

PETITIONER:
MAJOR YOGENDERA NARAIN YADAV ETC.

Vs.

RESPONDENT:
SHRI BINDESHWAR PRASAD & ORS. ETC.

DATE OF JUDGMENT: 10/12/1996

BENCH:
K. RAMASWAMY, G.T. NANAVATI

ACT:

HEADNOTE:

JUDGMENT:

O R D E R

Leave granted in the special leave petitions.

These appeals have a chequered history. But it is not necessary to burden the judgment with minute details of the entire history of the case. Suffice it to state that Major Yogendera Narain Yadav, the appellant in the main appeal, was a short Commissioned Officer in the Army as Engineer and was appointed on April 15, 1963 and was released from the Army on October 25, 1970. Pursuant to an advertisement for appointment to a post of a temporary Asstt. Engineer made in 1973 he was selected by the Public Service Commission and was appointed to the post on July 29, 1974. The Government of Bihar had issued Circular dated June 21, 1969 in which it was stated that 30% of the posts of permanent as well as temporary Engineers were available to the demobilised Army officers and the date of entry into the State service would be the date of their attaining the age of eligibility for appointment in the military service or actual date of entry, whichever is later. Pursuant thereto, the appellant made a request by a memorandum to the Government to consider his case for permanent post available to the demobilised officers and appoint him to that post with effect from the date on which he joined the Army as Commissioned Officer. Request was acceded to and an order came to be passed by proceedings dated December 6, 1977 giving him the date of his permanent appointment for the purpose of seniority in terms of the Government Circular dated June 21, 1969 with effect from April 15, 1963. Thus he became a permanent Assistant Engineer in Bihar Roads and Building Department, which was formerly known as Public Works Department.

The question arose: whether he would be senior to the respondents? After giving him the notional date, he was promoted to the post of Executive Engineer. It appears that the respondents filed a writ petition in the High Court which is the subject matter of C.A. No.1394/91. There was difference of opinion between two learned judges and consequently reference to third learned Judge was made. It was held per majority that the appointment of the appellant as Executive Engineer without considering the claims of the respondents was not correct in law. Pending appeal, the

Court had given direction to the Government by order dated April 1, 1991 thus:

"the DPC to be constituted and to take the decision as directed by the High Court without delay. The decision being taken by the DPC it will be implemented subject to the result of the Appeal. Till the decision is taken by the DPC the appellant will not be reverted."

From the record, it is clear that DPC was constituted but his case was negatived. Consequently, he filed a writ petition in the High Court, viz., CWOC No.1563/92 which went against the appellant. When SLP bearing No.6794/94 was filed, this Court directed that a fresh DPC be constituted and in furtherance thereof the DPC was constituted and the claims of all the respective persons were considered. The appellant was found eligible for the promotion as Executive Engineer and thereafter as a Superintending Engineer and then as a chief Engineer and ultimately Engineer and then as a chief Engineer and ultimately as Engineer-in-Chief by proceedings dated May 16, 1994 and he was accordingly promoted. This promotion gave rise to filing of further writ petitions in the High Court which are the subject matters in other appeals. The High Court has held that since the respondents were already working as on the date when the appellant had entered the service as Executive Engineers though as temporary Assistant Engineers, their seniority has to be reckoned from the date of their initial appointment. Thereby they became senior to the appellant. As a result, he cannot be promoted as against them. It appears that pursuant to the directions issued in those writ petitions another DPC was constituted and promotions were given to the respondents. When it was sought to get those promotions stayed and to continue him in his past service, all the matters were directed to be posted together. Thus all the appeals have come up together.

Shri A. Sharan, learned counsel appearing for the appellant, with a neat presentation of the facts and analysis, contends that once the appellant has become permanent Asstt. Engineer w.e.f. April 15, 1963 and the respondents having been, admittedly, recruited as temporary Asstt. Engineers, unless they were appointed substantively to the post of permanent Asstt. Engineers, they cannot steal a march over the appellant; as a consequence, he became senior to them. He also contends that by proceedings dated 17.2.1969 the claims of all the persons who were temporarily working as Asstt. Engineers were considered; one Janaki Prasad Sinha of 1964 batch, who next below him was regularised as permanent Asstt. Engineer w.e.f. February 13, 1964 and R.R. Pathak, one of the respondents was regularised w.e.f. December 29, 1966 and, admittedly, the other respondents were regularised as permanent Asstt. Engineers in the years 1973 and 1976 and thereby they are far junior to the appellant in the post of Asstt. Engineer. Without considering appellant's case, they were confirmed as Executive Engineers in 1985. Rule 17 read with Rule 24 of the Bihar Engineering Class-I Service Rules, 1939 (for short, the 'Rules') provides for the procedure for promotion. Merit and seniority is to be considered for promotion to the post of Executive Engineer and merit alone without any consideration of seniority, would be considered for the post of Asstt. Engineer and Chief Engineer etc. The appellant who had reports of excellent record was considered by the DPC on his own merit and was found to be eligible for

promotion as against the respondents. Therefore, he was duly prompted. The high Court has not considered the case of the appellant in the proper perspective.

