

V.P. SHRIVASTAVA AND ORS.

A

v.

STATE OF M.P. AND ORS.

FEBRUARY 2, 1996

[K. RAMASWAMY AND G.B. PATTANAIK, JJ.]

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*Service Law—Madhya Pradesh State Industries (Gazetted) Service Recruitment Rules, 1965—Mode of recruitment to post of Assistant Director of Industries—Determination of inter se seniority between a direct recruit and a promotee—Where appointment is only ad hoc and not according to rules—Officiation in such post cannot be taken into account for fixing seniority.*

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*Practice and Procedure—Principle of determination of seniority—Challenged—State is necessary party.*

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The appellants, direct recruits as Assistant Director of Industries, having been appointed on 29-9-1980 through the process of selection, challenged the selection list for promotion. The respondents, ad-hoc promotees to the post of Assistant Director, they having been promoted on 27.9.1980, *de-hors* the rules, in anticipation of the approval of the Public Service Commission, were shown senior to the regular appointees like the appellants.

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Administrative Tribunal dismissed the application while holding that in an earlier case while deciding the inter se seniority of 1974 recruits the Tribunal had decided to take ad-hoc appointment of the promotees into consideration and therefore the decision should govern the case and that since the promotion in favour of the respondents in the year 1980 could not be challenged after such a long time, the said promotees would be entitled to count their entire service for the purpose of determining of seniority and since all the promotees had not been arrayed as party respondents no relief could be granted to the appellants. This appeal had been filed against the Judgment of the Tribunal.

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The appellants contended that the Tribunal erred in law in declaring the promotees to be senior to the direct recruits solely on the ground that the promotees were appointed on 27.9.1980 whereas the direct recruits

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- A were appointed on 29.9.1980; that non-inclusion of affected party will not be fatal to the case since the very principle of determination of *inter se* seniority adopted by the State Government was challenged, the only necessary party was the State itself and that selection list having been finalised only in the year 1988, on 23.12.1988, the appellants' application before the Tribunal in 1989 could not be held to be barred on the principle of delay and laches.

The respondents merely contended that they had served in the post for a long time, alteration of the seniority need not be made by this court.

- C Allowing the appeal, this Court

- HELD : 1.1. The initial appointment of the respondents on promotion not having been made following the procedure laid down by the Madhya Pradesh State Industries (Gazetted) Service Recruitment Rules of 1965 and even though they were continuing in the post uninterruptedly but the Public Service Commission having not approved their appointments as yet, their officiation in such post could not be taken into account for considering the seniority and the promotees could not be declared senior to the direct recruits solely on the ground that the promotees were appointed on 27.9.1980 whereas the direct recruits were appointed on 29.9.1980. The appellants must be held senior to the respondents *ad hoc* promotees. [65-C, 66-B]

- F *Direct Recruit Class II Engineering Officers Association & Ors. v. State of Maharashtra & Ors.*, [1990] 2 SCR 900; *State of West Bengal & Ors. v. Aghore Nath Day & Ors.*, [1993] 3 SCC 371 and *Sreenivasa Reddy & Ors. v. Govt. Andhra Pradesh & Ors.*, [1995] Suppl. 1 SCC 572, followed.

- G 1.2. The appellants did not challenge the so called ad-hoc appointments of the promotee respondents but they did challenge the position of the said *ad-hoc* promotee respondents over the appellant in the seniority list. The very principle of 'determination of seniority' made by the State Government being under challenge, for such a case State was in necessary party who has been impleaded. The Tribunal erred in law in holding that non inclusion of the affected parties was fatal to the proceeding.

[66-B-C, 67-B]

- H *General Manager, South Central Railway Secunderabad and Anr. Etc. v. A.V.R. Siddhanti and Ors. Etc.*, [1974] 3 S.C.R. 207 and *Prabodh Verma*

*and Others, Etc. v. State of Uttar Pradesh and Others Etc.*, [1985] 1 SCR 216, A  
relied on.

1.3. The final gradation list was prepared only on 23.12.1988 and the appellants had approached the Tribunal in 1989 and therefore the question of delay did not arise. [68-A]

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 2769 of 1996.

From the Judgment and Order dated 24.7.92 of the Madhya Pradesh Administrative Tribunal, Jabalpur in O.A. No. 894 of 1988.

P.P. Rao, Amitabh Verma and Ashok Mathur for the Appellants.

