

(2004) 10 DEL CK 0128

In the Delhi High Court

Case No : Writ Petition (Civil) No. 2308 of 2003

Union of India (UOI) and Another

APPELLANT

Vs

B.L. Sharma and Others

RESPONDENT

Date of Decision : 15-10-2004

Acts Referred:

Constitution of India, 1950 — Article 141, 142

Citation : (2005) 79 DRJ 722

Hon'ble Judges : Manju Goel, J;B.A. Khan, J

Bench : Division Bench

Advocate : A.K. Bhardwaj, for the Appellant; Chetan Sharma and S.K. Tewari, for the Respondent

Final Decision : Allowed

Judgement

B.A. Khan, J.—This petition challenges Tribunal order dated 9.1.2003 allowing respondent's OA No. 297/2002 and directing petitioners to grant them the benefit of their uninterrupted ad hoc service on the post of Junior Analyst from 30.6.1994, when they were appointed to the post in the second spell, for all purposes including seniority, pensionary benefits, fixation of pay and promotion and to deem them regularised on this post from this date with consequential benefits.

2. These respondents were appointed to the post of Technical Assistant with Staff Inspection Unit (SIU) of petitioner No. 1 in April 1989. They were appointed as Junior Analyst on ad hoc basis initially for six months or till regular candidates would become available, whichever was earlier by order dated 6.2.1991. This order also stipulated that their appointment would not confer any right on them to count their period of ad hoc appointment towards their seniority in the grade of Junior Analyst and would not fix their seniority in the grade of Technical Assistant which was the subject matter of OA No. 557/87 (Baljit Singh v. Union).

3. The ad hoc tenure of these respondents was, however, extended from time to

time. On 1.3.1994, they were later reverted to the post of Technical Assistants. They were, however, again appointed on ad hoc basis as Junior Analyst on 30.6.1994 after four months or so allegedly against the deputation quota posts. In 2000, it appears that an exercise was undertaken to open up some promotional avenues for Technical Assistants upon which seven posts of Technical Assistants were upgraded and available vacancies in the deputation quota diverted to promotion quota with the approval of UPSC & DOP&T as one time measure through which posts were made available in the promotion quota. A DPC was held pursuant where to these respondents were regularly promoted to the post of Junior Analyst on 28.8.2002. Subsequently, respondents made a representation for counting of their past ad hoc service from 6.2.1991 towards their seniority, promotion and other benefits which was rejected by order dated 20.7.2001. They then filed OA No. 297/2002 for quashing of this order rejecting their representation and for direction to petitioners to count their ad hoc service on the post of Junior Analyst from 6.2.1991 to 27.2.2000.

4. The case of respondents before the Tribunal was that since they had worked on the post in an unbroken and continuous spell for as long as 10 years and had fulfilled eligibility conditions of the post and had acquired necessary qualifications and experience, their ad hoc service on the post was to be counted towards their seniority and promotion, etc. without which their ad hoc service would be rendered null and void and would also come in the way of their promotion to the next higher grade. They also claimed that as they had fulfilled all necessary conditions for appointment to the post of Junior Analyst in terms of recruitment rules, their continued appointment on ad hoc basis despite availability of regular vacancies was because of respondents' failure to act properly for which they could not be blamed. They supported this by Supreme Court judgments in *The Direct Recruit Class-II Engineering Officers' Association and others Vs. State of Maharashtra and others*, *Rudra Kumar Sain and Others Vs. Union of India and Others*, and a judgment of the Tribunal in *Kunjai Laxminarayan Nayak v. Union* ATR 1987 CAT 458.