Shri S.B. Sanyal and Shri Uday Sinha, learned senior counsel for the respondents, contend that the respondents were regularly selected, though to the temporary posts by the BPSC and subsequently they were regularised to the permanent posts. Their initial appointments on temporary posts and subsequent regularisation is a fortuitous circumstance, viz., availability of permanent posts; but they having been recruited and selected by the BPSC on regular basis, their appointment to the posts as permanent Assistant Engineers would date back to their earlier regular selection. though they were promoted on temporary basis as Executive Engineers, they were confirmed thereafter in the post of Executive Engineers and thereby, the respondents are far senior to the appellants in both the cadres. Even before the appellant's entering into the service they became Executive Engineers in the post and thereby the non-consideration of their claims was bad in law. Shri sanyal placed reliance on Rule 27 of the Rules stating that when the respondents were appointed substantively to the posts of Executive Engineer, the appellant would not get any seniority over the respondents. In support thereof he placed reliance on the judgments of this court in Direct Recruit Class II Engineering Officers' Association v. State of Maharashtra & Ors. [(1992) 2 SCC 715] and State of West Bengal v. Aghore Nath Day [(1993) 3 SCC 371]. Shri Sinha further contends that the appellant had not worked as an Executive Engineer at all and, therefor, he cannot be considered for the post of Supdt. Engineer straight from the post of Asstt. Engineer and, therefore, the view of the High Court is perfectly consistent with the Rules and the law laid down by this Court.

In view of the respective contentions, the question that arises for consideration is: whether the appellant is senior to the respondents in the cadre as Asstt. Engineer and not notionally, as held by one of the learned Judges of the High Court, in the post of Executive Engineer for the purpose of promotion to the post of Supdt. Engineer in the service? It is seen that Class II Service, namely, Asstt. Engineers shall be recruited - (i) by direct recruitment in accordance with the Rules in Part II, or (ii) by the promotion or transfer of officers already in Government service, permanent or temporary, in accordance with the Rules in part III. Thereby, it is clear that the posts of Asstt. Engineers in Class II consist of permanent and temporary Engineers. Admittedly, the permanent and temporary posts are treated as distinct and separate posts, though in the same cadre. The Rules envisage substantive appointment to a post as is evident under Rule 27 of the Rules. Rule 27 reads as under:

"27, Seniority. - Seniority in the service shall be determined by the date of the officer's substantive appointment to the Service irrespective of the pay drawn by him provided that a member of the service who holds a superior to an officer who holds an inferior post substantively. The seniority of officers appointed on the same date shall be determined according to the order of merit in which they were placed at the time of their

selection for appointment."

It would thus be clear that the appointment to a temporary post, though in the cadre, is not a substantive appointment as contemplated by the Rule. Substantive appointment to the permanent post gives right to a substantive status in the post on permanent basis. It is seen that the Government had issued the orders, obviously for that reason, on February 17, 1969 and Janaki Prasad Sinha, who was recruited and was last among the selectees of 1964 was given confirmation from February 13, 1964; R.R. Pathak was given confirmation w.e.f. December 29, 1966. Thus they became the members of the service in a substantive capacity with respect to the above dates. It is also not in dispute that other respondents also were confirmed in the year 1973 on permanent posts. Though Major Yadav was recruited in 1973 and was appointed in 1974, by virtue of Government circular, his seniority dated back of April 15, 1963 as permanent Asstt. Engineer. Thus they became far junior to the appellant as permanent Asstt. Engineers. It is seen that Rule 17 of the Rules prescribes procedure for promotion to the post of Executive Engineer with a condition that merit should be the consideration and seniority also may be taken into consideration. It reads thus:

"17. - Procedure for recruitment by promotion. - (a) When the Governor has decided that any vacancy or vacancies in the service shall be filled by promotion, the Chief Engineer will nominate for promotion officers from the Bihar Engineering service, Class II. The nomination will be made by seniority and merit combined but more important will be attached to merit. The officers nominated by the Chief Engineer shall be arranged in order of preference and the number should ordinarily be 50 per cent in excess of the number of vacancies to be filled."

