

CASE NO.:
Appeal (civil) 12578-12582 of 1996

PETITIONER:
A.G. Sainath Reddy

RESPONDENT:
The Govt. of A.P. and Ors.

DATE OF JUDGMENT: 28/02/2003

BENCH:
DORAISWAMY RAJU & ARIJIT PASAYAT

JUDGMENT:

J U D G M E N T

ARIJIT PASAYAT, J

Challenge in these appeals is to the order passed by the Andhra Pradesh Administrative Tribunal at Hyderabad (in short 'the Tribunal'). The controversy lies within a very narrow compass i.e. the date of seniority of the appellant and, therefore, a brief reference to the factual aspects would suffice.

Appellant joined as Welfare Officer in Andhra Pradesh Jails Department on 8.9.1978. He completed his probation on 5.10.1981. On 16.6.1983, nine posts of Deputy Superintendent of Jails were notified to be filled up and on 25.8.1983 an advertisement was issued by a requisite Gazette Notification by the Andhra Pradesh Public Service Commission (in short the 'Commission') for filling up the aforesaid vacancies by direct recruitment. Five years' service is required for an employee other than a direct recruit to be eligible for consideration for the said post. On 16.10.1984, 11 prisons welfare officers and jailors were appointed as Deputy Superintendents of Jails on ad hoc basis. Appellant joined as Deputy Superintendent of Jails on 20.10.1984 on the aforesaid ad hoc basis. The Commission conducted the written examination in October 1985 and interviews were conducted in October 1986. The results were declared in 1987. By Government Order dated 17.12.1987, four persons were given appointment, but only three joined. Subsequently, two persons were appointed on 4.5.1988 and 19.6.1989. A Government Order No. 595 dated 1.10.1990 was issued by the Government where the date from which service as Deputy Superintendent of Jails was to be regularised was indicated. While the dates of regularisation for direct recruits were indicated to be the date they joined, so far as the appellant is concerned, it was indicated to be the date when he had joined on ad hoc basis in 1984. This was questioned by the direct recruits before the Tribunal. They raised two contentions in the applications filed under Section 19 of the Administrative Tribunals Act, 1985 (in

short 'the Act'). They were (i) their seniority should be counted from the date of notification i.e. 16.6.1983; (ii) and in any event, the dates fixed by the non-direct recruits were not legal as their appointments were on purely ad hoc basis and merely as stop gap arrangement since they were appointed in respect of the posts for which requisitions had been sent to the Commission by the State Government. The Tribunal accepted the second contention. It came to hold that there was no scope for retrospective regularisation and deemed probation. Reference was made to Rule 4 of the Andhra Pradesh Deputy Superintendents of Jails Service Rules, 1974 (in short 'the Rules'). These rules are framed under Article 309 of the Constitution of India, 1950 (in short 'the Constitution'). As afore-noted, the judgment of the Tribunal disposing of the 5 original applications is the subject matter of challenge in these appeals.

Mr. S.K. Dholakia, learned senior counsel appearing for the appellant submitted that the approach of the Tribunal is erroneous. The method of appointment is indicated in Rule 2 of the Rules. There are three sources of appointment, i.e. (i) recruitment by transfer of jailors in jails other than sub-jails in Andhra Pradesh Jail Subordinate Services; (ii) recruitment by transfer of Welfare Officers of Branch II of the aforesaid Services and (iii) by direct recruitment if no qualified or suitable person is available by any of the other two methods. Where the recruitment is by transfer, the concerned officer is required to have served as a Jailor in jail other than sub-jails or as Welfare Officer for not less than five years. There is a requirement that every person appointed to the post by transfer has to be on probation for a specified period. Appellant was recruited in terms of the Rules and merely because his appointment was styled as an ad hoc appointment the same will not make a difference. The appointment was on the basis of the Rules and not on the basis of the Government Order. Since there was vacancy the appointments could have been made and have been made in terms of the Rules. Strong reliance was placed on Direct Recruit Class II Engineering Officers' Association v. State of Maharashtra and Ors. (1990 (2) SCC 715), more particularly, para 47, conclusions (A) and (B) which read as follows:

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

In response, learned counsel for the respondents submitted that the Tribunal has rightly analysed the legal position. The appointments were stop-gap, emergency or fortuitous arrangements and it cannot be treated to be appointment under the Rules. The probation period started only when there was a regular appointment in terms of the Rules and not on any point of time before that date.

