

(2001) 05 SC CK 0001

In the Supreme Court Of India

Case No : C.A. No.-000247-000247 / 1997

Swapan Kumar Pal and Others etc.

APPELLANT

Vs

Samitabhar Chakraborty and Others

RESPONDENT

Date of Decision : 09-05-2001

Acts Referred:

Citation : AIR 2001 SC 2353 : (2001) AIRSCW 2223 : (2001) 1 JT 449 Supp : (2001) LabIC 2076 : (2001) 4 SCALE 85 : (2001) 5 SCC 581 : (2001) SCC(L&S) 880 : (2001) 3 SCR 641 : (2001) 2 SCT 1104 : (2001) 3 SLJ 1 : (2001) 4 Supreme 200

Hon'ble Judges : G. B. Pattanaik, J;B. N. Agrawal, J

Bench : Division Bench

Advocate : L.N. Rao, P.P. Rao, P.P. Malhotra, Shambunath Singh, P.S. Sudheer, Pratap Venugopal, for K.J. John, Raj Kumar Gupta, Sheo Kumar Gupta, A. N. Bardiya, Ms. Shashi Kiran, Ms. Anil Katiyar, for A.K. Sharma, Ms. Sushma Suri, for the Appellant;

Final Decision : Allowed

Judgement

Pattanaik, J.—The appellants filed by the private persons and the SLP filed by the Union of India, are directed against one and the same judgment of the Central Administrative Tribunal, Calcutta Bench in O.A. No.1360 of 1990. Though , the SLP by the Union of India is barred by limitation, but in view of the fact that the leave has been granted by this Court at the instance of the private persons and the judgment of the tribunal is under challenge in appeal, it would be meet and proper to condone the delay in filing the special leave petition, and we accordingly condone the same and grant leave therein.

2. The inter se seniority in the cadre of Senior Clerk under the Railway Administration between the promotees from the grade of Office Clerk (Clerk Grade II) against 66-2/3% quota and the in-service graduates, working as Junior Clerks, who were promoted through a limited departmental examination against 13-1/3% quota is the subject matter of dispute. By the impugned order of the

tribunal, the promotees who were initially promoted on ad hoc basis and later on, whose services were regularised, have been held to be entitled to count their ad hoc period also for the purpose of reckoning their seniority in the cadre of Senior Clerk, whereas, according to the Railway Administrations as well as according to the appellants in Civil Appeal No. 247/97, the criterion for determination of seniority being the date of regular promotion after due process, the ad hoc period would not count for reckoning the seniority in the promotional grade, which is the grade of Senior Clerk in the case in hand. This the sole question that arises for consideration is whether the services rendered by the promotees on ad hoc basis in the post Senior Clerk can be allowed to be counted for the purpose of their seniority in the cadre of Senior Clerk?

3. The cadre of Office Clerk in the scale of Rs.950-1500 is filled up, 66-2/3% by direct recruitment through the agency of the Railway Recruitment Board and 33-1/3% by promotion by selection of specified Group 'D' staff, the minimum educational qualification for a direct recruit being matriculate or its equivalent examination with not less than 50% marks in the aggregate. The next promotional post is the senior clerk in the scale of pay of Rs.1200-2040. Under the Railway Establishment Manual, Paragraph (174), of the total vacancies in the grade, 20% of the posts are filled up by direct recruitment through the Agency of the Railway Recruitment Board, 13-1/3% through a limited departmental competitive examination from amongst the serving graduates clerks in the scale of pay of Rs. 950-1500 through the agency of the Railway Recruitment Board and 66-2/3% are filled up by promotion from the Office Clerks. The present appellants were appointed on different dates as Office Clerks (Clerk Grade II) in the year 1981-82, and all of them are graduates. The private respondents were non-graduates and were serving as Office Clerks in the scale of pay of Rs.950-1500. On diverse dates between 9.12.1982 to 07.1.1984 these private respondents were promoted to the post of Senior Clerk on ad hoc basis, as no regular recruitment could be made by holding suitability test, because of certain stay orders passed by different Courts. On 18.1.85, the appellants were declared suitable for promotion to the grade of Senior Clerk against 13-1/3% meant for in-service graduate office clerks. The suitability test of the private respondents, who had been promoted on ad hoc basis was held and the result was declared on 28.2.1985. The Railway Administration published a seniority list on 01.01.88, but the same had not been prepared in accordance with the relevant provisions for determination of seniority, as contained in paragraph 302 of the Railway Establishment Manual. A revised seniority list, therefore, was prepared on 02.11.89, in which list, the appellants were shown senior to the private respondents in the cadre of Senior Clerk, on the basis of the date of regular promotion, after due process of selection. The private respondents herein, challenged the legality of the aforesaid seniority list by filing O.A. No. 1360/90 in the Central Administrative Tribunal, Calcutta Bench. By the impugned judgment, the tribunal having allowed the O.A. on the conclusion that the period of ad hoc service of the respondents would count for their seniority, since the suitability

