

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 5807 OF 2003

Arjun Sopan Gaikwad )  
Aged 54 years, son of Shri Sopan, )  
presently working as Office )  
Superintendent at the Office of CGHS, )  
Mukund Nagar, Pune and residing at )  
18/9, Defence colony, Lullanagar, )  
Pune – 411 040. .. .. ).. .. .. Petitioner.

Versus

- 1) The Union of India )  
through the Secretary, Ministry )  
of Health & Family Welfare, )  
Nirman Bhavan, New Delhi - )  
110 011 . .. .. )
- 2) The Director, C.G.H.S., Nirman )  
Bhavan, New Delhi – 110 011. )
- 3) The Additional Director )  
C.G.H.S., Mukund Nagar, )  
Pune – 411 037. )
- 4) Shri M. C. Shrivastava, )

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Office Superintendent, Office )  
of Additional Director, Sangam )  
Palace, Allahabad. ).. .. Respondents.

Mr. S. P. Saxena for Petitioner.

Mr. Suresh Kumar for Respondent Nos.1 to 3.

None for the Respdents.

**CORAM : V. G. PALSHIKAR and**

**V. R. KINGAONKAR, JJ.**

**DATED : 17TH MARCH, 2006.**

**JUDGMENT (Per: Kingaonkar, J.) :**

This petition is preferred against dismissal of Original Application No. 129 of 2000 by the Central Administrative Tribunal (for short `Tribunal') whereby the Petitioner's claim for placement of his name in the seniority list above the name of Respondent No.4 was rejected.

2. There is no dispute about the fact that the Petitioner was appointed on regular basis to the post of Lower Division Clerk w.e.f. 16<sup>th</sup> October, 1978 and was promoted as Upper Division Clerk w.e.f. 9<sup>th</sup>

April, 1984. The next promotion available to him was in the post of Office Superintendent. The criteria for such promotion is "Seniority-cum-Fitness" by non-selection method from amongst Upper Division Clerks / Stenographers Grade II employees with 5 years service in the grade and minimum 2 years experience of administrative work.

3. One Shri R. Kailash was promoted as Administrative Officer and as such post of Office Superintendent in CGHS Office at Pune had fallen vacant. The Petitioner was appointed as Office Superintendent in the said vacant post w.e.f. 10<sup>th</sup> July, 1992. His promotion was effected with a rider that the appointment will not confer any right for regularisation of the same or for benefits such as seniority, etc. on a future date. It was made clear that the Appointing Authority reserved right to terminate the adhoc appointment without assigning any reason or giving notice to the Petitioner.

4. Subsequently, the Petitioner was selected by Departmental Promotion committee as per the rules and his appointment to the promotional post was regularised w.e.f. 14<sup>th</sup> March, 1996. Respondent No.4 came to be promoted to the post of Office Superintendent w.e.f. 4<sup>th</sup> August, 1996, during the period the Petitioner was officiating on such promotional post as an adhoc promotee.

5. The Petitioner has come out with the case that though he ranked senior to Respondent No.4, yet in the seniority list he is wrongly shown below the name of Respondent No.4. He made representation for correction of the seniority list which request, however, was rejected. He preferred Original Application No. 129 of 2002 before the Central Administrative Tribunal, Bombay Bench, Bombay. By the impugned order the Tribunal dismissed the Original Application and rejected the claim of Petitioner for seniority over and above Respondent No.4.

6. We have heard learned Counsels for the Petitioner and Respondent Nos.1 to 3. None appeared for Respondent No.4. We are at a loss to know the stand adopted by Respondent No.4. For, he has not filed reply affidavit too. On behalf of the Petitioner, learned Counsel contended that the seniority of the Petitioner in the cadre should have been counted from the date he joined the promotinal post and not from the date of regularisation of his services in the promotinoal post. It is argued that exclusion of the period for which the Petitioner held the promotional post on adhoc basis is per se illegal and incorrect. It is contended that when the Petitioner was appointed by following due procedure and continued to work on the promotional post since much before Respondent No.4 was promoted, his claim for seniority could not have been rejected. It is pointed out that the adhoc promotion of

the Petitioner was continued from time to time until it was regularised after selection by the Departmental Promotion Committee. On the other hand, learned Counsel for Respondent Nos.1 to 3 submitted that the benefits of adhoc services were not available to the Petitioner and his claim has been rightly rejected by the Tribunal.

7. Before we proceed to examine merits of the Petitioner's claim, it may be noticed that he was promoted from time to time and the post of Office Superintendent could be filled by promotion in accordance with the instructions contained in the Notification No. A.12018/37/85-RR/CGHS.I/CGHS(P) issued by the Government of India. These Rules (Exhibit 'A') regulate the method of recruitment to the Group 'C' post of Office Superintendent in the Central Government Health Scheme, outside Delhi. Rule 7(2) reads as follows:

“(2) The regular continuous service of officers mentioned in Sub-Rule (1) above, prior to their appointment to the posts shall count for the purpose of probation period, qualifying service for promotion, confirmation and pension.”