5. Petitioner's, in their reply, explained that the post of Junior Analyst was to be filled up 50% by promotion and 50% by deputation. The feeder cadre for promotion was Technical Assistant with three years' experience. Because of non-availability of regular candidates and due to exigencies of work, respondents who were working as Technical Assistants were appointed as Junior Analysts on ad hoc basis granting them one time relaxation in regard to their eligibility in service conditions as they did not possess three years regular service as Technical Assistant by order dated 6.2.1991. This order made it clear that their appointment was purely on ad hoc basis for six months or till regular candidates would become available; that it would not confer any rights on them for counting of the ad hoc service for their seniority in the grade of Junior Analyst. Their appointment was initially for six months which was later extended from time to time till they were reverted to the post of Technical Assistant on 1.3.1994. Subsequently, following re-organization of SIU they were again appointed on ad

hoc basis on 30.6.1994 i.e. after four months or so for two months or till regular incumbents would join the post. This ad hoc arrangement was, however, continued with the approval of competent authority because of non-availability of posts in the promotion quota. Thereafter when posts of deputation quota were diverted to promotion quota, these respondents were promoted from 28.2.2000 on regular basis.

6. It was submitted by petitioners that respondents could not now turn around and seek regularisation of their services on the post of Junior Analyst from the date they were initially appointed on ad hoc basis, more so when they were not even eligible to be promoted to the post on that date in 1991. Reliance was placed by them on a Supreme Court judgment in *State of Orissa v. Dr.P.M.Mishra* 1995 (1) SLJ 259 and *Excise Commissioner, Karnataka v. Srikanta* 1993 (1) SLJ 297 to show that mere prolonged continuation on ad hoc service could not ripen into a regular service and that respondents could not claim regularisation of their services on the post from the initial date of their ad hoc appointment.

7. Tribunal, on consideration of the matter held:-

"In fact, as it is found that the engagement of the applicants having being gone through correct procedure of selection by the competent authority, the applicants should get the benefit of the division of the Hon'ble Supreme Court in the case of *Direct Recruit Class-II Engineering Officers Association (Supra)* as well as the decision of the Constitution Bench of the Hon'ble Supreme Court in *Rudra Kumar Sain and Ors., etc v. Union of India and Ors.* (2000 (2) SLJ 168. The above decisions had held that the period of continuance officiation in a post for a long time, then the selection was made correct procedure followed by regularisation, would count for seniority. It would, Therefore, mean that the applicants would correctly get the benefit of inclusion of their uninterrupted ad hoc service from 30.6.1994 for all purposes, including seniority, fixation of pay, pension etc. Denial of the above would lead to the situation that the effect of ad hoc service put in by the applicants uninterruptedly following appointment after proper selection would be washed way. This cannot be permitted."

8. Petitioners assail the Tribunal judgment and their grievance is that it had wrongly proceeded on the premise that these respondents were appointed as Junior Analyst after following the procedure under recruitment rules, which in fact was not the case. Because under the relevant rules, the post of Junior Analyst was a selection post and was to be filled up by promotion amongst Technical Assistants with three years regular service by holding the DPC. As respondents were not eligible for promotion to the post on 6.2.991 for not having three years service as Technical Assistant and as no post of Junior Analyst was available in the promotion quota, no DPC could, Therefore, be held and these respondents were appointed in exigency of service in relaxation of rules on ad hoc basis and it was made clear to them that their ad hoc appointment would not confer any right on them to count their period of ad hoc service for seniority in the grade of Junior Analyst and that their appointment was till regular candidates/

incumbents would become available. It is submitted that once no promotional exercise was undertaken to the post of Junior Analyst and these respondents were never promoted as ad hoc Junior Analyst, the question of their regularisation from the date of their initial ad hoc appointment did not arise at all.

9. It is also asserted by petitioners that Tribunal had placed wrong reliance on the Supreme Court judgment in Direct Recruit Engineers case (supra) and Rudra Kumar Sain's case and if anything, the proposition laid down in these cases supported their case that the ad hoc service of these respondents was not liable to be counted and that their service could not be deemed regularised from the date of their initial ad hoc appointment. The Tribunal failed to appreciate that the ad hoc appointment of respondents was subject to outcome of OA No. 557/87 and also OA No. 2156/93 against which a writ petition was pending in this court and which had a bearing on their seniority in the grade of Technical Assistant.

