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Ninya Bagra Vs. State of Ap and ors.

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Court : Guwahati

Decided On : Aug-06-2003

Judge : I.A. Ansari, J.

Acts : Arunachal Pradesh Administration (Public Works Department) GroupB posts Recruitment Rules, 1983; Arunachal Pradesh Power Engineering Service Rules, 1993 - Rule 11 and 11(8); Constitution of India - Article 226

Appeal No. : W.P.(C) No. 268 (AP) of 2002

Appellant : Ninya Bagra

Respondent : State of Ap and ors.

Advocate for Def. : B.L. Singh, G.A.

Advocate for Pet/Ap. : R.P. Sharma, Adv.

Prior history : I.A. Ansari, J. 1. This writ petition has raised a fundamental question of service jurisprudence, namely, as to whether the period, which a government servant spends, while officiating on a promotional post, though not qualified for such promotion, shall be counted for the purpose of seniority in the promotional post if the officiating promotion is subsequently regularized. 2. In a nutshell, the case of the petitioner runs as follows : The petitioner, a graduate Engineer (Electrical), was a

Judgement :

I.A. Ansari, J.

1. This writ petition has raised a fundamental question of service jurisprudence, namely, as to whether the period, which a government servant spends, while officiating on a promotional post, though not qualified for such promotion, shall be counted for the purpose of seniority in the promotional post if the officiating promotion is subsequently regularized.

2. In a nutshell, the case of the petitioner runs as follows :

The petitioner, a graduate Engineer (Electrical), was appointed as Junior Engineer, on 11.8.1992, in terms of the relevant recruitment rules called Arunachal Pradesh Administration (Public Works Department) Group-El posts Recruitment Rules, 1983 (hereinafter referred to as '1983 Rules'). Under 1983 Rules, a graduate Engineer appointed as a Junior Engineer was required to put in, at least, five years of regular service in order to qualify, for promotion to the post of Assistant Engineer-Subsequent to petitioner's appointment as Junior Engineer, a new set of recruitment rules known as Arunachal Pradesh Power Engineering Service Rules, 1993 (hereinafter referred to as '1993 Rules') came into force on 20th December, 1993. According to Rule 11 of the 1993 Rules, there shall be two branches of cadre of Assistant Engineer, namely, Assistant Engineer (Electrical/Mechanical) and Assistant Engineer (Electronics/Telecommunication, computer) and recruitment to both the branches shall be 50% by direct recruitment and 50% by promotion on selection basis from amongst the eligible Junior Engineers of service as prescribed in Sub-rule (8) of Rule-11. According to Rule 11 (8) a, Junior Engineer, who has rendered, at least, eight years of regular service in the grade of Junior Engineer shall be eligible for consideration for such promotion. Thus, under 1993 Rules, the petitioner could not have become eligible for promotion until 11.8.2000. However, the petitioner was appointed, as early as on 16.7.1997, on officiating basis as Assistant Engineer. Eventually, petitioner's promotion to the post of Assistant Engineer was regularized on 12.3.2001. The petitioner's promotion was, however, not regularized with effect from 16.7.1997, i.e., the date on which he was directed to officiate in the promotional post of Assistant Engineer thereby the private respondents, who had been formally

recruited as Assistant Engineer in the year 1996-99 as direct recruits were all made senior to the petitioner, though the petitioner had been officiating as Assistant Engineer since 16.7.1997. Aggrieved by the alleged denial of promotion with effect from 16.7.1997, the petitioner has approached this Court, with the help of the present application made under Article 226 of the Constitution of India, seeking issuance of appropriate writ/writs commanding the respondents to accord promotion to the petitioner with effect from 16.7.1997 aforementioned.

3. The private respondents, namely, respondent Nos. 3 to 9 aforementioned have not contested this case and none has appeared on their behalf. The State respondents have contested this case by filing their affidavit-in-opposition, their case being, briefly stated, thus : The petitioner was allowed to officiate as an Assistant Engineer with effect from 16.7.1997 on temporary basis and cannot, therefore, be allowed to claim regular promotion with effect from 16.7.1997 inasmuch as the petitioner had not completed qualifying period of service under the relevant rules for promotion to the post of Assistant Engineer. The private respondents were directly recruited to the posts of Assistant Engineer long before the petitioner could qualify for promotion. The petitioner's seniority and promotion have been accorded in accordance with the relevant rules. There is no merit in the present writ petition and the same may be dismissed.

4. I have perused the materials on record. I have heard Mr. R.P. Sharma, learned counsel for the petitioner, and Mr. B.L. Singh, learned senior Government Advocate, appearing on behalf of the respondents.