A.K. Chitale, S.K. Agnihotri for the Respondents.

Ashok Kr. Singh for Respondent No. 4.

The Judgment of the Court was delivered by

PATTANAİK, J. Leave granted.

This appeal is directed against the Judgment of the Madhya Pradesh Administrative Tribunal dated 24th July, 1992 in Original Application No. 894 of 1988. The appellants are the direct recruits as Assistant Director of Industries, they having been appointed on 29.09.1980 through the process of selection conducted by the Public Service Commission. The respondents are the *ad hoc* promotees to the post of Assistant Director, they having been promoted on 27.09.1980. The *inter se* seniority between these two groups of appointees is the subject matter of controversy in this appeal.

The State of Madhya Pradesh had framed a set of Rules called Madhya Pradesh State Industries (gazetted) Service Recruitment Rules, 1965 (hereinafter referred to as 'the recruitment Rules of 1965'). Under the said rules, 50 per cent posts of Assistant Director of Industries were to be filled by direct recruitment and balance 50 per cent by promotion. The aforesaid Rule was replaced by a new set of Rules called Madhya Pradesh State Industries (gazetted) Service Recruitment Rules, 1985 (hereinafter referred to as 'the recruitment Rules of 1985'). Both these Rules though provide for the mode of recruitment to the post of Assistant

A Director of Industries as well as the procedure therefor, but do not contain any provision for determination of *inter se* seniority between a direct recruit and a promotee. Therefore the said seniority had to be determined in accordance with the general principle.

B Though the principle has been authoritatively laid down by Constitution Bench of this Court in the case of *Direct Recruit Class II Engineering Officers Association and Ors. v. State of Maharashtra and Ors.*, reported in [1990] 2 SCR 900, commonly called the Direct Recruits Case, but yet very often the High Courts and the Administrative Tribunals have been committing the mistake in applying ratio of this case. In the case in hand the  
C Administrative Tribunal has failed to apply the ratio laid down in Direct Recruits Case and as such has committed an error.

Under the Recruitment Rules, 1965 no appointment to the service could be made except after selection by one of the methods of recruitment  
D specified in Rule 6. So far as the direct recruitment is concerned the selection has to be made by the Public Service Commission after interviewing the candidates as provided under Rule 11 and then Commission forwards a list to the Government arranging the persons in order of merit as provided in Rule 12 and finally the Government makes the appointments from the said list. So far as the appointment to the service by promotion  
E is concerned, under Rule 13 a preliminary selection committee is constituted which committee considers the cases of all eligible persons as provided under Rule 14 and finally a list of suitable persons is prepared by the said committee under Rule 15. The selection is made on the basis of merit and suitability in all respects with due regard to seniority and  
F thereafter the names of the officers included in the list are arranged in order of seniority. The list thus prepared is forwarded to the Public Service Commission as provided under Rule 16 and only after approval of the Commission under Rule 17, it forms the selection list for promotion. The State Government then makes appointments from the select list as provided in Rule 18. Admittedly the appellants who are direct recruits had  
G been appointed in accordance with the prescribed procedure under the Recruitment Rules. whereas the promotee respondents had not been appointed in accordance with the procedure prescribed for promotion under the Recruitment Rules. A bare look at the letter of appointments of the respondents dated 27.9.1980 clearly indicate that the appointments had  
H been made in anticipation of the approval of the Public Service Commis-

sion and the appointments were until further orders. Thus the appointment of the respondents on 27.9.1980 was *de-hors* the rules and though the said respondents being continued since September 1980, Mr. Rao, learned senior counsel appearing for the appellants submitted that the Public Service Commission has not yet granted approval to the appointments of the respondents which fact is not disputed by the learned counsel appearing for the private respondents as well as by the counsel appearing for the State. In the year 1983 a provisional seniority list of the Additional Directors was drawn up by the State Government wherein *ad hoc* promotees were shown senior to the regularly appointees like the appellants. The appellants filed objections to the said provisional list. Without taking any decision on the same the State Government issued another provisional selection list in the year 1986 but continued the mistake which was there in the 1983 list. The appellants put forward their grievances again on 18.9.1987. The seniority list prepared in 1983 and 1986 were withdrawn. Then on 19.9.1988 another provisional list was brought out wherein the appellants were again shown junior to the *ad-hoc* promotees some of whom are the private respondents. The appellants against filed the representation and finally on 23.12.1988 the State Government brought out the final selection list wherein the appellants were again shown junior to the said *ad-hoc* promotees. The appellants therefore approached the State Administrative Tribunal. The Tribunal by the impugned order dismissed the application essentially on two grounds namely, in an earlier case while deciding the inter se seniority of 1974 recruits the Tribunal has decided to take *ad-hoc* appointment of the promotees into consideration and therefore that decision should govern the present case. The Tribunal also came to the conclusion that since the promotion in favour of the respondents in the year 1980 cannot be challenged at this length of time, the said promotees would be entitled to count their entire service for the purpose of determining of seniority. The Tribunal also is of the view that even though respondents 3 and 4 who are promotees successfully safeguarded the interest of all promotees yet since all the promotees have not been arrayed as party respondents no relief can be granted to the appellants.