test was delayed by the Administration over which the private respondents had no hand and having quashed the seniority list published on 2.11.89, and the private respondents having been declared senior to the present appellants, the present appeal has been filed by grant of special leave and the Railway Administration has also filed the special leave petition.

4. Mr. L.N. Rao, the learned senior counsel, appearing for the appellants and Mr. P.P.Malhotra, the learned senior counsel, appearing for the Railway Administration, contend that the question of inter se seniority in the cadre of Senior Clerk being governed by the provisions contained in paragraph 302 of the Railway Establishment Manual and in case of promotees, the criterion for determination of seniority being the date of regular promotion, after due process, the period of service rendered as ad hoc appointees cannot be counted for the purpose of seniority and the tribunal, therefore, committed serious error in counting the said ad hoc period and directing the private respondents to be senior to the appellants. It is further contended that the promotion of a railway servant to fill any post, whether a selection post or a non-selection post being subject to his found fit and only after passing the test, which is condition precedent for being considered fit to hold the promotional post and such a test in case of promotees having been made only in the year 1985 and the results thereof having been declared only on 28.2.1985, so far as the private respondents are concerned, the period prior to that date, during which they were holding the promotional post on ad hoc basis, could not have been counted for determining their seniority in the cadre of Senior Clerk and the impugned order of the tribunal, therefore is erroneous. It was then contended that in view of the provisions contained in the Railway Establishment Manual, providing the procedure for promotion to the post of Senior Clerk, the ad hoc promotion given to the private respondents cannot, but be held to be promotion 'de hors' the rules, and the conclusion of the tribunal to the contrary, solely on the ground that the suitability test had not been held at regular intervals, as provided in paragraph 214(c)(v) of the rules and the employees had no fault, is erroneous. La (SIC) it is contended that in view of the decision of this Court in the case Anuradha Mukherjee (Smt) and Others Vs. Union of India (UOI) and Others, clearly indicating that ad hoc appointees being appointees de hors the rules, cannot get their seniority from the date of their ad hoc appointment, but only from the date on which they were actually selected and appointed, in accordance with the rules, interpreting the very provisions of the Railway Establishment Manual, the impugned decision of tribunal is unsustainable.

5. Mr. P.P.Rao, the learned senior counsel, appearing for the private respondents, on the other hand contended that inaction on the part of the Railway Administration, to hold the suitability test for adjudging the eligibility of the Office Clerks for promotion to the post of Senior Clerk, against their quota of 66-2/3% and the promotions granted to such office clerks on ad hoc basis, who were eligible and found suitable, cannot be a ground for not counting the ad hoc period for reckoning seniority in the cadre of Senior Clerk, when these promotees

