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S.K. SAHA AND ANR. ETC.

v.

PREM PRAKASH AGARWAL AND ORS. ETC.

NOVEMBER 23, 1993

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[J.S. VERMA, R.M. SAHAI AND N.P. SINGH, JJ.]

Civil Services—Appointment and seniority—Candidate appointed on Contract basis—Extended from time to time—Post made gazetted—Selected by Service Commission and appointed with retrospective effect—Validity of the retrospective appointment and seniority—Subsequently joining Government Corporation—Deemed option for absorption—Later requesting appointment in Government service—Appointed accordingly—Period spent in Corporation—Whether could be counted for purposes of seniority.

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The appellant was appointed as Foreman in the Cycle Parts Factory run by the State Government, for one year on contract basis. The appellant joined on 4.1.1957 and his contract of service was extended from time to time. In 1959, the post of Foreman which was a class-III post was declared as class-II Gazetted post. An advertisement was issued by the Service Commission inviting applications for the post of Foreman Class-II and the appellant applied along with others. He was recommended by the Service Commission and by order dated 12.5.1960, the Government appointed the appellant as Foreman Class-II with effect from 4.1.1957.

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When the State Government decided to transfer the management of the Cycle Parts Factory to a Government Corporation, all the persons working in the Factory were given option either to join the Corporation or to be absorbed in any other department of the State Government. Appellant joined the service of the Corporation. Later, in 1972 he made a representation that he may be taken back in the service of the Government, and the Government by its order dated 19.6.1972 appointed him as Asstt. Director of Industries.

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In a batch of Writ Petitions filed before the High Court, Respondent No. 1 challenged the appellant's appointment as Foreman Class-II with retrospective effect from 4.1.57, when the post was only a non-gazetted post, and as such Respondent No. 1 who was appointed on 18.2.1959 as Asstt. Director of Industries, which post was equivalent to Foreman, would

rank senior to the appellant. Respondents 2-8, who were appointed as Assistant Directors prior to the appellant, challenged the retrospective appointment and seniority given to the appellant.

The High Court held that the State Government could not have appointed the appellant on 12.5.1960 w.e.f. 4.1.1957 from a date not only prior to the date of the recommendation made by the Commission but even prior to the date of the advertisement in respect of the said post, and that once the appointment of the appellant had been made by the process of direct recruitment, there was no occasion to reckon his seniority taking into consideration the period during which he served the State on contract basis. It also held that since the appellant was appointed to the cadre of Assistant Director of Industries w.e.f. 19.6.1972, after the appointment of respondents Nos. 2 to 8, he should rank junior to them as well. Hence these appeals.

Dismissing the appeals, this Court

HELD : 1.1 There cannot be any dispute that the appointment of the appellant, according to rules, was made on basis of the recommendation of the Service Commission, on 12.5.1960. As such there was no occasion to take into consideration the period when the appellant was continuing on *ad hoc* basis, especially, during the period when the post itself was a non-gazetted post. The appellant was given seniority w.e.f. 4.1.1957, but the post of the Foreman which the appellant was holding became a gazetted post since 16.1.1959. Any officiation on the post when it was a non-gazetted post cannot be held to be a continuous officiation on the post so as to entitle the appellant to count that period towards his continuous officiation. The High Court has rightly held that while appointing him on the basis of the recommendation of the Commission, the date of appointment could not have been ante-dated and made to be effective w.e.f. 4.1.1957. [838-B-D]

1.2 Respondent No. 1 had been appointed as Assistant Director of Industries on 18.2.1959 on the basis of an advertisement made in the year 1958 and on the recommendation of the Service Commission. Therefore, his seniority in the service could not have been affected by the State Government, by giving notional date of appointment of the appellant w.e.f. 4.1.1957. [838-E-F]

Direct Recruit Class II Engineering Officers' Association v. State of

A *Maharashtra*, [1990] 2 SCC 715, followed.

State of West Bengal v. Aghore Nath Dey, [1993] 3 SCC 371, relied on.