-Mr. P.P. Rao, the learned senior counsel appearing for the appellants raises two contentions in assailing the legality of the order of the Tribunal:

(1) In view of the admitted position that the appellants - direct recruits were appointed in accordance with the Recruitment Rules, 1965

- A and the respondents promotees were appointed on promotion on *ad hoc* basis not in accordance with the procedure prescribed for promotion under 1965 Recruitment Rules, the Tribunal erred in law in declaring the promotees to be senior to the direct recruits solely on the ground that the promotees were appointed on 27.9.1980 whereas the direct recruits were appointed on 29.9.1980.

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- (2) Since the very principle of determination of *inter se* seniority adopted by the State Government was challenged, the only necessary party is the State itself and not the affected party and therefore non inclusion of affected party will not be fatal to the case. At any rate when some of the promotee appointees have been impleaded as parties and the Tribunal itself came to the conclusion that they successfully safeguarded the interest of the promotees the appellants could not have been refused relief on that score. On the question of delay and laches, Mr. Rao contends that the appellants do not challenged the so called *ad-hoc* appointments of respondents by way of promotion but they merely challenge the position assigned to them in the selection list and the selection list having been finalised only in the year 1988, on 23.12.1988, the appellants' application before the Tribunal in 1989 by no stretch of imagination can be held to be barred on the principle of delay and laches.

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- E Learned counsel appearing for the respondents while could not refute the contention of Mr. Rao with regard to erroneous application of the principles of determination of *inter se* seniority by the Tribunal, but merely contended that the respondents have served this length of time and many of them have been retired in the meantime, and therefore, alternation of the seniority need not be made by this Court.

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- F We are unable to accept the request made by the learned counsel appearing for the respondents and in our considered opinion all the contentions raised by Mr. Rao, learned counsel appearing for the appellants must succeed.

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In the Direct Recruits case the Constitution Bench of this Court summarised the legal position in paragraph 44 as follows :

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"(A) Once an incumbent is appointed to a post according to rule, his seniority has to be counted from the date of his appointment and not according to the date of his confirmation.

The Corollary of the above rule is that were the initial appointment is only *ad-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.

(B) If the initial appointment is not made by following the procedure laid down by the rules but the appointee continues in the post uninterruptedly till the regularisation of his service in accordance with the rules, the period of officiating service will be counted."

We are not concerned with the other propositions laid down by this Court in the present case. In the case in hand the initial appointment of the respondents on promotion not having been made following the procedure laid down by the Recruitment rules of 1965 and even though they are continuing in the post uninterruptedly but the Public Service Commission having not approved their appointments as yet, proposition B above will have no application. Consequently applying proposition A above, the appellants direct recruits must be held senior to the respondents - private respondents - *ad-hoc* promotees. The Tribunal obviously erred in law in not following the aforesaid authoritative pronouncement of this Court for determination of the *inter se* seniority between direct recruits and the promotees.

In the three Judge Bench decision this Court in the case of *State of W.B. and Others v. Aghore Nath Day and others*, [1993] 3 S.C.C. 371, this Court held :

that to enable his seniority to be counted from the date of initial appointment the incumbent of the post has to be initially appointed 'according to rules'. Thus 'where initial appointment is only *ad-hoc* and not according to rules and made as a stop gap arrangement, the officiation in such posts cannot be taken into account for considering the seniority'.

It was thus held that conclusions A and B of the Constitution Bench in Direct Recruits case have to be read harmoniously and conclusion B cannot cover cases which are expressly excluded by conclusion A.