were otherwise suitable and in fact continuously holding the post of Senior Clerk on ad hoc basis till their suitability was adjudged by holding the test. The tribunal therefore, was justified in reckoning the ad hoc period for the purpose of their seniority in the cadre of Senior Clerk. Mr. Rao further contended that these promotees having been promoted on ad hoc basis and being otherwise duly qualified to hold the promotional post and, thereafter having passed the suitability test later on, the past services rendered by them on ad hoc basis has to be given credit, and the tribunal, therefore was right in its conclusion. Mr. Rao also urged that on account of lapses on the part of the administration in not holding the suitability test at regular intervals, as required under the relevant provisions of Railway Establishment Manual, the respondents cannot be made to suffer and great injustice would be meted out to them, if the period rendered as ad hoc is not taken into account for the purpose of seniority. Mr. Rao, further urged that the promotees, not having been promoted beyond 66-2/3% quota available for them and in fact, there having been no impediment for granting regular promotion, which was not done because of the laches on the part of the Railway Administration in holding the suitability test, there is no rhyme or reason, not to count the ad hoc services for the purposes of seniority in the promoted cadre of Senior Clerk. Mr. Rao urged that the decision of this Court in Anuradha Mukherjee's case will have no application to the case in hand as the Court in that case was not dealing with the fact situation, where the Administration is guilty of not having the suitability test at regular intervals, as required under the Establishment Manual. Mr. Rao lastly submitted that during the pendency of this appeal, the competent authority having approved and regularised the ad hoc officiating promotion, as a one time measure and as a special case, as per the letter of the Chief Personnel Officer dated 17th July, 2000, in the eye of law, it cannot be said that they continued as ad hoc, and therefore, the conclusion of the tribunal is unassailable.

6. In view of the rival submissions made by the counsel for the parties, the following questions arise for our consideration:

(a) What is the Rule, which governs the inter se seniority between the two competitive claimants in the cadre of Senior Clerk?

(b) The so-called ad hoc promotion of the respondents to the cadre of Senior Clerk, whether can be held to be a regular promotion, after due process of selection, merely because the suitability test had not been held at regular intervals, as was required to be held under paragraph 214(c)(v) of the Railway Establishment Manual?

(c) Is it possible to hold that on regular promotion being given, after adjudging the suitability of the ad hoc employees by holding test, it dates back to the date of ad hoc promotion?

(d) Can it be said that the earlier decision of this Court in Anuradha Mukherjee's case, will have no application to the fact situation of the present case?

7. So far as the first question is concerned, the post of Senior Clerk in the scale of pay of Rs.1200-2040 being filled up by direct recruitment, by promotion and by limited departmental competitive examination from amongst serving graduates, the provisions of paragraph 302 of the IREM would govern the seniority in the grade. The aforesaid provision is extracted herein below in extenso:

"302. Seniority in initial recruitment grades - Unless specifically stated otherwise, the seniority among the incumbents of a post in a grade is governed by the date of appointment to the grade. The grant of pay higher than the initial pay should not, as a rule, confer on a railway servant seniority above those who are already appointed against regular posts. In categories of posts partially filled by direct recruitment and partially by promotion, the criterion for determination of seniority should be the date of regular promotion after due process in the case of promotees and the date of joining the working post after due process in the case of direct recruit, subject to maintenance of inter-se seniority of promotees and direct recruits among themselves. When the dates of entry into a grade of promoted railway servants and direct recruits are the same they should be put in alternate positions the promotes being senior to the direct recruits, maintaining inter-se seniority of each group.

Note- In case the training period of a direct recruit is curtailed in the exigencies of service, the date of joining the working post in case of such a direct recruit shall be the date he would have normally come to a working post after completion of the prescribed period of training."

8. On a plain reading of the aforesaid provision, it is crystal clear that date of regular promotion after due process of selection would be the date from which seniority in the cadre of Senior Clerk would count. In the case in hand, the appointment of the respondents in the cadre of Senior Clerk against 66-2/3% quota as well as the appointment of the appellants in the said grade against 13-1/3% quota, through limited departmental competitive examination are by way of promotion from the cadre of Office Clerk. The inter se seniority, therefore, of these two category of personnel in the cadre of Senior Clerk, would be from the date on which each one of them were promoted after their regular selection by due process of selection. In other words, when promotion is given after holding the suitability test, on adjudging the suitability of the employee, then the promotion can be held to be a regular promotion and not earlier. In the case in hand, so far as the appellants are concerned, the relevant date would be 18.1.1985 and so far as the respondents are concerned, the relevant date would be 28.2.1985. The ad hoc services rendered by the respondents for different periods from 9.12.1982 till they were regularly absorbed on adjudging their suitability by holding test, cannot be reckoned for the purposes of their seniority in the cadre of senior clerk. The conclusion of the tribunal is contrary to the aforesaid provision of the Railway Establishment Manual and cannot be sustained.

9. Coming to the second question, the relevant provision dealing with this aspect

is paragraph 214 of the Railway Establishment Manual. Paragraph 213 also deals with the question, of promotion. Both the above-said paragraphs are quoted herein below in extenso.

