

PETITIONER:
VIJAYA KUMAR SHROTRIYA

Vs.

RESPONDENT:
STATE OF U.P. & ORS.

DATE OF JUDGMENT: 13/02/1998

BENCH:
K. VENKATASWAMI, A.P. MISRA

ACT:

HEADNOTE:

JUDGMENT:

O R D E R

The short question raised is, whether the appellant is entitled to the benefit of his earlier service rendered in the Irrigation Department for his promotion and seniority in the Public Works Department (PWD). The foundation for the impugned order dated 19th August, 1993, is the decision of the High Court in Gokaran Singh v. State of U.P (Writ Petition No, 4396 of 1990), in which the appellant, admittedly, was not a party wherein it was held that the benefit for the said earlier period was not admissible.

On 25th August, 1962, the appellant was appointed on ad hoc basis as Assistant Engineer in the irrigation Department. In September, 1962, interview was held in the combined services of Uttar Pradesh for the posts of Assistant Engineers in Public Works Department (PWD) Irrigation Department by the U.P. Public Service Commission. The appellant was recommended at Sl. No.55. In view of this, he was allotted the Public Works Department. On 29th July, 1963, the Public Works Department approved the appellant's appointment and indicated the appellant's merit at Sl. No. 21. On 8th August, 1963, the Chief Engineer, PWD, issued letter of his appointment. However, the appellant was not relieved by the Irrigation Department, inspite of his consent earlier to join PWD through a letter dated 10th May, 1963. So, he continued to work in the Irrigation Department. In 1965, another competitive examination was held by the said Commission for substantive permanent vacancies in the Public Works Department. On 13th September, 1967, the appellant was again selected and appointed through letter dated 23rd November, 1967. On 1st January, 1968, the appellant joined the post of Assistant Engineer in PWD. Subsequently, on 10th October, 1968, appellant's case is, that he was transferred from the Irrigation Department to the PWD. By means of Government Order dated 19th October, 1968, it was directed that Assistant Engineers in the Public Works, Irrigation and L.S.B.E. Departments, who came through competitive examination and are working in any of the said Departments, if allocated to any such other department, they would be deemed to have been transferred from one department to the other. In June, 1972, the appellant was promoted to

the post of Executive Engineer, PWD. This was only possible by accepting the earlier service in the Irrigation Department, since after the selection through Public Service Commission in the year 1962. Admittedly this appointment by promotion was not challenged. It is urged, later when the question of the appellant's appointment to the post of Superintending Engineer came up for consideration, his right was ignored on the same basis, viz. absence of minimum request to period in the PWD. This issue if at all could have been raised when he was promoted as Executive Engineer in 1972. To raise it now after the being Executive Engineer for twentyone years is neither justifiable nor valid. It is not in dispute if his service in the Irrigation Department is taken into consideration, he is qualified for being appointed as such. Aggrieved by this the appellant filed his Claim Petition before the U.P. Public Service Tribunal. On 22nd June, 1992 the Tribunal allowed the Claim Petition and directed the respondents to consider posting of the appellant as Superintending Engineer on the basis of the service records as that existed on 1st December, 1962. It also held that the basis of such placement would also be merit list of 1962 issued by the Public Service Commission and thus the appellant would be entitled to other consequential benefits. Accordingly, the Government by order dated 20th February, 1993 fixed his seniority at serial No. 319A. It, however, recorded that this would be subject to the orders of the higher courts where the matter of finalisation of the principles of seniority is still pending. As aforesaid, the decision then came in the case of Gokaran Singh (supra). The High Court in that case with reference to the case of P.D. Aggarwal & Ors. v. State of U.P. & Ors.: (1987) 3 SCC 622 held in the matter of inter se dispute, a claim of seniority by a person could only be from the date he becomes member of that service. In other words, it would be from the date one joined the Public Works Department from the Irrigation Department. In the case of appellant, it would only be when he joined PWD after 1965 selection. Any period prior, would not be admissible. Further the Government itself treated such cases and the appellant's case to be a case of transfer from the Irrigation Department to the Public Works Department for valid reason. The reason was that for no fault of his, inspite of being selected in 1962 on account of for a public cause he was not relieved from the Irrigation Department. Hence, the said period has to be computed.

The appellant referred to the letters dated 18th June, 1963, of the Chief Engineer, Irrigation Department and letter dated 15th September, 1963 of the Joint Secretary to the Government of Uttar Pradesh to bring home his point that the appellant was not relieved in 1963 from Irrigation Department in public interest. In spite of all this, on 19th August, 1993, the appellant was served with a letter by which the State of U.P. withdrew its earlier decision conferring higher seniority to the appellant. On 23rd August, 1993, respondents' impugned order excluded the appellant from the promotion to the post of Superintending Engineer and his junior was promoted. This led to the filing of the Writ Petition in the High Court in September, 1993 for quashing the aforesaid order dated 19th August, 1993 and for directions to the respondent to maintain his seniority at Serial No. 319A and promoted him to the post of Superintending Engineer. The High Court dismissed the Writ Petition. Aggrieved by the same, the present appeal is filed by special leave.