Thus due weight is given only to merit and where merit and ability are approximately equal. Seniority also could be considered. It is also not in dispute that the appellant being senior to the respondents by more than 10 years the question is: whether he could be considered for promotion as Executive Engineer? It is not in dispute that the appellant while in the Army, was a Class I officer and had held three ranks, namely, Lt. Colonel, Captain and Major. All the three posts were Class I posts equivalent to Executive Engineer Class I post. It is also not in dispute that one of the learned Judges, in the circumstances, and in our view quite rightly, has given direction to consider him notionally as if he is eligible to be considered as an Executive Engineer for promotion to the post of Supdt. Engineer. It is also not in dispute that throughout his career he earned "excellent" confidential reports. Merit under Rule 17 alone is the consideration for promotion as Supdt. Engineer and upwards. Under these circumstances, the DPC has considered, as per the directions referred to earlier, the relative merits of all the persons and considered the appellant more meritorious and accordingly directed the Government to give promotion in him and in furtherance thereof promotion was given. In the same proceedings further consideration was made for promotion to the post of Supdt. Engineer, Chief Engineer and Engineer-in-Chief. Rule 24 of the Rules speaks

that promotion to the post of Supdt. Engineer and the Chief Engineer "shall be made by selection and seniority alone shall confer no claim". Thus it could be seen that promotion should be only on merit. The appellant having been found more meritorious than others, obviously the DPC had considered and directed him to be promoted as Supdt. Engineer, Chief Engineer and thereafter as Engineer-in-Chief. Thus, his promotion to the above posts is consistent with the Rules and according to law.

It is true that the respondents entered into service much earlier to the entry into the service by the appellant. That is obvious. But the question is: whether the respondents who entered service later than the appellant can deny him the seniority? But for the Circular of the Government of Bihar, giving the benefit of past service as a demobilised military officer, obviously the appellant has no right to claim seniority over them. The Government order giving such a benefit to the ex-servicemen, when challenged, was upheld and thereafter it was not challenged in this Court. It cannot be challenged since in several cases the policy has been upheld by this court for the reason that the persons like the appellant rendered service to the country at the time when their service was needed by the nation to defend it from foreign aggression. Further though the appellant was initially appointed to a temporary post, admittedly, permanent post was available to the demobilised officers as Asstt. Engineer. His representation to consider his case for fitment into the permanent post was acceded to and the Government had passed that order and that order also had become final. Thus the appellant became senior to the respondents as permanent Asstt. Engineer much earlier to the respondents'.

The ratio in Direct Recruit Class II Engineers' case (supra) has no application to the facts in this case. Therein para 13 and proposition A and B in paragraph 47 have to be read in the light of the fact therein. Though the respondents were regularly recruited as temporary Asstt. Engineer in accordance with the Rules, until they became members of the service in a substantive capacity, they had not become members of Class II service. As seen they became members of Class II service in 1966, 1973 and onwards. Under those circumstances, though they were appointed on regular basis by selection by the Public Service Commission, they cannot steal a march over the appellant to claim seniority. Rule 27 amplifies the legal position. In this regard, this Court has considered a case similarly arising under the Medical services of the State of Bihar in Dr. (Capt.) Akhouri' Ramesh Chandra Sinha & Ors. v. State of Bihar & Ors. [(1966) 2 SCC 20]. Therein also, the appellant was a demobilised Army officer and he claimed seniority pursuant to the above circular of the Government. When the inter-se seniority was to be considered, it was stated in para 3 thus:

"As a consequence of the above circular, on appointment to the post and on completion of the probation for a period of two years, the candidate would be confirmed in the cadre as Civil Assistant Surgeon in the Bihar State Medical Service. It is settled law that on completion of the satisfactory probation, his confirmation would date back to his initial appointment. Admittedly, he

was regularly appointed on 6.9.1966. Consequently, he was regularly appointed as Civil Assistant Surgeon w.e.f. 6.9.1966."

Thus it was held that the seniority would be from the date of the entry into the service on a substantive appointment. Though the respondents were senior in temporary posts or in temporary promotions as Executive Engineers their status remained as temporary until they were confirmed. Before their confirmation as Executive Engineers, the case of the appellant, a senior permanent Asstt. Engineer was not considered. So that confirmation was bad in law. Though for purposes other than seniority, their temporary service would be counted, for the purpose of seniority only confirmation as permanent Asstt. Engineers would be the criteria. The ratio in the above case applies to the facts in this case. Though the respondents are entitled to other benefits by virtue of their temporary appointment, for the purpose of inter se seniority their seniority would be considered only from the date of entry into the service as permanent Asstt. Engineers. Since they entered into service much later to the appellant, they cannot claim any seniority over the appellant. Thus considered, we hold that the view of the High Court that the appellant is not entitled to seniority and other benefits is clearly bad in law.

It is contended by Shri Sinha that his client has already retired from service and pursuant to the directions, though now upset, by this Court, he was considered and promoted and, therefore, whatever benefits that were given to him may be retained. We cannot give any direction as contended for. They were subject to the result of these appeals. However, it would be open to his client to make a representation and it is for the Government to consider one decide accordingly.

The appeals are accordingly allowed. All the writ petitions filed by the respondents stand dismissed. No costs.