
(1992) 04 AHC CK 0097

In the Allahabad High Court

Case No : Civil Misc. Writ Petition No. 3647 of 1989

Tek Chand Agrawal

APPELLANT

Vs

State of Uttar Pradesh and Others

RESPONDENT

Date of Decision : 23-04-1992

Acts Referred:

Uttar Pradesh Service of Engineers (Building and Roads Branch) Class II Rules, 1987
— Rule 5, 5(1), 5(3), 6, 9

Citation : (1992) 3 AWC 1303

Hon'ble Judges : M. Katju, J

Bench : Single Bench

Advocate : Chandra Prakash, for the Appellant;

Final Decision : Allowed

Judgement

M. Katju, J.—By means of this writ petition the Petitioner prays for regularisation as Assistant Engineer in the U.P. Public Works Department in accordance with the U.P. Regularisation of ad hoc promotions Rules, 1988 (Annexure 7 to the writ petition). The Petitioner had obtained a Diploma in Civil Engineering and he joined the Public Works Department, U.P. on 20-6-1956 as a trainee Overseer. On successful completion of his training he was appointed as ad hoc Overseer on 23-10-1956 and as officiating Overseer on 20-6-1957. The Petitioner's appointment as an Overseer was approved by the U.P. Public Service Commission in 1959 and he was placed in the list of Overseers prepared by the Commission; The nomenclature of the post of Overseer was changed to Junior Engineer in 1959 and the Petitioner was confirmed in the said post. The Petitioner has been promoted as Assistant Engineer in 1981 and he has been working as Assistant Engineer in ad hoc capacity since then. Now by this writ petition the Petitioner prays that he should be considered for regularisation first before promoting other Junior Engineers who are not working as Assistant Engineers.

2. A counter affidavit has been filed in this case in which it has been asserted on the basis of various provisions that the Petitioner is not qualified to be appointed

as Assistant Engineer.

3. I have heard Shri S.C. Budhwar, learned Counsel for the Petitioner and learned standing counsel for Respondents.

4. Rule 5(1)(3) of the U.P. Service of Engineers (Building and Roads Branch) Class II Rules. 1987 had provided the source of appointment of Assistant Engineer by promotion. Rule 9 laid down the qualifications for appointment as Assistant Engineer and this rule stated that only those persons can be promoted as Assistant Engineer who had either got A.M.I.E. certificate or had passed the departmental examination. By the amendment of 1969 and 1971, Rules 5 and 6 were substituted by the new rules, but these new rules were declared *ultra vires* by a Division Bench of this Court in writ petition No. 2447 of 1980 V.N. Mittal v. State of U.P. and Ors. decided on 14-1-82 In para 113 of this judgment it was observed that since the substituted rules have been declared *ultra vires*, the old rules will not get revived. Reference was made in this connection to the decision of the Hon'ble Supreme Court in *Firm A.T.B. Mehtab Majid and Co. Vs. State of Madras and Another*, where the Hon'ble Supreme Court held that once the old rule has been substituted by the new rule it ceases to exist and it does not automatically get revived when the new rule is held to be invalid. In *B.N. Tiwari Vs. Union of India (UOI) and Others*, the Hon'ble Supreme Court held that the carry forward rule of 1952 was substituted by the 1955 Rule and hence the striking down of the 1955 rules as un-constitutional did not revive the 1952 Rules:

5. In view of the aforesaid judgments of Hon'ble the Supreme Court which have been referred to by the Division Bench in V.N. Mittal's case it is obvious that the original rules 5 and 6 which laid down the source of recruitment did not revive

6. It may be noticed that in V.N. Mittal's case the division bench did not expressly strike down Rule 9. The contention of Shri Budhwar, learned Counsel for the Petitioner, however is that Rule 9, which provides the qualification for appointment as Assistant Engineer, is unworkable without Rules 5 and 6. In other words, Shri Budhwar's contention is that if Rules 5 and 6 fall, then Rule 9 also falls by implication as it cannot exist independently without the former and hence is not severable from Rules 5 and 6. In my opinion Shri Budhwar's contention is correct. In fact Rule 9(1) begins with the words "No person shall be recruited to the service under the provisions of Rule 5(i), 5(ii) or 5(iii) unless. "This makes it clear that Rule 9 is inextricably linked with Rule 5 and cannot survive without the latter. When there is no prescribed source of recruitment the question of qualification does not arise. The doctrine of severability will therefore not save Rule 9 once Rule 5 is struck down, because that doctrine applies only when a rule can exist independently of the one which is struck down. Since Rule 5 was declared *ultra vires* in V.N. Mittal's case by the division bench in my opinion Rule 9 also becomes *ultra vires* by necessary implication as it forms part of the same integral scheme.