In a more recent case of *V. Sreenivasa Reddy and Others v. Govt. of A.P. and others*, [1995] Suppl. (1) S.C.C. P. 572, where one of us (brother

A Ramaswamy, J.) was a member, all the decisions of this Court on the point have been considered and it has been laid down the temporary or *ad-hoc* appointments are not appointments in accordance with the rules and the temporary service cannot be counted towards the seniority.

B The conclusion of the Tribunal that non inclusion of the affected parties is fatal to the appellants case is also unsustainable in law. It is to be stated that the appellants do not challenge the so called *ad-hoc* appointments of the promotee respondents but they do challenge the position of the said *ad-hoc* promotee respondents over the appellants in the seniority list. In other words the very principle of 'determination of seniority' made  
C by the State Government is under challenge and for such a case State is the necessary party who has been impleaded. It has been held by this Court in the case of *General Manger, South Central Railway Secundrabad and Anr. Etc. v. A.V.R. Siddhanti and Ors. Etc.*, [1974] 3 S.C.R. 207 :

D "As regards the second objection, it is to be noted that the decision of the Railway Board impugned in the writ petition contain administrative rules of general application, regulating absorption in permanent departments, fixation of seniority, pay etc. of the employees of the erstwhile Grain Shop departments. The Respondents-petitioners are impeaching the validity of those policy  
E decisions on the ground of their being violative of Articles 14 and 16 of the Constitution. The proceedings are analogous to those in which the constitutionality of a statutory rule regulating seniority of government servants is assailed. In such proceedings the necessary parties to be impleaded are those against whom the relief is  
F sought, and in whose absence no effective decision can be rendered by the Court. In the present case, the relief is claimed only against the Railway which has been impleaded through its representative. No list or order fixing seniority of the petitioners vis-a-vis particular individuals pursuant to the impugned decisions, is being challenged. The employees who were likely to be affected as a result  
G of the re-adjustment of the petitioner's seniority in accordance with the principles laid down in the Board's decision of October 16, 1952 were, at the most, proper parties and not necessary parties, and their non-joinder could not be fatal to the writ petition."

H In the case of *A. Janardhana v. Union of India and others*, [1983] 2



S.C.R. 936, a similar contention was also repelled by this Court in the following words :

"In this case, appellant does not claim seniority over particular individual in the background of any particular fact controverted by that person against whom the claim is made. The contention is that criteria adopted by the Union Government in drawing-up the impugned seniority list are invalid and illegal and the relief is claimed against the Union Government restraining it from upsetting or quashing the already drawn up valid list and for quashing the impugned seniority list. Thus the relief is claimed against the Union Government and not against any particular individual. In this background, we consider it unnecessary to have all direct recruits to be impleaded as respondents."

Further in view of finding of the Tribunal that respondents 3 and 4 successfully safeguarded the interest of the promotees. The Tribunal erred in law in holding that non-inclusion of the affected parties is fatal to the proceeding. It has been held by this Court in the case of *Prabodh Verma and Others, Etc. v. State of Uttar Pradesh and others, Etc.*, [1985] 1 SCR 216, that :

"A High Court ought not to hear and dispose of a writ petition under Article 226 of the Constitution without the persons who would be vitally affected by its judgment being before it as respondents or at least some of them being before it as respondents in a representative capacity if their number is too large to join them as respondents individually."

Even in Janardhana case referred to supra this Court also rejected a similar objection on the ground that 9 of the direct recruits having been impleaded as party, therefore the case of direct recruits has not gone unrepresented and therefore the non-inclusion of all the 400 and odd direct recruits is not fatal to the proceedings.

In the aforesaid circumstances we have no hesitation to come to the conclusion that the Tribunal was wholly in error in coming to the conclusion that the appellants application becomes unsustainable in the absence of all the promotees being impleaded as party.

- A So far as question of delay and laches is concerned, as we have noticed earlier the final gradation list was prepared only on 23.12.1988 and the appellants had approached the Tribunal in 1989 and therefore, the question of delay does not arise. In the aforesaid premises the impugned order of the Tribunal is set aside and this appeal is allowed. The appellants are entitled to get their seniority over the *ad-hoc* promotees who were appointed as Assistant Director on 27.9.1980. The respondent-State is directed to re-draw the seniority. The appellants' application before the Tribunal stand allowed. There will be no order as to costs. The seniority list may be re-drawn up within 4 months from the date of the receipt of this order and consequential benefits may be given.
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- C R.A.

Appeal allowed.