One basic feature which needs to be considered is that the posts were advertised by the Commission in 1983 for direct recruits. Requisitions were sent to the Commission by the government before that. Since the posts were to be filled up by direct recruits on the basis of acceptance of recommendations of Commission, any arrangement to fill up those posts on officiating basis does not confer any right of probation on the person appointed as there was no post to which there could be appointment of a promotee after requisitions were sent to the Commission to such posts earmarked for direct recruitment. Any officiating arrangement is really of no consequence. Rule 4 of the Rules relating to "Probation" reads as follows:

"Every person appointed to the post by transfer shall from the date on which he joins duty, be on probation for a total period of one year on duty within a continuous period of two years and every person appointed by direct recruitment shall, from the date on which he joins duty, be on probation for a total period of two years on duty within a continuous period of three years."

Obviously, the date to be reckoned when the regular appointment is made on the basis of the Rules. Once the post is earmarked for direct recruit, it goes out of reach of the department for effecting promotions on regular basis and comes to the hands of the Commission. Their recommendation which is subject to acceptance by the Government alone governs such posts for appointment. The decision in the Direct recruits' case (supra) was considered later by this Court, more particularly, relating to conclusions (A) and (B) in *State of West Bengal and Ors. etc. v. Aghore Nath Dey and Ors.* (1993 (3) SCC 371). At paras 21 to 25 it was held as follows:

"21. We shall now deal with conclusions (A) and (B) of the constitution bench in the Maharashtra Engineers case quoted above.

22. 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 considering 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 stopgap arrangement. The case of the writ petitioners 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.

23. This being the obvious inference from conclusion (A), the question is whether the present case can also fall within conclusion (B) which deals with cases in which period of officiating service will be counted from seniority. We have no doubt that conclusion (B) cannot include, within its ambit, those cases which are expressly covered by the corollary in conclusion (A), since the two conclusions cannot be read in conflict with each other.

24. The question, therefore, is of the category which would be covered by conclusion (B) excluding therefrom the cases covered by corollary in conclusion (A).

25. 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 latter expression 'till the regularization 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 purpose by the appointment order itself, and is 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 regularization, 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 uninterruptedly till the regularization of his service, in accordance with the rules. In such cases, the appointee is not to blame for the deficiency in the procedural requirements under the rules at the time of his initial appointment, and the appointment not being limited to a fixed period of time is intended to be a regular appointment, subject to the remaining procedural requirements of the rules being fulfilled at the earliest. In such cases also, if there be any delay in curing the defects on account of any fault of the appointee, the appointee would not get the full benefit of the earlier period on account of his default, the benefit being confined only to the period for which he is not to blame. This category of cases is different from those covered by the corollary in conclusion (A) which relates to appointment only on ad hoc basis as a stopgap arrangement and not according to rules. It is, therefore, not correct to say that the present cases can fall within the ambit of conclusion (B), even though they are squarely covered by the corollary in conclusion (A)."

Reference can also be made to A.P.M. Mayankutty v. The Secretary and Anr. (1977 (2) SCC 360). In paragraphs 7, 8 and 9 of the said decision the position as to when a person can be treated as probationer and what happens relating to appointments on emergency or fortuitous arrangement were analysed.

Additionally, it is to be noted that the orders of appointments on ad hoc basis dated 1.12.1983 and 16.10.1984 which were issued to the appellant and others contained the following stipulations respectively.

"The temporary promotions of the following officers may be ordered till such time as these posts are regularly fill in by direct recruitment for which notification has already been issued by the APPSC."

Xxx xxx xxx xxx xxx

"The appointments ordered in para-I above are purely temporary and provisional and do not confer any right whatsoever on the persons for continuance in the posts and do not entitle them to any preferential claim to future appointments thereto, and are liable to be terminated at any time without assigning any reason and without any notice."

If any vacancy remained after joining of the selected

direct recruits, same was available to be filled up from other sources of appointment.

One thing further is to be noted. Rule 2(3) of the Rules is applicable when departmental candidates are not available. Since no qualified departmental candidates were available, the vacancies were notified to the Commission. It is further to be noted that the crucial words in Rule 4 are "shall from the date on which he joins duty be on probation...". There is no question of any deemed probation or notional date of probation as probation starts from the actual date of joining duty. The question of joining duty on probation shall arise only when there is a substantive appointment against a post available and not any ad hoc or officiating arrangement.

That being the position, the Tribunal was justified in allowing the original applications filed before it. We find no merit in these appeals. The appeals fail and are dismissed. Costs made easy.