10. Respondents again claim in their written submissions that they were appointed to the post of Junior Analyst in accordance with the rules and since they had worked on the post uninterruptedly from 6.1.1992 to 27.2.2000 (except for a short break of four months or so) on the basis of various notifications issued by petitioners from time to time in consultation with DOP&T, which notifications were always issued as per the rules, it was not open to the petitioners now to claim that no DPC was held for their ad hoc appointment because no notification of their ad hoc appointment could have been issued if the DPC was not held and since no document was brought on record to show that DPC was not held, it had to be presumed that their ad hoc appointment was made in accordance with rules. It is also denied by them that their ad hoc appointment was against deputation quota post.

11. The short issue that arises for consideration is whether the ad hoc service of respondents could be counted towards their promotion, seniority and other benefits and whether Tribunal could have directed that they be deemed regularised in service on the post of Junior Analyst midway from 30.6.1994 when they were re-appointed on ad hoc basis in the second spell ?

12. It is no more rest integra that once statutory rules have been made to govern and regulate an appointment, such appointment has to be made only in accordance with these rules. The seniority of an appointee whose appointment is made under the rules is to be counted from the date of his appointment and not from the date of his confirmation of service on the post. The Rules may also provide for making an ad hoc appointment to tide over unforeseen contingencies and for a specific period but the ad hoc service period of an appointee in such a case is not liable to be counted because this is made de hors the rules which govern regular appointment to the post and the ad hoc appointee does not become a member of service. If the ad hoc appointment is, however, provided under the rules and so is its regularisation, the ad hoc service prior to regularisation is to be counted. The same is the case where ad hoc appointment is made following the same procedure by and large which is provided for the

regular appointment and where ad hoc appointee is continued in a long uninterrupted officiation till his regularisation under rules.

13. The issue of ad hoc appointment and the counting of ad hoc service towards seniority and other benefits has engaged the attention of the Supreme Court and various High Courts in several cases. In some cases like *Dr.A.K.Jain v. Union*, 1987 SCC 49 *Dr P.P.C. Rawani and Others Vs. Union of India (UOI) and Others*, ; *State of Haryana and others Vs. Piara Singh and others etc. etc.*, , the Supreme Court issued directions to regularise the services of ad hoc appointees in peculiar facts and circumstances of those cases under Article 142 without laying down any ratio under Article 141 of the Constitution.

14. In *The Direct Recruit Class-II Engineering Officers" Association and others Vs. State of Maharashtra and others*, , which has been heavily relied upon by the Tribunal to direct counting of Respondent's service, the court culled out the following propositions, so far as these are relevant for our purposes on the issue:-

"(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 appointment continues in the post uninterruptedly till the regularisation of his service in accordance with the rules, the period of officiating service will be counted."

15. This was a case where the quota rule between the direct recruits and the promotees had broken down and the appointments from one service were made in excess after following the procedure prescribed under the rules for the appointment and it was held in this context that the appointees should not be pushed down below the appointees from the other source inducted in the service at a later date.

16. The two propositions enunciated were later reconciled by the Court in *State of W.B. and Others Vs. Aghore Nath Dey and Others*, by holding:-

"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 consideration 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 petitioner 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.

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 purposes by the appointment order itself, and it 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 uninterrupted till the regularisation of his service, in accordance with the rules."

17. In *M.K. Shanmugam and Another Vs. Union of India and Others*, , the Supreme court said that in none of its decisions had it held that ad hoc service of the appointee regularised later was to be counted towards seniority. The court held after referring to its own decisions in several cases:-

"But all these decisions do not point out that in case the promotions had been made ad hoc and they are subsequently regularised in the service in all the cases, ad hoc service should be reckoned for the purpose of seniority. It is only in those cases where initially they had been recruited even though they have been appointed ad hoc the recruitment was subject to the same process as it had been done in the case of regular appointment and that the same was not a stop gap arrangement. This is not the position in the present cases at all. Therefore, we are of the view that conclusions reached by the Tribunal appear to us to be correct and call for no interference."

