

CASE NO.:
Appeal (civil) 2791-2793 of 2002

PETITIONER:
K. MADALAIMUTHU & ANR.

RESPONDENT:
STATE OF TAMIL NADU & ORS.

DATE OF JUDGMENT: 04/07/2006

BENCH:
Dr.AR. Lakshmanan & Altamas Kabir

JUDGMENT:
J U D G M E N T

ALTAMAS KABIR, J.

These three appeals arise from the common judgment and order dated 24.12.2001 passed by the Division Bench of the Madras High Court in Writ Petition Nos. 16806/98, 1548/99 and 1549/99. One K. Madalaimuthu was the petitioner in the first two writ petitions, while one A. Arumuga Nainar was the petitioner in the third writ petition. Both of them had similar interests and the reliefs prayed for were also similar and were thus disposed of by the common judgment referred to above. Since these appeals arise out of a common judgment and order passed by the Madras High Court, they have been clubbed together, heard together and are being disposed of by this common judgment.

The appellants belong to the Tamil Nadu Registration Services and are said to be working as Assistant Inspector General of Registration. Their services are governed by the Tamil Nadu State and Subordinate Services Rules, 1955 (hereinafter referred to as "the General Rules") and by the Tamil Nadu Registration Services Rules, 1969 (hereinafter called 'the Special Rules'). In 1969, the Special Rules provided for two classes of officers. Class I comprised the Inspector General (Registration). Class II provided for two categories, namely, Inspector of Registration Officers, and District Registrars. Subsequently, the categorization was modified and the District Registrars were placed in the third category. The method of recruitment of District Registrars is either by direct recruitment or recruitment by transfer from Tamil Nadu Registration Subordinate Service. According to the appellants, the recruitment for the post of District Registrar comes under the purview of the Tamil Nadu Public Service Commission and the Special Rules had originally provided that substantive vacancies of District Registrars were to be filled or reserved to be filled by direct recruitment and by recruitment by transfer from the Madras Registration Subordinate Service in the proportion of 1:5, provided that the number of substantive vacancies filled or reserved to be filled by direct recruitment was not to exceed three at a given time. It is the further case of the appellants that the Special Rules were amended on 26th April, 1972, whereby the proportion of 1:5 was omitted and it was substituted

by the condition that substantive vacancies of District Registrars were to be filled or reserved to be filled by direct recruitment and by recruitment by transfer from the Tamil Nadu Registration Subordinate Service in such manner that there would be at least three directly recruited District Registrars in position at any given time and this would be exclusive of directly recruited District Registrars occupying higher posts in the department or outside. It was also stipulated that if in any particular year, a direct recruit was to be appointed, he was to be given the first vacancy.

In 1981, 1982 and 1984, the Government prepared a temporary list of officers who were fit for appointment by transfer to the post of District Registrar, pending finalization of the regular list in consultation with the Tamil Nadu Public Service Commission. It is the case of the appellants that the said temporary list for the year 1981 consisted of 34 Sub-Registrars and the lists for the years 1982 and 1983 consisted of 36 and 25 Sub-Registrars, respectively. Subsequently, temporary appointments were made under Rule 10 (a) (i) (1) of the General Rules which reads as follows:-

"10 (a) (i) (1):

Where it is necessary in the public interest owing to an emergency which has arisen to fill immediately a vacancy in a post borne on the cadre of a service, class or category and there would be undue delay in making such appointment in accordance with these rules and the Special Rules, the appointing authority may temporarily appoint a person, who possess the qualifications prescribed for the post otherwise than in accordance with the said rules.

Provided that no appointment by direct recruitment under this clause shall be made of any person other than the one sponsored by the Tamil Nadu Public Service Commission from its regular or reserve list of successful candidates to any of the posts within the purview of the Tamil Nadu Public Service Commission."

Subsequently, the State Government after considering the proposal of the Inspector General of Registration and the observations of the Tamil Nadu Public Service Commission passed various orders regularizing the services of those candidates from the Tamil Nadu Registration Subordinate Service who had been temporarily appointed to function as Deputy Registrars under Rule 10 (a) (i) (1) of the General Rules. Consequently, by virtue of the State Government's orders the services of the said officers who had been recruited by transfer to the post of District Registrars for the years 1986-87, 1987-88 and 1988-89 were regularized.

