

CASE NO.:
Appeal (civil) 6763 of 2001

PETITIONER:
Chandramohan Pandurang Kajbaje

RESPONDENT:
State of Maharashtra & Ors.

DATE OF JUDGMENT: 07/01/2008

BENCH:
H.K. SEMA & V.S. SIRPURKAR

JUDGMENT:
J U D G M E N T

H.K. SEMA, J

(1) This appeal is directed against the judgment and order dated 11.10.2000 of the Division Bench of the High Court of Bombay in Writ Petition No. 3024 of 1997.

(2) This case has a chequered history. The controversy, in this appeal, is with regard to inter-se seniority between Maharashtra Public Service Commission (PSC) selectee employees and non-Public Service Commission employees. Lengthy arguments have been advanced before us by learned counsel on both sides. However, the resolution of dispute bogged down to a narrow compass.

(3) The question raised is, as to whether the final inter-se seniority lists published on 6th March, 1997 and 26th March, 1997 were in pursuance to the directions of this Court or not.

(4) This appeal is preferred by a Public Service Commission selectee employee. The undisputed facts are:
The respondents were non-PSC selectee employees.

They were appointed in between 1962 and 1965 by executive orders on ad-hoc basis without resorting to process of selection by Public Service Commission. Prior to their appointment, by a Notification dated 22nd May, 1957, the Government of Maharashtra, in exercise of the powers conferred by the proviso to Article 309 of the Constitution, amended the Bombay Civil Services Classification and Recruitment Rules, 1939. Rule 2 (B) thereof provides that appointments of Lower Division -Clerks, Clerk-Typist, Typists shall be made by nomination on the result of a competitive examination held by the Commission.

(5) It is undisputed that the appointments of respondents were not made on the result of a competitive examination held by the Commission. It is also not disputed that their services had never been regularized till coming into force the Government resolution dated 1st March, 1974, which is apple of discord in these proceedings.

(6) The Government Resolution No. EXM-1074-Q, Sachivalaya, Bombay \026 32, BR, dated 1st March, 1974 is relevant for proper adjudication of the present controversy, and, therefore, it is extracted:

\023Persons temporarily appointed to Ministerial posts in Government Offices in Greater Bombay pending availability of P.S.C. selected candidates ---
Regularisation of appointments of.

GOVERNMENT OF MAHARASHTRA
General Administration Department,
Resolution No. EXM-1074-Q,
Sachivalaya, Bombay \026 32, BR,
Dated the 1st March, 1974

RESOLUTION: Direct recruitment to various ministerial posts in Government offices in Greater Bombay, including Secretariat Departments, viz., Clerks, Typists, Stenographers, Assistants etc. is made on the basis of the results of the competitive examinations held by the Maharashtra Public Service Commission. During the course of last several years, a number of candidates who have not been selected by the Public Service Commission came to be recruited to these posts, pending allotment of candidates selected by the Public Service Commission. Many of these persons have put in many years of service. The question regarding regularization of appointment of these persons has been under the consideration of Government for some time past. Government is now pleased to direct, after consulting the Maharashtra Public Service Commission, that the non-P.S.C. who were employed in the ministerial posts, viz. Clerks, Typists, Clerk-Typists, Steno-Typists and stenographers in the Secretariat Departments and various Government Offices in Greater Bombay prior to 1st January, 1971 and who are in the service of Government on the date of issue of these orders should continue in Government service, without being replaced by the candidates selected by the Maharashtra Public Service Commission provided they fulfil the following conditions:-

- (1) The non-P.S.C. persons concerned should have the minimum educational qualifications prescribed for the posts to which they were appointed.
- (2) They were within the age-limits prescribed for appointment to the respective posts held by them at the time of their initial appointment to such posts.

2. The above orders will also be applicable to the non-P.S.C. persons who were recruited in various Government Offices prior to 1st January 1971 but were subsequently retrenched and provided with alternative employment, according to the orders contained in Government Resolution, General Administration Department No. AEM-1071-J, dated the 1st June, 1971 and are in Government service on the date of issue of these orders.

3. The candidates who were recruited in the Secretariat Departments and various Government Offices on or before 1st January, 1971 will be replaced by the candidates selected by the Commission as soon as such candidates are available, unless in the meanwhile, they appear at the competitive examinations, held by the Public Service Commission and are selected by the Commission for appointment to the respective posts held by them.