B 2.1 A holder of any civil post in a Government department has no right to question the wisdom of the State to entrust the activities of the department to an autonomous body. It is true in view of the Article 311 of the Constitution, the holders of civil posts cannot be dismissed or removed from service. However, the State can give an option to the holders of such posts either to be absorbed in some other department or to leave the service of the State and to opt for the service of the Government Corporation or Undertaking in question. Once any such employee of the State opts for the service of the Corporation, he shall cease to be in the service of the State. In such a situation, it cannot be held that the holder of the post, has been deputed to the Corporation holding his lien with the State Government. [839-D-F]

D 2.2 In the present case, an option was given to the appellant to opt either to be absorbed in another department or to go to the Corporation. A time limit was fixed after which it was to be deemed that he had agreed to the transfer of his service to the Corporation. There is nothing on the record to show that the appellant ever exercised his option to remain with the State Government. On the other hand, he joined the service of the Corporation and only in the year 1972, on his representation, he was appointed as Assistant Director of Industries. In this background, the period when the appellant joined the Corporation and was again appointed in the service of the State Government on 19.6.1972, shall not be counted towards his seniority and it shall be deemed that appellant was appointed afresh on 19.6.1972. There is no dispute that the respondent Nos. 2. to 8 had entered in the cadre before 19.6.1972 and in that event they will also rank senior to the appellant. [839-F-H, 840-A]

G *State of Mysore v. H. Panappa Gowda*, AIR (1971) SC 191, followed.

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 4382(N).
of 1983.

H From the Judgment and Order dated 21.4.82 of the Madhya Pradesh High Court in Miscellaneous Petition No. 523 of 1977.

With

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Civil Appeal No. 4383(N) of 1983.

S.K. Gambhir and S.R. Setia for the Appellants.

Ravinder Bana, A.K. Sanghi, Sakesh Kumar and S.K. Agnihotiri for
the Respondents. B

The Judgment of the Court was delivered by

N.P. SINGH, J. One appeal on behalf of S.K. Saha and the other on
behalf of the State of Madhya Pradesh, have been filed against the judg- C
ment of the High Court, directing to treat the appellant junior to the
writ-petitioners/respondents in the cadre of Assistant Director of In-
dustries.

The appellant was appointed as Foreman, Cycle Parts Factory, by
the erstwhile Madhya Bharat Government, on 31.10.1966. The appointment D
was for one year on contract basis. The appellant joined on 4.1.1957, after
the formation of the new State of Madhya Pradesh, on 1.11.1956. Sub-
sequently, the contract service of the appellant was extended from time to
time by the State Government. The post of Foreman was a Class-III post
(non- gazetted). The State Government by its order dated 18.12.1959 E
declared the post as Gazetted Class-II, w.e.f. 16.1.1959.

An advertisement was published in the year 1959 by the Madhya
Pradesh Public Service Commission (hereinafter referred to as the "Com-
mission"), inviting applications for the post of Foreman Class-II. Alongwith F
others the appellant also applied for the said post and the name of the
appellant was recommended by the Commission. The State Government
by its order dated 12.5.1960, appointed the appellant on temporary basis
till further orders, to the post of Foreman w.e.f. 4.1.1957.

The writ application in question was filed on behalf of the respon- G
dents, challenging the validity of a part of the order dated 12.5.1960, by
which the appellant was appointed on 12.5.1960, w.e.f. 4.1.1957. It was
pointed out before the High Court, on behalf of the said respondents, that
the order dated 12.5.1960 appointing the appellant as Foreman was on
basis of an advertisement issued in the year 1959 and recommendation
made by the Commission thereafter. As such on basis of the said recom- H

