions/orders of the department wherein it is opined that PWD Recruitment Rules will be applicable will have an adverse impact on the seniority of the petitioner. It is also required to be answered whether the petitioner's transfer to GDA from SADA is a "deputation" or a "transfer" in administrative exigency. Whether such transfer/deputation will take away his seniority in any manner.

9. It is not in dispute that 1976 Rules provide the method of recruitment. As per rule 4, the recruitment in service or a post can be made by way of - (a) direct recruitment, (b) promotion, and (c) by transfer or deputation of a person serving in connection with the affairs of any local authority or of the State Government with the approval of the State Government. The method of promotion is prescribed in Part IV. Rule 17 prescribes the eligibility conditions. Thus, these rules are complete code which deals with the eligibility and promotion of SADA

employees. Part VII of the Rules deal with the method of preparation of seniority list.

10. The petitioner was promoted as Asstt. Engineer in the year 1987 as per 1976 Rules. In the considered opinion of this Court, since the petitioner's promotion was made in SADA in consonance with 1976 Rules, the benefit of this promotion cannot be taken away by taking shelter of PWD Rules. A statutory right of promotion is accrued in favour of the petitioner under 1976 Rules on the post of Asstt. Engineer. Right of consideration for promotion is a statutory as well as constitutional right. Once it is clear that the petitioner's services in SADA were governed by statutory rules of 1976, PWD Recruitment Rules had no role to play. Statutory right accrued in favour of the petitioner for promotion cannot be taken away on the basis of an executive order of the State Government/ Department directing that PWD Rules would be applicable in SADA. Thus, I am unable to hold that the orders dated 25.4.1981, (Annexure R/12) and 31.7.1996 (Annexure R/15) (in W.P. No. 8199/2003) in any manner can take away the right of the petitioner to count seniority from the date of actual promotion as Asstt. Engineer, i.e., 7.9.1987.

11. The respondents have stated that the petitioner could not have been transferred under 1976 Rules from SADA to GDA, Thus, such transfer order must be read as an order of deputation. On abolition of SADA, the petitioner becomes State cadre employee and cannot be treated on the strength of GDA.

Pausing here for a moment, it is apt to refer to the Division Bench judgment of this Court in Misc. Petition No. 1905/1992 (S.C. Hiranandani vs. State of MP & ors.) (Annexure P/7). The said case was filed by Assistant Engineers of Bhopal Development Authority. The question of applicability of 1976 Rules was posed before this Court. This Court in the said judgment opined that vacancies existing prior to 31.3.1988 were required to be filled up in terms of 1976 Rules. Vacancies arising during 1.4.1988 till coming into force of 1991 Amendment Act of M.P. Nagar Tatha Gram Nivesh Adhiniyam were required to be filled up in terms of 1976 Rules. Admittedly, the petitioner was transferred to Gwalior on 20.12.1988. Thus, the judgment of S.C. Hiranandani (supra) will be applicable because the petitioner's transfer is prior to coming into force of 1991 Amendment Act. Thus, it cannot be doubted that 1976 Rules are applicable on transfer from SADA to GDA. Apart from this, Rule 4 of 1976 Rules makes it clear that transfer by the State Government is also a mode of recruitment. The question is whether the transfer of the petitioner can be treated to be deputation. This point was considered by a Division Bench of this Court in the light of 1976 Rules in Parashu Ram Vs. State of Madhya Pradesh and Others, Para 11 of the judgment reads as under:

11. It is well known that the deputation is a post of temporary duration outside home range or district and the person sent on deputation continues to look homeward for promotion or confirmation. The transfer is the anti-thesis and it must exhibit the opposite indications. See: Avtar Singh Vs. Delhi Administration

and Others, The respondents did not place petitioner's service records or any other record to show that his lien was retained in SADA and that he was sent on deputation. The word "deputation" is prominently missing in Annexure A-6. Therefore, the defence version must be rejected.

(Emphasis Supplied)

Applying the said principle in the present case will show that the word "deputation" is totally missing in the transfer order of the present petitioner also. The respondents have not produced any record before this Court to show that petitioner's lien was retained in SADA. The petitioner has not been paid any deputation allowance also. The State Government was competent to transfer the petitioner under 1976 Rules. For these cumulative reasons, I am unable to hold that petitioner's transfer to Gwalior was in fact a "deputation". Indeed, in my opinion, it is a case of transfer. Transfer was not on petitioner's request. It was in administrative exigency by the State Government. In that situation, the petitioner will carry seniority with him and his seniority cannot be downgraded on his joining in GDA.

12. The contention of the respondents that in Writ Petition No. 1/2003 filed by Sudhakar Khedkar, the seniority list was affirmed which includes the present petitioner's downgraded position and, therefore, no challenge can be made to it, in my opinion, the argument is misconceived. The litigation regarding seniority between two different parties in which present petitioner was not a party, in no way binds him or operates as res judicata against him. The questions involved in the present case were never considered or decided in the said matter. Accordingly, the judgment of Sudhakar Khedkar (supra) is of no assistance to the respondents.

13. On the basis of aforesaid analysis, it is clear that the petitioner's transfer from SADA to GDA was possible and was in accordance with 1976 Rules. In both the petitions the petitioner has claimed seniority from 7.9.1987. On the basis of aforesaid analysis, in my opinion, the petitioner has a valuable right to enjoy the seniority from 7.9.1987, the date when he was promoted as Asstt. Engineer in accordance with 1976 Rules. Consequently, petitions deserve to be and are accordingly allowed. The impugned order dated 30th July, 2003 (Annexure P/10) in Writ Petition No. 8199/2003 is set aside. The respondents are directed to treat the petitioner as Asstt. Engineer in GDA w.e.f. 7.9.1987 with all consequential benefits. No costs.