We have heard learned counsel for the parties at great

length.

It appears from letter dated 20th July, 1993 from the Deputy Secretary to Government, that the appellants name was approved for appointment on temporary basis for the post of Assistant Engineer (Civil) in Public Works Department as a result of the interview held by the Public Service Commission in August/September, 1962 and was placed at Serial No. 21. Thereafter by means of Office Memorandum dated 8th August, 1963, the appellant was appointed on the said post with a direction to join the duties by 15th September, 1963. The appellant gave his consent for joining the Public Works Department. Thereafter, as aforesaid, the Chief Engineer, Irrigation Department through his letter date 18th July, 1963, did not relieve the appellant from the Irrigation Department in public interest which is also confirmed by a letter from the Joint Secretary to the Government of Uttar Pradesh dated 15th September, 1992.

It is in this background the question is, once the appellant being selected through a combined test held both for Irrigation and Public Works Department in 1962 and not being permitted to join Public Works Department, inspite of he having opted, should he be deprived of the services rendered by him in Irrigation Department for the purpose of computing his eligibility, seniority and promotion in the Public Works Department. In this regard we also find G.O. No. 822 EBR/XXIII-PWD dated 19th October, 1968, which decided such cases to be of transfer inter se from Irrigation Department to Public Works Department and vice versa of the persons who were recruited as Assistant Engineers through combined examinations. By this it was clarified such persons, in case are placed from one department to other, will be deemed to have been transferred from one department to the other. It further clarified, where any difficulty is felt in fixation of their pay in the department to which they are transferred, that could be resolved under F.R.22 of Finance Hand Book Volume 11 part 11 to IV. To the latter part, we are not concerned, the concluding words of this G.O. are:

"Since the services of these Assistant Engineers will be deemed to have been transferred, they would also be entitled to Transfer T.A., joining time for the journeys performed by them in connection with their transfer from one department to another."

Thus stand of the Government is absolutely clear, and on this basis the appellant would be treated to have been transferred from Irrigation Department to Public Works Department when he was appointed/absorbed in the Public Works Department on the basis of combined examination held in the year 1965. We also find Office Memorandum No. 5060/23 Irri-1/42/WP/80 dated 12th July, 1982 which reiterated the aforesaid Government policy of counting the services in the Irrigation Department towards the Public Works Department it clearly spelled out its policy relying on the decision given earlier by the High Court in Abdul Kher vs. Chief Justice Allahabad (1971 SLR, 25) that the benefit of the service rendered in the erstwhile department can be granted in case a person is transferred from one department to another. Relevant part of this Office Memorandum is quoted hereunder:-

"As per the provision in the judgment in matters of Abdul Kher v. Chief Justice Allahabad 1970

SLR-25, Hon. High Court has held that benefit in seniority can be given on transfer from one Department to another Department, if there is no prohibition on the rules and benefit of past services can be given and cannot be held as unfair. In the present matter, there is no prohibition in 1936 service rules, but in Government Order No 23 I.A.-144/64 dated 13.6.1963 provides that the services rendered by officers in that the services rendered by officers in P.W.D., shall be counted in Irrigation Department after joining and shall draw the same salary as they were drawing in PWD. After careful consideration as natural justice and legally, it is decided that the benefit of past service of other department is to be given in seniority fixing.

The Tribunal also gave a finding in favour of the appellant that there is no reason not to follow the seniority as mentioned in the merit list of 1962 made by the Public Service Commission.

We find, the appellant in this case could not be faulted as inspite of he being selected through 1962 combined selection examination and he having consented was not relieved by the Irrigation Department due to his requirement in that department. This fact, as stated earlier, is also recorded in Government's Office Memorandum NO.402 EPOR. 12.3.93. 915/91 dated 20th February, 1993. This is also referred in the letter of the joint Secretary, Government of U.P., Irrigation Department, to the Joint Secretary, Public Works Department dated 19th September, 1992. The main reason, to reject the claim by the Government is the decision of Gokaram Singh (supra) which was also the basis of the impugned judgment of the High Court viz. relying on P.D.Aggarwal's case (supra). This decision merely declares, a claim of seniority could only be from the date one is borne in service. But the question still is, as to when did the appellant enter service or could be said to have been borne in service. If the appellant could be said to have entered service only on his appointment in the Public Works Department as a result of combined examination held in 1965, he would be borne in service then. But in case his selection and appointment in pursuance to the combined selection examination of 1962 is accepted this he would be borne in service then, we find he not being relieved from the Irrigation Department for public purpose coupled with the policy in such cases to treat it to be a case of transfer for all this. We unhesitatingly come to the irresistible conclusion that the appellant would be treated to have been borne in service on the date when he was appointed through 1962 combined selection examination and not in 1965 examination. We have already referred to various letter as also the decision of the Government treating such placement in the departments inter se to be a case of transfer. The government throughout, has also treated the appellant to be a case of transfer from Irrigation Department to Public Works Department. His claim was only rejected by the Government as aforesaid in view of the decision in the case of Gokaran Singh (supra) relying on

P.D.Aggarwal (supra), about this we would be referring later.