18. In *J and K. Public Service Commission, etc. Vs. Dr. Narinder Mohan and others etc. etc.*, the Court said:-

"Back door ad hoc appointments at the behest of power source or otherwise and recruitment according to rules are mutually antagonistic and strange bed"

partners. They cannot co-exist in the same sheath. The former is in negation of fair play. The later are the product of order and regularity. Every eligible person need not necessarily be fit to be appointed to a post or office under the State, selection according to rules by a properly constituted commission and fitment for appointment assures fairness in selection and inhibits arbitrariness in appointments."

19. Applying all this to the present case, we feel convinced that Tribunal had misappreciated the nature of controversy and had also misplaced its reliance on the Supreme court judgment in Direct Recruit Class-II Engineering Officers" Association case and Rudra Kumar Sain"s case.

20. Before coming to whether the respondent"s case, would be covered by any of these judgments, the record requires to be set right by pointing out that the appointment of respondents to the post of Junior Analyst was de hors the rules and not in accordance with the method of recruitment provided under the rules. Because admittedly this post was a selection post and was to be filled up from the feeder cadre of Technical Assistant with three years" service and the selection was to be made by DPC comprising of Additional Secretary/ Joint Secretary (SIU), Director (SIU) and Deputy Director, in charge of Administration.

21. It is not anybody"s case that any DPC was held and these respondents were selected by such DPC for appointment to the post of Junior Analyst on 6.2.1991. It is also not their case that they had the requisite three years" service to be eligible for the post on that date. On the contrary, it is a matter of record that they were appointed to the post on ad hoc basis initially for six months or till regularly selected candidates would become available, whichever is earlier, subject also the the stipulation that their appointment would not confer any right on them to count their period of ad hoc appointment towards their seniority in the grade of Junior Analyst, nor would it fix their seniority in the grade of Technical Assistant which was in dispute and the subject matter of OA No. 557/87 (Baljit Singh v. Union).

22. This being the position, it could not be said that these respondents were appointed on ad hoc basis in accordance with the rules or that any selection process provided under these rules was followed leading to their ad hoc appointment on the post of Junior Analyst on 6.2.1991. The Respondents were bound by the terms of their appointment order and had to sink or swim with it. They could not be allowed to claim any benefit contrary to the terms of their appointment. The question of their ad hoc service being counted towards their seniority, promotion, etc, Therefore, did not arise.

23. The case of Respondents cannot be said to be covered by any of the Supreme Court judgments including that of Direct Recruit Class-II Engineering Officers" Association case. Because once their ad hoc appointment was de hors the rules, their ad hoc service was not liable to be counted any way. The only exception to this could be if their ad hoc appointment and regularisation was

covered by the rules or if the ad hoc appointment was the result of a selection process provided under the rules and if they had enjoyed uninterrupted, unbroken officiation on the post which is not the case. Once they were reverted and reappointed on the ad hoc basis, it could not be held that they had enjoyed an unbroken officiation for years on.

24. The case of these respondents also does not fall under proposition (B) of the Supreme Court judgment in Maharashtra Engineers case. On the contrary it falls under proposition (A) because their ad hoc appointment was de hors the rules in a stop-gap arrangement and conditional also. Therefore once proposition (A) applied to their case, proposition (B) would get excluded in terms of Supreme Court judgment in Aghore Nath Dey's case (supra).

25. All this leads to the only inescapable conclusion that Tribunal had misappreciated the nature controversy and had gone wide of the mark in granting Respondent's claim. The Tribunal order naturally becomes unsustainable and is set aside to allow this petition.