4. The seniority of the non-P.S.C. persons referred to in para 1 and 2 above vis-à-vis the candidates selected by the public Service Commission working in various Departments/ Offices should be fixed with reference to the date of issue of this order. The inter-se seniority of these non-P.S.C. persons working in a particular Department/ Office should however be according to their length of service in the respective posts in their Departments. In other words, the Public Service Commission selected candidates working in various Departments/ Offices prior to the date of this resolution should be treated as senior to the non-P.S.C. persons referred to in para 1 and 2.

(emphasis supplied)

5. Government is very much concerned over the practice of recruitment of non-P.S.C. candidates in Government Offices in Greater Bombay all these years. Government has therefore decided that there should be an absolute ban on direct recruitment to various ministerial posts in Government Offices in Greater Bombay through the Employment Exchange or any other source. Under no circumstances should such a recruit be continued beyond a period of three months.

6. All Heads of Departments and Offices should follow the above instructions scrupulously. The receipt of this resolution should be acknowledged.

By order and in the name of the Governor of Maharashtra.

K.G. Paranjpe

Secretary to Government of Maharashtra\024

(7) It is clear from the above Resolution that the direct recruitment to various ministerial posts in Government offices in Greater Bombay, including Secretariat Departments, viz., Clerks, Typists, Stenographers, Assistants etc. is made on the basis of the results of the competitive examinations held by the Maharashtra Public Service Commission. The Government also took note of the fact by the said Resolution that during the course of last several years, a number of candidates (respondent\022s group), who had not been selected by the Public Service Commission came to be recruited to the said posts, pending allotment of candidates selected by the Public Service Commission. The Resolution further noted the fact that many of those persons had put in many years of service. The Resolution also revealed that the questions of regularization of appointment of those persons had been under the consideration of the Government for some time past. The Resolution also speaks about the decision taken by the Government in consultation with Public Service Commission, that the non-P.S.C. who were employed in the ministerial posts, viz. Clerks, Typists, Clerk-Typists, Steno-Typists and stenographers in the Secretariat Departments and various Government Offices in Greater Bombay prior to 1st January, 1971 and who were in the service of Government on the date of issue of the said Resolution should continue in Government service, without being replaced by the candidates selected by the Maharashtra Public Service Commission provided they

had the minimum educational qualifications and were within the prescribed age-limit at the time of their initial appointment.

(8) The Resolution further made it clear that the seniority of the non-P.S.C. persons vis-à-vis the candidates selected by the public Service Commission working in various Departments/ Offices should be fixed with reference to the date of issue of the order. It was further made clear that the inter-se seniority of the said non-P.S.C. persons working in a particular Department/ Office should however be according to their length of service in the respective posts in their Departments. The Resolution specifically clarified in paragraph 4 as under:

“In other words, the Public Service Commission selected candidates working in various Departments/ Offices prior to the date of this resolution should be treated as senior to the non-P.S.C. persons referred to in para 1 and 2.”

(9) The non-P.S.C. employees (respondents herein) have not challenged the Government Resolution dated 1st March, 1974 in any forum.

(10) On a cursory reading of the Resolution, as referred to above, we have no doubt in our mind that the Public Service Commission selected employees prior to the date of Resolution, were correctly treated as senior to the non-P.S.C. employees.

(11) In service jurisprudence the incumbent who did not belong to the stream of regularly and lawfully appointed through Public Service Commission cannot claim seniority vis-à-vis those who have been regularly and properly appointed through the Commission, till the appointments have become regular and are regularized by the appointing authority as a result of which their stream joins the regular stream. In *Shitla Prasad Shukla (appellant) v. State of U.P. & Ors.* (respondents) 1986 Supp. SCC 185, this Court held at page SCC 190 para 10 as under:

“10. An employee must belong to the same stream before he can claim seniority vis-a-vis others. One who belongs to the stream of lawfully and regularly appointed employees does not have to contend with those who never belonged to that stream, they having been appointed in an irregular manner. Those who have been irregularly appointed belong to a different stream, and cannot claim seniority vis-a-vis those who have been regularly and properly appointed, till their appointments became regular or are regularized by the appointing authority as a result of which their stream joins the regular stream. At that point of confluence with the regular stream, from the point of time they join the stream by virtue of the regularization, they can claim seniority vis-a-vis those who join the same stream later. The latecomers to the regular stream cannot steal a march over the early arrivals in the regular queue. On principle the appellants cannot therefore succeed. What is more in matters of seniority the court does not exercise jurisdiction akin to appellate jurisdiction against the determination by the competent authority, so long as the competent authority has acted bona fide and acted on principles of fairness and fair play. In a matter where there is no rule or regulation governing the

situation or where there is one, but is not violated, the court will not overturn the determination unless it would be unfair not to do so. In any view of the matter the appellant who did not even belong to the stream of regularly (he was allowed to teach only in an irregular and unauthorised manner) and lawfully appointed lecturers cannot claim seniority against any one already in the stream before he joined the stream himself. The view taken by the High Court is unexceptionable.\024

(12) That apart, the Government Resolution of 1st March, 1974 has been dealt with by this Court in R.S. Makashi & Ors. (appellant) v. I.M. Menon & Ors. (respondents), (1982) 1 SCC 379. In fact Makashi\022s case (supra) was a dispute relating to inter-se seniority between the direct recruits and the incumbents coming from different departments. However, a three-Judge Bench of this Court had also occasion to deal with the Government Resolution dated 1st March, 1974 in paragraph 25 of the Judgment as under:

\02325. On March 1, 1974, the Government of Maharashtra passed a Resolution directing that non-P.S.C. persons who were employed in the ministerial posts, namely, Clerks, Typists, Clerk-cum-Typists, Steno-typists and Stenographers in the Secretariat departments and various government offices in Greater Bombay, prior to January 1, 1971, and who were in the service of Government on the date of the issue of the said order, should continue in government service without being replaced by the candidates selected by the Maharashtra Public Service Commission, provided they possessed the minimum educational qualifications prescribed for the post to which they were appointed and they were also within the age limits prescribed for appointment to the respective posts held by them at the time of their initial appointment to such posts. It was made very clear in para 4 of the said order that the seniority of the non-P.S.C. persons on whom the benefit of permanent absorption in service was conferred thereunder was to be fixed only with reference to the date of the said order and that all the Public Service Commission selected candidates who were working in the various departments/offices prior to the date of the said Resolution would be treated as seniors in relation to the non-P.S.C. persons covered by the said order. It is manifest that this order did not in any way affect the inter se seniority between the writ petitioners and the \021released government servants\022 drafted to the BRO from other government departments wherein they had been holding posts on a regular basis after having passed the Public Service Commission examination. It is also worthy of note that the Government Resolution of 1974 was a general order applicable to all the non-P.S.C. personnel functioning on a temporary or ad hoc basis in the Secretariat as well as the various departments of the State Government and except as indicated above it did not have any special applicability to the BRO.\024

(13) The decision in Makasi\022s case has been followed by a two-Judge Bench of this Court in Chandramohan P Kajbaje & Ors. (Petitioners) v. State of Maharashtra & Ors. (respondents) in Special Leave Petition Nos. 28017-28024 of

1995 disposed of on 8th November, 1996.

(14) In Kajbaje's case (supra) the Government Resolution dated 1st March, 1974 was dealt with by this Court not only the decision in Makasi's case was referred to but a direction was also issued to the State Government to revise the seniority lists in terms of the Resolution dated 1st March, 1974 within four months' time. It is in pursuance of the said direction that final seniority lists were prepared on 6th March, 1997 and 26th March, 1997.

(15) It appears that both the Makasi's case and Kajbaje's case (supra) were brought to the notice of the Division Bench of the High Court, but we notice with dismay that the High Court has brushed aside the judgment of the Supreme Court on the ground that the said observations of the Supreme Court are only an obiter dicta and they cannot be treated as ratio decidendi. It is most unfortunate. The High Court has failed to take note of the fact that a direction was issued by this Court. A direction issued by this Court cannot be treated as obiter dicta. It appears that the High Court did not care to read the judgment of this Court in between the lines in Makasi's case followed by Kajbaje's case. This is where the High Court went wrong creating multiplicity of litigation instead of giving a quietus to the litigation.

(16) In the result, this appeal is allowed. We hold that the final seniority lists, published on 6th March, 1997 and 26th March, 1997, are validly made and in pursuance of the directions of this Court, as referred to above. The impugned order of the High Court dated 11th October, 2000 is set aside. Parties are asked to bear their own costs.