7. A government order was issued on 7-1-80 (Annexure 4 to the writ petition) providing that 25% of the posts of Assistant Engineers shall be filled in by promotion from Junior Engineers Half of this 25% quota, i.e. 12 1/2%, shall be filled from amongst Junior Engineers who had an A.M.I.E. certificate or had passed the departmental examination, and the remaining half, in the absence of AMIE. certificate holders or persons who had passed the departmental examination, may be filled in by Junior Engineers who did not have A.M.I.E. certificate and had not passed the departmental examination Admittedly the Petitioner neither had A.M.I.E. certificate nor had passed the departmental examination. However, in view of the G.O. dated 7-1-80 the Petitioner was clearly qualified to be appointed as Assistant Engineer in the 12 1/2% quota for Overseers/Junior Engineers who had not passed the departmental examination and did not have A.M.I.E. certificate. The Petitioner has been working as Assistant Engineer in ad hoc capacity since 1981 and he is entitled to the benefit of the 1988 Regularisation of Adhoc promotions (post within the purview of Public Service Commission) Rules. As such in my opinion the Petitioner has to be considered first for regularisation as Assistant Engineer under the 1988 Regularisation Rules before any one else is promoted as Assistant Engineer. It may be clarified that this direction is only in respect of 12 1/2% of the total post of Assistant Engineers in Public Works Department, since only 12 1/2% of such post are available to the Junior Engineers who have passed departmental examination and do not have A.M.I.E. certificate.

8. My attention has been invited to the decision of this Court, Gopal Krishna Goel v. State of U.P. 1984 UP LB EC 412. In this decision it has been held that the G.O. dated 7-1-80 is invalid being inconsistent with Rule 9. The bench held that Rule 9 has laid down the qualifications for appointment as Assistant Engineer, and since the G.O. dated 7-1-80 provides for appointment as Assistant Engineer of persons who do not have these qualifications the said G.O. is invalid.

9. The bench did not consider, nor was it invited to consider, whether Rule 9 survived after Rule 5 was struck down by this Court. As held earlier. Rule 9 cannot survive independently once Rule 5 is struck down, and hence Rule 9 became invalid as soon as Rule 5 was declared invalid. The decision in Gopal Krishna Goel is sub-silento on this point, and hence clearly distinguishable. As held by the Supreme Court in Goodyear India Ltd., Gidore (India) Pvt. Ltd., Kelvintor of India Ltd. and the Food Corporation of India and Another Vs. State of Haryana and Another, , a decision is an authority only for the point of law which it decides, and not for what may remotely or even logically follow from it. Since the decision in Gopal Krishna Goel's case does not deal with the question of validity of Rule 9 after Rule 5 was struck down it is clearly distinguishable being sub-silento.

10. In Gopal Krishna Goel it has also been held that the G.O. dated 7-1-80 is not statutory. However, as held by the Supreme Court in Union of India (UOI) Vs. K.P. Joseph and Others, , G.O. is also binding (see also Orissa Judicial Services

Association, Cuttack and another Vs. State of Orissa and others, . Hence even if the G.O. dated 7-1-80 is not statutory it has to be observed. Since Rule 9, as has been held by me earlier as invalid, hence the G.O. dated 7-1-80 cannot be held to be ultra vires Rule 9. The decision in Gopal Krishna Goel was consequently given sub-silento.

11. In "Salmond on Jurisprudence", 12th Edn, the meaning of a decision sub-silento has been explained as follows:

A decision passes sub-silento when the particular point of law involved in the decision is not perceived by the court or present to its mind. The court may consciously decide in favour of one party because of point A, which it considers and pronounces upon. It may be shown, however, that logically the Court should not have decided in favour of the particular party unless it also decided point B in his favour, but point B was not argued or considered by the court. In such circumstances, although point B was logically involved in the facts and although the case had a specific outcome, the decision is not an authority on point B. Point B is said to pass sub-silento.

12. An illustration of a decision sub-silento is *Gerard v. Worth of Paris Ltd* (1936) 2 All ER 906, where a dismissed employee who had obtained damages against a company for wrongful dismissal applied for a garnishee order, on a back account standing in the name of the liquidator of the company. In this case the question whether a garnishee order could legally be made on an account standing in the name of the liquidator was not considered at all. Hence when this question was raised in the subsequent case *Lancaster Motor Co. v. Bremith Ltd.* (1941) 1 KB 675, it was held that the previous decision was not binding.

13. The principle of a decision sub-silento has been followed in our Courts too vide *Chandulal v. Babulal* AIR 1952 MB 171 (FB). *Yeshbai and Another Vs. Ganpat Irappa Jangam and Another*, , *State of U.P. and Another Vs. Synthetics and Chemicals Ltd. and Another*, .

14. In view of the above discussion I am of the opinion that the Petitioner was eligible to be appointed Assistant Engineer. The writ petition is allowed, and a mandamus is issued to the Respondents to first consider the Petitioner for regularisation under the U.P. Regularisation of Adhoc promotions Rules, and only if the Petitioner is not found suitable under the Regularisation Rules, the Junior Engineers can be considered there after for promotion as Assistant Engineer. There shall be no order as to costs.