We feel that it would be unjust, to disallow the claim of the appellant in spite of the being selected and appointed to the P.W.D. through 1962 Commission Selection when on no fault of his if he was not being permitted to join in the Public Works Department. In *Shri Anand Chandra Das vs. State of Orissa & Ors.* : JI 1988 (1) S.C.98, on the question of the seniority of the appellant who had gone on deputation to labour department as Senior Auditor, it was held, since he never agreed to go on deputation, therefore his seniority has to be re-fixed by including period in the Revenue Department and thus notional promotion to be given.

"We find sufficient force in the aforesaid contention of the learned counsel appearing for the appellant. That the appellant was appointed as a Senior Auditor on Revenue on 28.10.1996 is not disputed. It is also not disputed that his services were brought over to the Labour Department on requisition being made to all the Government Departments and on his name being sponsored by the Revenue Department. It is no doubt true that the Labour Department had indicated that the seniority will be determined on the basis of the date of joining of the Labour Department itself but the appellant had no point of time agreed to the said condition, and on the other hand, unequivocally expressed his unwillingness to come over to the Labour Department by letter dated 6.11.1970 and without consideration of the same the Revenue Department relieved him requiring him to join in the Labour Department. In the aforesaid premises we see no justification in ignoring the service rendered by the appellant as a Senior Auditor under the Revenue Department. The Tribunal, in our considered opinion, committed an error by directing that seniority of the appellant in the cadre of Senior Auditor will be determined by taking his services from the date he joined the Labour Department. In our considered opinion the services of the appellant as a Senior Auditor from 28.10.1995 shall be taken into account for determining his seniority in the cadre of Senior Auditor in the Labour Department."

In *K.Madhavan & Anr. etc. vs. Union of India & Ors.* etc. 1988 (1) SCR 421, also there was a dispute about seniority and the questions for consideration were, whether the petitioner's appointment should be treated as transfer and whether the earlier period spent to be counted towards seniority or not. The Court observed:

"There is not much difference

between deputation and transfer. Indeed, when a deputationist is permanently absorbed in the CBI, he is under words, deputation may be regarded as a transfer from one government department to another. It will be against all rules of service jurisprudence, if a government servant holding a particular post is transferred to the same or an equivalent period of his service in the post before his transfer is not taken into consideration in computing his seniority in the transferred post. The transfer cannot wipe out his length of service in the post from which he had been transferred."

Regarding the question of length of service for computing seniority, whether could it be only from the date of his appointment on permanent post in the year 1969 or will also include the period when he was appointed on the temporary post in the year 1962, the appointed on a substantive vacancy on a temporary post after due approval by the Public Service Commission if fulfils all other essential criteria as prescribed he shall be deemed to be borne in service from such date of his appointment. In other words his entire length of service from that date should be reckoned in computing seniority. This point is well settled and is reasserted in the aforesaid case of P.D.Aggarwal (supra) itself.

We further find this question whether the said period to be computed for the purpose of seniority was a matter which the Government ought to have considered and we feel must have been considered while appointing him as Executive Engineer in Public Works Department which was in the year 1972. He suffered from the same disability for the post of Superintending Engineer. But after due considerations then after appointing him two decades back, none challenging it then, to raise it now, has no justiciable reasons to stand. By that time the policy of the Government was also well known which is evident from the aforesaid G.U. of 1968. When the question of appointment as Superintending Engineer came up for consideration in the year 1993 i.e. more than 21 years after appellant's appointment as Executive Engineer, we do not find, it was proper for the Government, to revert back and deprive the appellant by withdrawing his seniority by excluding the period he worked in the Irrigation Department.

Even otherwise, we find from the record that the Government's own stand and its policy accepted the stand of the appellant but the reason for this change was only in view of the decision of the High Court, as aforesaid, in the case of Gokaran Singh relying on the case of P.D.Aggarwal. The High Court committed wrong by wrong application of the principle of P.D.Aggarwal. The same is not eroded or violated when the appellants appointment to the PWD is treated to be by way of transfer from Irrigation Department.

The High Court did not properly scrutinize the facts and circumstances of this case and merely on the basis of the earlier decision of its Court in the aforesaid Gokaran Singh's case (supra) rejected his claim.

We find that both, the Government's Order dated 19th August, 1993 and the impugned order of the High Court are not sustainable in the eye of law and are hereby quashed. On

the facts of this case, we hold that the appellant's service in the Irrigation Department since after he was selected and appointed in 1962 in the PWD through combined services examination, cannot be excluded for fixing his seniority in the PWD. Hence the period, the appellant worked in the Irrigation Department, be treated to be valid period for computing his seniority in the PWD.

The respondent Government will now fix the seniority of the appellant in the light of the above observations and if any person is affected, the fixation to be made after giving due opportunity to the person concerned. Consequent promotion and other benefits flowing thereunder will also be admissible to the appellant.

In the result, this appeal succeeds and the impugned Government Order dated 19th August, 1993 and the impugned order of the High Court in the Writ Petition filed by the appellant are quashed with the aforesaid observations and directions. Cost on the parties.