As indicated hereinbefore, the appellants were directly recruited as District Registrars in the Tamil Nadu Registration Service by G.O. dated 24th October, 1989 and while Sri A. Arumuga Nainar joined his duties on 9th November, 1989, Sri K. Madalaimuthu joined his duties on 22nd November, 1989. Both successfully completed their probation period but since A. Arumuga Nainar had joined his duties earlier, he was senior to Sri

K. Malalaimuthu in the cadre.

Having regard to the Special Rules regarding recruitment to the post of substantive vacancies of District Registrars in the proportion of 1:5, which stood modified on 26th April, 1972 so that at any given time there would be at least three directly recruited District Registrars, the appellants claimed that their seniority should be counted from the year 1986 when the first set of transferee officers were sought to be regularized. The said claim was turned down by the Government on the ground that in terms of Rule 2 (1) of the Tamil Nadu State and Subordinate Services Rules, a person is said to be appointed to a service only when he discharges for the first time the duties of a post borne on the cadre of such service and commences probation or training prescribed for members thereof. It was also indicated that inter se seniority in the post of District Registrars where there was more than one method of recruitment, would have to be fixed under Rule 35 (aa) of the Tamil Nadu State and Subordinate Services Rules read with Rule 2(1). The obvious inference was that the seniority of the appellants could not be fixed in the year 1986 as they had not entered service at that point of time. Subsequently, the names of the appellants were included in the seniority list but placed below the persons who were promotee District Registrars.

Aggrieved by the preparation of the seniority list, the appellants herein and one K. Durairajan filed O.A.Nos. 779/1995, 1067/1995, 1068/1995, 7429/1996 and 1181/1997 before the Tamil Nadu Administration Tribunal (for short 'the Tribunal') for a direction upon the respondents to fix their inter se seniority for the year 1986 in a manner so that they were placed above the promotees for the said year in the inter se seniority list. By its detailed order, the learned Tribunal dismissed the applications filed by the appellants herein upon holding that if their claim was to be accepted, their seniority will have to date back to a period when they had not even commenced discharging their duties of District Registrars which would run counter to the provisions of Rule 2(1) of the Tamil Nadu State and Subordinate Services Rules. The Tribunal accepted the case made out on behalf of the promotees who had been appointed temporarily under Rule 10 (a) (1) on different dates and also took note of the fact that probation of the said promotees had been declared in respect of the regular panel of District Registrars for the years 1985-86, 1986-87 and 1987-88. Inasmuch as the appellants had been appointed only in 1989, the Tribunal was of the view that the claims of the appellants herein was without merit. Being aggrieved by the decision of the Tribunal, the first appellant herein filed Writ Petitions Nos. 16806/1998 and 1548/1999. Mr. K. Durairajan who had filed O.A.No.1181/1997 did not challenge the common order passed by the Tribunal. Reiterating their submissions made before the Tribunal, the appellants herein urged before the High Court that the common order dated 10th August, 1998, passed by the Tribunal should be quashed and a direction should be given to the State Government to prepare the inter se seniority list between the promotees and the direct recruits in the cadre of District Registrars by following the quota as per Rule 25 of the Tamil Nadu Registration Service Rules and to grant the appellants consequential seniority/promotion over all the promotees from 1981 onwards together with all service benefits.

After discussing the Special Rules governing the Tamil Nadu Registration Service which had originally made provision

for recruitment by direct recruits and promotees in the proportion of 1:5, the High Court took note of the Government Order dated 26th April, 1972 whereby such ratio was amended and it was provided that substantive vacancies of District Registrars were to be filled by direct recruitment or recruitment by transfer from the Tamil Nadu Registration Subordinate Service in such a manner that there would be at least three directly recruited District Registrars in position at any given time. The High Court observed that this amendment virtually took away the quota available to the direct recruits and merely made a provision that at any given time there should be at least three directly-recruited District Registrars in position. The High Court took note of the concession given to the directly-recruited District Registrars to the effect that in a particular year a direct recruit was to be given the first vacancy over and above the promotees.

After discussing the relevant rules relating to the appointment of District Registrars in terms of the Tamil Nadu State and Subordinate Service and the Special Rules, the High Court came to a finding that Rule 23-a of the General Rules were relevant regarding the filling up of the vacancies by direct recruitment.

In order to understand the reasoning of the High Court, the provisions of Rule 23-a are set out hereinbelow:-

"Rule 23 (a) - If a person appointed temporarily either under sub-rule (a) or sub rule (d) of the Rule 10 to fill a vacancy otherwise than in accordance with the rules governing appointment thereto, such vacancy being a vacancy which may be filled by direct recruitment, is subsequently appointed to the service, class or category in accordance with the rules, he shall commence his probation if any, in such category either from the date of his first temporary appointment or from such subsequent date, as the appointing authority may determine. If the post is one to which appointment may be made by transfer, and the person who had been appointed thereto either under General Rule 10 (a) or 10 (d) is subsequently recruited thereto by transfer and included in the list of approved candidates, the appointing authority may, in his discretion, allow such person to commence his probation if any, from the date of his first temporary appointment or from such subsequent date, as the appointing authority may determine:

Provided that the date so determined by the appointing authority to commence probation in this clause, shall not be earlier than the date of commencement of probation of the junior most person already in service."