These rules do not exclude, in any manner, the period spent on promotinal post between adhoc appointment and regularisation of promotion. There is no rule to reckon seniority from the date of regularisation or confirmation of a promotee.

8. It is undisputed that post of Office Superintendent at Pune was a permanent substantive post as shown in the Schedule appended with Rules ( Exhibit-A) and there were similar posts at other places like Allahabad, Delhi, Meerut, Nagpur and so on and so forth. There are in all 15 such posts in the same scale of pay. The post of Office Superintendent is a non-selection post. Further, there is no direct recruitment provided for the said post. Thus the post could be filled only by promotion from amongst those who were working as U.D.C./Stenographer with experience as mentioned in column 12 of the Schedule. The petitioner was admittedly qualified for such promotional post. His promotion to the post of Administrative Officer cannot be regarded as the promotion contrary to any recruitment Rules or *de hors* the Rules.

9. At this juncture, we shall turn to the affidavit of Dr. M.D. Mohapatra, Joint Director, Government of India, C.G.H.S. It is stated in the affidavit of Dr. Mohapatra that there was no post of Administrative Officer available in C.G.H.S., Pune, prior to promotion of Shri R. Kailash, since that post was newly created. The promotion of Shri R. Kailash, who was predecessor in chair of the petitioner, was also made on ad-hoc basis because had that post been abolished at subsequent

point of time, then he could be reverted to the substantive post. It is for such reason that the petitioner was also given ad-hoc promotion. It is further stated that on appointment of Shri R. Kailash to the post of Administrative Officer on regular basis, the petitioner was also promoted on regular basis but both of them were not entitled to claim the benefit of ad-hoc services as per the terms and conditions of their appointment. True, the office order No. 36 (Exh. R-2) dated 27<sup>th</sup> July, 1992, reveals that the petitioner was promoted on ad-hoc basis and he was not entitled to claim any right for regularisation of the promotion or for benefits such as seniority, etc. on a future date.

10. The question is not as to whether the petitioner had any right to claim regularisation of promotion when the initial promotion was on an ad-hoc basis. The real issue is as to whether after regularisation of the promotion, the seniority relates back to the date of initial promotion. We are aware that benefit of ad-hoc service is not admissible if appointment/promotion was in violation of the service Rules. The general rule is that length of service in the cadre would count for reckoning seniority of an employee. The date from which seniority is to be reckoned may be laid down by rules or instructions. If the seniority rule did provide for recognition of seniority from the date of regularisation of promotion, then the stand of Respondent Nos. 1 to 3 could be proper. On behalf of respondent Nos. 1 to 3, reliance is

placed on certain observations in the case of *State of W.B. and others vs. I Aghore Nath Dey and others* [ (1993) 3 SCC 371] . The Apex Court has held that benefit of ad-hoc service is not admissible, if appointment was in violation of rules. It is further held that the corollary set out in *Direct Recruitment Class II Engineering Officers' Association's case* [ (1990) 2 SCC 715] disallows benefit of ad-hoc appointment made as a stop gap arrangement, whereas it allows benefit of service in cases where there was procedural irregularity in making appointments according to rules and this irregularity was subsequently rectified. This authority is of no much help to the case of respondent Nos. 1 to 3.

11. Rule of continuous officiation is duly recognised as a criteria for counting of seniority in the parlance of service jurisprudence. In case of *G.P. Doval and others vs. Chief Secretary, Government of U.P. and others*, [ (1984) 4 SCC 329] it is observed :

“ ``Where officiating appointment is followed by confirmation, unless a contrary rule is shown, the service rendered as officiating appointment cannot be ignored for reckoning length of continuous officiation for determining the place in the seniority list. If the first appointment is made by not following the prescribed procedure but later on the appointee is approved making

his appointment regular, then in the absence of a contrary rule, the approval which means confirmation by the authority which had the authority, power and jurisdiction to make appointment or recommend for appointment, *will relate back to the date on which first appointment is made and the entire service will have to be computed in reckoning the seniority according to the length of continuous officiation.* If a stopgap appointment is made and the appointee appears before the Public Service Commission when the latter proceeds to select the candidates and is selected, there is no justification for ignoring his past service. At any rate, there is no justification for two persons selected in the same manner being differently treated." (emphasis supplied)

It need not be reiterated that the petitioner was promoted to a substantive post although the promotion was termed as ad-hoc since it depended on the fate of the promotional post of Administrative Officer being formally approved after the creation thereof. The petitioner was borne in the cadre of Office Superintendent from the date of his promotion. If this hypothesis is to be ignored, then the question may arise as to in which cadre the petitioner was working during the period between the date of his promotion and the date of subsequent regularisation. It cannot be said that he was neither borne in the cadre of Office Superintendent or that of Upper Division Clerk. His seniority could not be considered in the cadre of U.D.C. for

the relevant period and as such it follows that his seniority ought to have been reckoned in the cadre of Office Superintendent.