"213. Promotion.

(a) A Railway servant may be promoted to fill any post whether a selection post or a non-selection post only if he is considered fit to perform the duties attached to the post. The General Manager or the Head of Department or Divisional Railway Manager may prescribe the passing of specified departmental or other test as conditions precedent to a Railway servant being considered fit to hold specified post; such rules should be published for the information of the staff concerned.

(b) Unless specifically provided otherwise, the promotion shall be made without any regard for communal or racial consideration."

"214.(a) Non-selection posts will be filled by promotion of the senior most suitable Railway servant. Suitability whether an individual or a group of Railway Servants being determined by the authority competent to fill the posts on the basis of the record of service and/or departmental tests if necessary. A senior Railway servant may be passed over, only if he/she has been declared unfit for holding the post in question. A declaration of unfitness should ordinarily have been made sometime previous to the time when the promotion of the Railway servant is being considered.

(b)When, in filing of a non-selection post, a senior Railway servant is passed over the authority making the promotion shall record briefly the reason for such supersession.

(c)In respect of promotion to non-selection post, the following principles should be followed:-

(i)Staff in the immediate lower grade with a minimum of 2 years service in that grade will only be eligible for promotion. The service for this purpose includes service, if any rendered on ad hoc posts followed by regular service without break. The condition of two years service should stand fulfilled at the time of actual promotion and not necessarily at the stage of consideration.

(ii)The number of eligible staff called for consideration should be equal to the number of existing vacancies plus those anticipated during the next four months due to normal wastage (i.e. retirement/superannuation), likely acceptance of request for voluntary retirement, staff approved to go on deputation to other units, staff already empanelled for the ex-cadre posts, creation of additional posts already sanctioned by the competent authority, and staff likely to go out on transfer to other Railways/Divisions.

(iii)Where non-selection posts are filled from different categories of staff, no hard and fast limits need be prescribed as to the number of the candidates to be

admitted from each eligible category. In cases where posts are to be filled on the quota basis it should be ensured that each category is adequately represented within the overall number of candidates called up. Employees passing the suitability test should only be placed in the select list. Employees not qualifying in the test should not be taken merely to make up the quota fixed.

(iv) An employee who has passed a suitability test once need not be called for the test again and should be eligible for promotion as and when vacancies arise.

(v) A suitability test should be held at the interval which should not be less than six months. All the eligible candidates as per their seniority including those who failed at the last test should be called. The period of six months is reckoned from the date of announcement of the result.

(vi) If an employee fails in a suitability test but is called up again, a suitability test, after a time lag of six months and he passes the same, he should be given preference over his junior who had passed the suitability test earlier than him but is still waiting to be promoted for want of a vacancy."

10. It is thus apparent that a promotion can be given only when the employee concerned is considered fit to perform the duties of the higher post and a person can be considered fit only after he passes the prescribed test held for the purpose. The post of Senior Clerk being a non-selection post, it is required to be filled up by promotion of the senior-most suitable railway servant in the feeder chard. A senior railway servant can be superseded when he/she is declared unfit for holding a promotional post. The rules also further provide that when a senior railway servant is passed over, the authority must record briefly the reasons for supersession. The procedure for making promotion to non-selection post has been indicated in paragraph 214(c) referred to above. Clause (iii) of para 214(c), unequivocally indicates that the employees only after passing the suitability test, should be placed in the select list and further those, who do not pass the qualifying test, they cannot be given promotion merely to make-up the quota fixed for them. It is no doubt true that under Clause (v) of paragraph 214(c), a suitability test is required to be held at interval, which should not be less than six months. But in a case where such suitability test had not been held, as in the case in hand and persons are promoted from the Junior Clerk to Senior Clerk, on the basis of their seniority on ad hoc basis, such ad hoc promotion by no stretch of imagination can be held to be regular promotion after due process of selection. It can be a promotion by due process only when the suitability test, as indicated in paragraph 214(c)(iii) is held and the concerned employee qualifies the said test. It is necessary in this connection to notice some of the decisions relied upon by Mr. Rao, appearing for the respondents, in support of the conclusion of the tribunal that the suitability test not having been held earlier, ad hoc promotion must be held to be regular promotion. The first case which Mr. Rao relied upon is the case of G.P. Doval and Others Vs. Chief Secretary, Government of U.P. and Others, In the said case, the inter-se seniority amongst the Khandsari Inspectors was the subject matter of dispute. There was no rule,