According to the High Court, though initially the appointment of the promotee District Registrars was said to have been made under Rule 10 (a) (i) (1) of the General Rules, since they had been subsequently recruited by transfer and included in the list of direct candidates, the appointing authority had the discretion either to allow them to commence their probation from the date of their first temporary appointment or from such subsequent date as the appointing

authority chose to determine. The High Court held in the instant case that when the appointing authority had not determined any subsequent date for the commencement of the probation by the promotee District Registrars, it would mean that they would be deemed to have been allowed to commence their probation from the date of their first temporary appointment. In other words, the moment they commenced their probation were said to be appointed to the service.

Negating the submissions made on behalf of the appellants herein that since the initial temporary appointments of the promotees had not been made according to the rules, their seniority could not be reckoned from the date of their initial appointment under Rule 10 (a) (i) (1) of the aforesaid rules and placing reliance on Rule 4 (a) of the aforesaid rules, the High Court distinguished the various decisions cited on behalf of the appellants herein to bolster their case that appointment in accordance with the rules is a condition precedent in counting seniority. The High Court held that the appointment of the promotees had been made in accordance with the Rules and in particular Explanation II to Rule 4 and that having regard to the above, the said decisions would have no application to the facts of the case. On the contrary, the High Court was of the view that the appointments of the promotees, though temporary and ad hoc, were not by way of any stop-gap arrangement and the decision of this Court in the case of I.K. Sukhjia & Ors. vs. Union of India reported in 1977 (6) SCC 406 was relied upon in support of the view that when promotions are made on ad hoc basis against clear vacancies, the seniority will be counted from the date of the initial appointment and not from the date of confirmation.

On the basis of its aforesaid reasoning, the High Court chose not to interfere with the common order passed by the Tribunal and dismissed the writ applications filed by the appellants herein.

As indicated hereinbefore, these appeals have been preferred against the said judgment and order of the High Court of Judicature of Madras.

Appearing in support of the appeals, Mr. L. Nageshwara Rao, learned senior advocate, firstly submitted that the High Court had erred in applying Rule 4 of the Tamil Nadu State and Subordinate Services Rules to the facts of the instant case, inasmuch as, the appointment orders of the promotees themselves indicate that they had been appointed temporarily under Rule 10 (a) (i) (1) of the Tamil Nadu State and Subordinate Services Rules. For the sake of convenience Rule 4 of the aforesaid Rules is set out hereinbelow:-

"Rule 4 (a) - All first appointments to a service or class or category or grade thereof, State of Subordinate, whether by direct recruitment or by recruitment by transfer or by promotion, shall be made by the appointing authority from a list of approved candidates. Such list shall be prepared in the prescribed manner by the appointing authority or any other authority empowered in the Special Rules in that behalf and shall be published in the Tamil Nadu Government Gazette in respect of appointments to State Services and in the Notice Board in the office of the appointing authority in respect of appointments to Subordinate Services. The list shall also be communicated to all persons concerned by Registered Post whose names are

found in such list whose names have not been included in the list, where the candidates in such list are arranged in their order of preference, appointments to the service shall be made in such order:

Explanation II: "In respect of appointment to the post, which are under the purview of the Tamil Nadu Public Service Commission, temporary list may be drawn and published as aforesaid with reference to the qualification on the date fixed for the regular lists to meet out the exigencies of service and to avoid, administrative delay. Once a qualified candidate is included in the temporary list with reference to the qualification on the crucial date fixed for regular list his rights for temporary appointment should be protected and he should not be overlooked in preference to a person, who was not included in the temporary list as he was not qualified on the crucial date but subsequently qualified. The temporary list shall be adopted for giving temporary appointments till the regular list is approved and regular appointments are made with reference to the regular list."

Mr. Rao urged that none of the conditions indicated in Rule 4 regarding preparation and publication of the list of approved candidates had been complied with and, on the other hand, the orders of promotion and posting of the promotees were admittedly made under Rule 10 (a) (i) (1) of the General Rules which specifically indicates that such appointments were made otherwise than in accordance with the Rules. The further case of the appellants was that since the initial appointment of the promotees had been made otherwise than in accordance with the rules, they would not be entitled to the benefit of their service rendered by them prior to the regularization of their appointment for counting their seniority and that their seniority will have to be reckoned from the date on which they were regularized. In support of such proposition, reliance was placed on the decision of this Court in the case of V. Sreenivasa Reddy and Ors. vs. Government of Andhra Pradesh and Ors. 1995 Supp. (1) SCC 572, wherein this Court was called upon to consider the dispute involving inter se seniority between persons temporarily appointed as Assistant Executive Engineers de hors the rules, to fill emergent vacancies as against direct recruits. It was held that since the appointment of the concerned appellants were under Rule 10 (a) (i) (1), they were not made part on the basis of selection by the Public Service Commission and, therefore, their appointments were made otherwise than in accordance with the Special Rules. They cannot, therefore, be members of the service till they were appointed to the service in accordance with the Special Rules. It was also held that a direct recruit takes his seniority from the date on which he starts discharging the duty of the post borne on the cadre while a temporary appointee appointed de hors the rules or on ad hoc basis or to a fortuitous vacancy gets seniority from the date of regular appointment. Considering further the effect of Rule 4, 23 (a) and 33(a) of the Rules and Rule 5 of the sub-rules, this Court went to hold that a Public Service Commission candidate gets his seniority from the date on which he starts discharging his duties on the post borne on the cadre and his seniority shall be determined