12. In case of *Baleshwar Dass and others vs. State of U.P. and others*, (AIR 1981 SC 41) , it is observed as under:

“A cadre post can be permanent or temporary and if an engineer was appointed substantively to a temporary or permanent post he becomes a member of the Service. The touchstone then is the substantive capacity of the appointment. The rules of procedure for direct recruitment and kindred matters are provided by an Office Memorandum of December, 1961. While temporary and permanent posts have great relevancy in regard to the career of Government servants, keeping posts temporary for long, some times by annual renewals for several years, and denying the claims of the incumbents on the score that their posts are temporary makes no sense and strikes as arbitrary, especially when both temporary and permanent appointees are functionally identified. If, in the normal course, a post is temporary in the real sense that the appointee knows that his tenure cannot exceed the post in longevity, there cannot be anything unfair or capricious in clothing him with no rights.”

By applying the ratio of “*Baleshwar Dass and others*” (supra), it can be said that ad-hoc appointment can be made for a short period if

administrative exigency demands such an appointment/promotion. The ad-hoc appointment also can be made when the post is a tenure post or that the Rules so permit such appointment/promotion. We find that in case of the petitioner, his initial appointment was for a period of six months and it was extended from time to time. Eventually, his promotion was regularised w.e.f. 14-3-1996. The long duration of approximately 4 years cannot be termed as a stopgap arrangement.

14. Respondent Nos. 1 to 3 have not pinpointed any rule of seniority which allows them to reckon seniority from the date of regularisation of the petitioner's posting as Office Superintendent. The seniority list circulated along with letter dated 27<sup>th</sup> November, 2001 (Exhibit R-3) clearly shows that the petitioner was shown at serial No.8 only because regularisation of his promotion was at a subsequent date, though he was promoted to the post of Office Superintendent on 10<sup>th</sup> July, 1992. Respondent no.4 was promoted as Office Superintendent on 4<sup>th</sup> August, 1992. The argument advanced by respondent Nos. 1 to 3 is that there was clear vacancy available for the post of Office Superintendent in C.G.H.S. Office at Allahabad at the relevant time, whereas in case of the post of Office Superintendent at Pune, the post was available as on 10<sup>th</sup> July, 1992, but the earlier incumbent viz. Shri R. Kailash had a lien over the said post due to his ad-hoc promotion as Administrative Officer in the newly created post at

C.G.H.S. Pune. The recruitment Rules do not support such kind of discriminatory treatment to the petitioner. The question of seniority has to be determined in the context of facts which are available on record. The eclipse on the seniority issue of the petitioner did vanish immediately after regularisation of his promotion and, therefore, his seniority would relate back to the date of initial promotion in the absence of any contrary Rule.

15. In case of *Chief Commissioner of Income tax and others vs. V.Subba Rao and others* [ (2003) 10 SCC 265], relying upon earlier the decision in *S.B. Patwardhan vs. State of Maharashtra* [ (1977) 3 SCC 399] , it is observed by the Apex Court as under:

“It has been in *Patwardhan case* that the principle that seniority should be determined on the basis of confirmation is a wholly unsound principle and therefore it was indicated that the seniority has to be determined on the test of continuous service and not on the basis of confirmation, inasmuch as confirmation is one of the inglorious uncertainties of government service which does not necessarily depend upon efficiency of the incumbent nor on the availability of the substantive vacancies.”

16. The settled legal position may be summarised as follows:-

I. The date of common seniority is to be reckoned may be laid down by rules or instructions:

- (a) on the basis of the date of appointment,
  - (b) on the basis of confirmation,
  - (c) on the basis of regularisation of service,
  - (d) on the basis of length of service, or
  - (e) on any other reasonable basis.
- II.
- (a) In the absence of any rule, the length of continuous officiation is a valid principle of determining the seniority;
  - (b) If ad-hoc appointment or temporary appointment is made without considering the claims of seniors in the cadre, the service rendered in such post cannot be counted for seniority in the cadre;
  - (d) If an ad-hoc appointment/promotion has continued uninterruptedly till regularisation of service by Departmental Promotion Committee or the Public Service Commission, there is no reason to exclude such service for determining seniority.

The foregoing discussion leads to the only deducible conclusion that the petitioner's seniority must be reckoned from the date of his promotion i.e. 10-7-1992 in the cadre of Office Superintendent in the absence of any contrary Rule to exclude such period between his initial adhoc appointment and regularisation of the promotional appointment to the post of Office Superintendent. It follows that his application should have been allowed by the Tribunal. The impugned order is, therefore, unsustainable. Hence, we are inclined to set aside the same.

17. In the result, the petition succeeds. The impugned order is quashed and set aside and the Original Application filed by the Petitioner is allowed. Respondent Nos. 1 to 3 are directed to modify the seniority list by reckoning seniority of the petitioner from 10-7-1992 i.e. initial date of his promotion as Office Superintendent. There shall be no order as to costs.

Sd/-

(V. G. PALSHIKAR, J.)

Sd/-

(V.R. KINGAONKAR, J.)