- A mendation, the appellant could not have been appointed w.e.f. 4.1.1957. It was also pointed out that till 15.1.1959, the post of the Foreman was a non-gazetted post and it is only on 16.1.1959, when by the Government order dated 18.12.1959, the said post was made a gazetted one, necessitating appointment, on the basis of the recommendation of the Commission.
- B Respondent No. 1, who was one of the writ-petitioners, before the High Court, had been appointed as Assistant Director of Industries on 18.2.1959 on basis of a recommendation by the Commission, pursuant to an advertisement issued in the year 1958. So it was pointed out on his behalf that the order dated 12.5.1960 of the State Government, appointing the appellant with effect from a retrospective date i.e. 4.1.1957, directly affected his
- C seniority, which was violative of Articles 14 and 16 of the Constitution. The posts of Foreman and Assistant Director of Industries are equivalent and it is not in dispute that if the order dated 12.5.1960 appointing the appellant w.e.f. 4.1.1957 is held to be valid, then the appellant although appointed on 12.5.1960 on basis of the recommendation of the Commission will rank senior to the said respondent, who had been appointed on 18.2.1959.

The High Court held that the State Government could not have appointed the appellant on 12.5.1960 w.e.f. 4.1.1957 from a date not only prior to the date of the recommendation made by the Commission but even prior to the date of the advertisement in respect of the said post. It was also said that once the appointment of the appellant had been made by the process of direct recruitment, there was no occasion to reckon his seniority taking into consideration the period during which he served the State on contract basis for one year, which was being extended from time to time.

So far the remaining seven writ petitioners/respondents are concerned, the High Court pointed out that in about January, 1964, the State Government decided to transfer the Cycle Parts Factory to Madhya Pradesh Udyog Nigam, a Government Corporation. The persons working in the said factory including the appellant were given option either to opt for the service under the said Corporation or for being absorbed in any other department of the State. In the communication dated 24.1.1964, addressed to the appellant, it was said that the State Government had decided to transfer the management of the Cycle Parts Factory to the Corporation aforesaid, as such the service of the appellant was proposed to be transferred to the said Corporation on the condition that his scale of pay and other conditions of service to which he was entitled, shall not be

affected by the transfer. The appellant was required to inform the State Government, whether he was agreeable to the said transfer of his service to the Corporation. It was further said that in case he was not agreeable to such transfer, then he "shall be retrenched or otherwise absorbed in the service of the State Government on such conditions as may be permissible under the law for the time being in force." Ultimately, it was said that if no reply was received from him by 29.2.1964, it would be presumed that he had agreed to the transfer of his service to the said Corporation. There is no dispute that the appellant joined the service of the Corporation and there is nothing on record to show that he ever opted to be absorbed against any post under the State Government. In the year 1972, the appellant made a representation that he should be taken back in the service of the State Government and by an order dated 19.6.1972, the State Government appointed him as Assistant Director of Industries. The High Court has pointed out that once the appellant did not opt to continue in the service of the State Government against any other post and voluntarily opted to join the service of the Corporation, it will be deemed that he ceased to be in the service of the State Government. In that connection, the High Court took note of statutory rules respect of recruitment against the post of Assistant Director of Industries, which admittedly were not followed when the appellant was appointed as Assistant Director of Industries on 19.6.1972. Even if, the appointment of the appellant against the post of Assistant Director of Industries by an order dated 19.6.1972, is held to be valid in eye of law, it will be deemed that he was appointed to the cadre of Assistant Director of Industries w.e.f. 19.6.1972, after the appointment of writ petitioners/respondents Nos. 2 to 8, as such he shall rank junior to them as well.

From time to time, this Court has considered, as to what is the relevant date for fixing *inter se* seniority of entrants in the same cadre, either by the same process or by different processes of recruitment. Ultimately, the matter was examined by a Constitution Bench, in the case of *Direct Recruit Class II Engineering Officers' Association v. State of Maharashtra*, [1990] 2 SCC 715 = AIR (1990) SC 1607. It was said that once the appointment is made to a post according to rules, the seniority of the person so appointed is to be counted from the date of his appointment and not with regard to the date of his confirmation. It was also said that the corollary of the above rule is, that where the initial appointment is only *ad*

A *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. The same view has been reiterated in the case of *State of West Bengal v. Aghore Nath Dey*, [1993] 3 SCC 371.