with effect from that date while in respect of temporary appointees under Rule 10 (a) (i) (1) who are subsequently appointed in accordance with the Rules, the temporary service rendered prior to their appointment would not be counted towards their seniority.

Reliance was also placed to another decision of this Court in the case of State of Tamil Nadu and Ors. vs. E. Paripoornam and Ors., 1992 Supp (1) SC 420, wherein also the provisions of Rule 10 (a) (i) (1) of the Tamil Nadu State and Subordinate Services Rules were under consideration in respect of Junior Professors who were later appointed on a regular basis on the basis of an approved list prepared by the Public Service Commission. Even though the order or regularization of the services of such temporary appointees were intended to be regularized with effect from the dates of their original appointments on a temporary basis, this Court held that they would not be entitled to count their temporary service for the purpose of seniority and that the services rendered by the appointees under Rule 10 (a) (i) (1) could not be considered for the purpose of seniority as such appointment was a stop-gap arrangement, emergency or fortuitous arrangement.

A later decision of this Court in the case of Sanjay K. Sinha-II and Ors. vs. State of Bihar and Ors., (2004) 10 SCC 734 was referred to by Mr. Rao regarding promotions against non-existing posts and its effect on inter se seniority with direct recruits. This Court held that appointments made contrary to rules were merely fortuitous and did not confer any benefit of seniority on appointees over and above the regular/substantive appointees to the service.

Several other decisions in which the aforesaid principle had been reiterated were relied upon by Mr. Nageshwara Rao, but reference to the same could only amount to multiplication of the decisions cited. It was contended by Mr. Rao that seniority in a cadre could only be in respect of substantial posts and not in respect of temporary posts made otherwise than in accordance with the rules.

Mr. Rao urged that the High Court had, in fact, taken a view which was contrary to the law as laid down by this Court and, could not, therefore, be sustained.

Mr. R. Venkataramani, learned senior advocate, who appeared for the respondents sought to justify the order passed by the High Court and contended that unless there was a contrary rule, service rendered on probation or in an officiating capacity could not be ignored for determination of seniority as was held by this Court in L. Chandrakishore Singh vs. State of Manipur and Ors., (1999) 8 SCC 287. In the said matter, a further observation was made that grant or approval to an appointment made without following the prescribed procedure implies confirmation and relates back to the date on which appointment was made. In other words, the entire period of service in such case counts for seniority. On a consideration on the submissions made on behalf of the respective parties and the decisions cited on their behalf, the consistent view appears to be the one canvassed on behalf of the appellants, the decisions cited by Mr. Rao have been rendered in the context of Rule 10 (a) (i) (1) and the other relevant rules which are also applicable to the facts of the instant case. The law is well established that initial appointment to a post without recourse to the rules of recruitment, an appointment to a service as contemplated under Rule 2 (1) of the General Rules, notwithstanding the fact that such appointee is called upon to perform duties of a post borne on the cadre of such service. In fact, Rule 39 (c) of the General Rules indicate that a person temporary

promoted in terms of Rule 39 (a) is required to be replaced as soon as possible by a member of the service who is entitled to the promotion under the rules. It stands to reason that a person who is appointed temporarily to discharge the functions in a particular post without recourse to the recruitment rules, cannot be said to be in service till such time his appointment is regularized. Therefore, it is only from the date on which his services are regularized that such appointee can claim seniority over those appointees subsequently.

In the instant case the authorities, on the strength of the several Government Orders giving retrospective effect to the regularization of the promotees, have taken the date of initial appointment of such promotees as the starting point of their seniority. In our view, such a course of action was erroneous and contrary to the well established principles relating to determination of seniority. In our view, the High Court appears to have taken an erroneous view in the matter in holding that the period during which the promotees had initially discharged the duties of District Registrars, though appointed under Rule 10 (a) (i) (1) were to be counted for determining their seniority.

We, therefore, set aside the order passed by the High court and direct the concerned respondents to re-determine seniority of the appellants in relation to the promotees after reckoning the starting point of seniority of such promotees from the date of regularization of their services.

The appeals, therefore, succeed and are disposed of with the aforesaid directions. There will be no order as to costs.