governing the inter se seniority and in the absence of any specific rule of seniority, governing a cadre of a service, the Court held that length of continuous officiation will provide a more objective and fair rule of seniority. It is in this context, this Court had observed that if a stop-gap appointment is made and the appointee appears before the Public Service Commission, when the latter proceeds to select the candidates and is selected, there is no justification for ignoring his past service. But this decision will have no application where a rule subsists, governing the inter se seniority in a cadre and in the case in hand, the rule is paragraph 302 of the IREM. Therefore, the general principles enunciated in the aforesaid decision will have no application. The next case relied upon by Mr. Rao was the case of AIR 1989 1688 (SC) In this case, the seniority in the cadre of Monitor in All India Radio was the subject matter for consideration. The post of Monitor was upgraded and made equivalent to the post of Central Information Service Grade IV and was re-designated as Sub-Editors (Monitoring). The Central Government did the upgradation and enhancement of pay by order dated 29th June, 1968. But the relevant schedule was amended and the posts were included in the Central Information Service Grade IV by Notification dated 9th May, 1972. It is in this context, this court held that the Monitors in All India Radio could be legitimately held to be in Central Information Service Grade IV w.e.f. 29.6.1968 and not from 09.5.1972, as they had been inducted into Grade IV of the Central Information Service from 29th June, 1968, when the post was brought at par with Group IV and the post was re-designated as Sub-Editor and the employees had received that post and pay after obtaining the approval of the department of Personnel as well as the Union Public Service Commission. It is in that context, this Court had observed that even though, the actual inclusion of the post of Monitor in the Central Information Service was made much later, but the fact remains that they were to all intent and purposes, treated as Grade IV post in the Central Information Service with effect from the date when the post of Monitor was re-designated with revised pay scales and became equivalent to Grade IV in the Central Information Service. Therefore, on account of the lapse on the part of the Government, the employees cannot be made to suffer. This decision also in our considered opinion will have no application inasmuch as under the relevant rules, holding a test and passing of the test is a condition precedent for promoting an employee from the Office Clerk to the Senior Clerk and any promotion in contravention of the same cannot be a promotion on regular basis. The next case relied upon by Mr. Rao was the case of Devendra Narayan Singh and others Vs. State of Bihar and others, In this case the year of allotment of an officer was the subject matter of consideration. The concerned authority had committed error by not preparing the select list for the year 1983 and pursuant to the directions of the Supreme Court, the appropriate authority on re-consideration, included the names in the select list for the year 1986. The Court on consideration of the facts of that case came to hold that in the eye of law, the select list can be held to be a select list for the year 1983 and, therefore, the year of allotment of the employee concerned is required to be determined on the basis that he was in the select list for the year 1983, though

that list was prepared in the year 1985 and was approved by the Union Public Service Commission in the year 1986. We fail to understand, how the aforesaid judgment will be of any application to the case in hand, when because of interim direction in pending cases, regular promotion had not been given and the cadre of Senior Clerk was being managed by granting ad hoc promotion to the respondents. The next case relied upon by Mr. Rao is the case of Suraj Parkash Gupta and Others Vs. State of Jammu & Kashmir Others, In the aforesaid case, on consideration of the relevant rules governing the service conditions of the Assistant Engineers of the J & K Government, the Court had observed that ad hoc or temporary service of a person, appointed by transfer as an Assistant Engineer or by promotion as an Assistant Executive Engineer can be regularised through the Publics Service Commission and Departmental Promotion Committee from an anterior date in a clear vacancy in his quota, if he is eligible and found suitable for such transfer or promotion, as the case may be, and his seniority will count from that date. The aforesaid conclusion was drawn because of the provisions of Rule 23 and Rule 15 of the J & K Rules but in the case in hand, there is no provision, which has been brought to our notice, which enables the appointing authority to regularise a promotion from an anterior date, though the suitability test is held at a later date. In the absence of any such provision in the rules in question, the ratio of the aforesaid decision, on interpretation of the relevant rules of J & K Engineering Rules will have no application. In the aforesaid premises, we have no hesitation in coming to the conclusion that merely because a suitability test had not been held at regular intervals, an employee promoted on ad hoc basis can claim that it is a regular promotion after due process of selection. As such the seniority of promotees in the cadre of Senior Clerk can be counted only from the date of regular promotion, after due process of selection.