B There cannot be any dispute that the appointment of the appellant, according to rules, was made on basis of the recommendation of the Commission, on 12.5.1960. In this background, there was no occasion to take into consideration the period when the appellant was continuing on *ad hoc* basis, especially, during the period when the post itself was a non-gazetted post. The appellant was given seniority w.e.f. 4.1.1957, but the post of the Foreman which the appellant was holding itself became a gazetted post since 16.1.1959. Any officiation on the post when it was a non-gazetted post cannot be held to be a continuous officiation on the post so as to entitle the appellant to count that period towards his continuous officiation. The High Court has rightly held that while appointing him on the basis of the recommendation of the Commission, the date of appointment could not have been ante dated and made to be effective w.e.f. 4.1.1957. This Court has repeatedly struck down and decried any attempt on the part of the appointing authority to give a notional seniority from a retrospective date especially, when this process affects the seniority of those who have already entered into the service. In the present case the respondent No. 1 had been appointed as Assistant Director of Industries on 18.2.1959 on basis of an advertisement made in the year 1958 and on the recommendation of the Commission. His seniority in the service could not have been affected by the State Government, by giving notional date of appointment of the appellant w.e.f. 4.1.1957.

G The other issue, as to whether the appellant having not opted to be absorbed in some other Department of the State Government, after the Cycle Parts Factory, was transferred to the Corporation and the appellant having joined the said Corporation in terms of the offer given to him by the State Government ceased to be an employee of the State Government, till he was again appointed as Assistant Director of Industries on 19.6.1972, needs a closer scrutiny. In view of Article 311(1) no person who is a member of civil service of the Union or of a State or who holds a civil post under the Union or the State can be removed from service except after an enquiry as contemplated by the said Article. A Constitution Bench of this

Court, in the case of *State of Mysore v. H. Panappa Gowda*, AIR (1971) SC 191, has held that in view of the provisions of Article 311, it is not open to the State Government to declare even by a statutory rule that after transfer of the department alongwith posts to a University, the holders of such posts under the Government in such department shall cease to be in the service of the State Government, because that will be violative of Article 311 of the Constitution.

Where all the functions of a Department of the State or Union Government along with posts are transferred to some University or Government Corporation, which of late has become a common feature, in view of the fact that it has been accepted at all levels that public interest is better served if the activities which were part of the department are entrusted to some autonomous Corporation or University, a question arises as to how to transfer the services of the holders of such posts having protection of Article 311 of the Constitution. A situation is created where the holders of the posts are in service of the State Government, but the activities of the whole department are transferred to some Government Corporation or Undertaking. How the State can retain the members of such service against those posts when the department itself becomes defunct. A holder of any post in such a department has no right to question the wisdom of the State to entrust the activities of the department to an autonomous body. It is true in view of Article 311, merely on this ground, the holders of civil posts cannot be dismissed or removed from service. However the State can give an option to the holders of such posts either to be absorbed in some other department or to leave the service of the State and to opt for the service of the Government Corporation or Undertaking in question. Once any such employee of the State opts for the service of the Corporation, he shall cease to be in the service of the State. In such a situation, it cannot be held that the holder of the post, has been deputed to the Corporation holding his lien with the State Government. Admittedly, in the present case an option was given to the appellant to opt either to be absorbed in another department or to go to the Corporation. A time limit was fixed after which it was to be deemed that he had agreed to the transfer of his service to the Corporation. There is nothing on the record to show that the appellant ever exercised his option to remain with the State Government. On the other hand, he joined the service of the Corporation and only in the year 1972, on his representation, he was appointed as Assistant Director of Industries. In this background, the period when the

- A** appellant joined the Corporation and was again appointed in the service of the State Government on 19.6.1972, shall not be counted towards his seniority and it shall be deemed that appellant was appointed afresh on 19.6.1972. There is no dispute that the respondent Nos. 2 to 8 had entered in the cadre before 19.6.1972 and in that event they will also rank senior to the appellant as has been held by the High Court.
- B**

Accordingly, both the appeals are dismissed. In the facts and circumstances of the cases, there shall be no order as to costs.

G.N.

Appeals dismissed.