So far as the third question is concerned, it is no doubt true that the respondents, who got their ad hoc promotion between the period 9th December 1982 to 7th January, 1984, were later on found suitable in the test that was held and the result of the said test was published on 28th February, 1985. It is also true that they had been continuing from their respective date of ad hoc promotion till they were regularised, after being selected through due process. But that by itself cannot confer a right on them to claim the ad hoc period of service to be tagged on, for the purpose of their seniority inasmuch as there is no provision which says that an employee on being regularly promoted, such regular promotion would date back to the date of original promotion in the cadre, which might have been on ad hoc basis. When the service conditions are governed by a set of rules, in the absence of any rules, it is difficult to hold that regular promotion would date back to the date of ad hoc promotion itself. We, therefore, answer the question in the negative.

So far as the earlier decision of this Court in Anuradha Mukherjee (Smt) and Others Vs. Union of India (UOI) and Others, is concerned, to which, one of us (G.B.Pattanaik, J), was a party, the Court was considering the question of

seniority in the very cadre, as in the case in hand. On consideration of the relevant provisions, it did consider the case of appointees de hors the rules, in paragraph 15 of the said judgment, and it was held that appointees de hors the rules can get seniority not from their initial appointment, but from the date on which they are actually selected and appointed, in accordance with the rules and their appointment and seniority would take effect from the date of selection, after due completion of the process. Mr. Rao contends that in the case of Anuradha Mukherjee's case, the Court had never faced the question of non-holding of suitability test, as required under law. But that in our view, will not change the effect of the judgment. The ad hoc promotion made in the present case, without holding any test for adjudging the suitability, has to be held promotion/appointment de hors the rules, and therefore, the ratio of the aforesaid judgment would apply also to the case in hand. Consequently, any period served by any promote prior to 28.2.1985 on ad hoc basis cannot be counted for the purposes of seniority in the cadre of Senior Clerk.

In view of our conclusion on the aforesaid four questions, we unhesitatingly hold that the impugned judgment of the tribunal is wholly unsustainable in law, and we, accordingly set aside the same. Necessarily, therefore the seniority list as on 01.6.1989 and published on 02.11.1989 is affirmed and O.A.No. 1360 of 1990 stands dismissed.

Before we part with this case, it would be necessary also to examine a situation which arises subsequent to the impugned judgment of the tribunal, while the appeal was pending in this Court. On behalf of the respondents, an interlocutory application had been filed, appending the letters dated 25.2.1999 and 17.7.2000. Mr. P.P. Rao, the learned senior counsel, appearing for the respondents placed reliance on the aforesaid document dated 17.7.2000 and contended that the competent authority having approved the regularisation of ad hoc officiating promotion, as a one time measure and as a special case, there would not be any justification not to treat that period for the purpose of seniority and, therefore, the conclusion of the tribunal can be sustained on this ground also. It is true that the document has come into existence while the appeal was pending and the appellants have not taken any steps by way of amending the memorandum, but the very proposal for regularisation of ad hoc period of service, as indicated in the letter of the Divisional Railway Manager dated 25.2.99 would establish the purpose behind such regularisation. The competent authority felt that unless the ad hoc period is regularised, future complications, consequent upon the retirement may arise. It is, therefore, not to deny any retiral benefit, the ad hoc promotion was sought to be regularised and the appropriate authority did approve the same as a one time measure with the caution that it should not happen in future. But that would not change the principle of inter se seniority, which is governed by the provisions, contained in paragraph 302 of the Railway Establishment Manual, which we have already considered and answered. Then again, from the aforesaid letter of approval dated 17.7.2000, it is not clearly discernible, as to whether under the order in question, it is the service of these

respondents which was sought to be regularised. We need not further delve into the matter, as in our view the so-called regularisation of ad hoc officiating promotion would only confer the retiral benefit to the concerned employees and would not count for the purposes of seniority in the cadre which has to be determined in accordance with the rules, as already discussed. These appeals are accordingly allowed. There would be no order as to costs.