5. It has been submitted by Mr. Sharma that though the petitioner had not put in eight years of regular service as Junior Engineer the fact remains that he was ordered to officiate as Assistant Engineer on 16.7.1997 and in this view of the matter, the State respondents ought to have regularized petitioner's promotion with effect from 16.7.1997. The period, which the petitioner has served, according to Mr. Sharma, as officiating Assistant Engineer ought to have been included as the period of service rendered in promotional post of Assistant Engineer and the petitioner's promotion ought to have been made effective from 16.7.1997. Support for his submission is sought to be derived by Mr. Sharma from Direct Recruit Class

II Engineering Officers Assn. v. State of Maharashtra, reported in (1990) 2 SCC 715, and L. Chandrakishore Singh v. State of Manipur, reported in (1999) 8 SCC, 287.

6. Controverting the above submissions made on behalf of the petitioner, learned senior Govt. Advocate has submitted that allowing the petitioner to officiate as Assistant Engineer was merely a temporary arrangement and in view of the fact that the relevant recruitment rules did not make the petitioner eligible for promotion until before 10.8.2000, the petitioner was lawfully promoted on 12.7.2001 and he cannot claim promotion with effect from 16.7.1997.

7. While dealing with the rival submissions made before me, on behalf of the parties, it is important to note that ordinarily, unless the relevant recruitment rules indicate otherwise, the service, which a person renders on officiating basis, shall be reckoned for the purpose of his seniority, when his service is regularized. This is clearly discernible from the law laid down in L. Chandrakishore Singh (supra), wherein the Apex Court has laid down as follows :

'15. It is now well settled that even in cases of probation or officiating appointments which are followed by a confirmation unless a contrary rules is shown the service rendered as officiating appointment or on probation cannot be ignored for reckoning the length of continuous officiating service for determining the place in the seniority list. Where the first appointment is made by not following the prescribed procedure and such appointee is approved later on, the approval would mean his confirmation by the authority and shall relate back to the date on which his appointment was made and the entire service will have to be computed in reckoning the seniority according to the length of continuous officiation in this regard we fortify our view by the judgment of this Court in G.P. Doval v. Chief Secy. Govt. of U.P.'

(Emphasis is supplied)

8. What is, however, essential to note is that if the officiating appointment is only on ad hoc basis and not according to the relevant recruitment rules and made as a stop-gap arrangement, officiation in such post cannot be taken into account for

considering the seniority. This become clear from a close reading of the observations made by the Apex Court in direct:

'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 where 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.'

(Emphasis is added)

9. In short, thus, the service, which a person renders on officiating basis, cannot be ordinarily reckoned for the purpose of his seniority, when his service is regularized if his officiating appointment was de hors the rules.

10. Keeping in view the above position of law, let me, now, come to the 1993 Rules, which admittedly, govern the case of the petitioner. Rule 33, which gives powers to the State Government to relax the provisions of the rules, state as follows :

'Power to relax : Where the State Government is of the opinion that it is necessary or expedient to do so, it may, by order, for reasons to be recorded in writing and in consultation with the Commission, relax any provision of these rules with respect to any class or category of persons or posts.'

11. While considering Rule 33, it is of utmost importance to note that in the realm of service jurisprudence, a distinction has been developing between the conditions of recruitment and the conditions of service. The present trend of judicial pronouncements is that while the conditions of service may be relaxed, the conditions of recruitment cannot be relaxed even if the relevant recruitment rules so provide. In other words, in no circumstances, there can be relaxation of the basic or fundamental rules of recruitment. Reference may be made to Suraj Prakash Gupta v. State of J&K;, reported in (2000) 7 SCC 561, wherein the Apex Court has held thus :

'The decisions of this Court have recently been requiring strict conformity with the Recruitment Rules for both direct recruits and promoters. The view is that there can be no relaxation of the basic or fundamental rules of recruitment.'

(Emphasis is added)

12. While dealing with Rule 33, I may also refer to Ananda Ram Borah v. State of Assam, reported in (2003) 2 GLT 78, wherein a Division Bench of this Court has laid down that while the conditions of service can be relaxed, conditions of recruitment cannot be relaxed. I am guided to adopt this view from the following observations made in Ananda Ram Borah (supra):

'Can the Government exercise power or relaxation of Rule of recruitment requiring a direct recruit to appear in the competitive examination and such relaxation of the recruitment rules is permissible. In Keshab Chandra Joshi v. Union of India, reported in (1992) Supp 2 SCC 272, the Apex Court had emphasized the need of strict compliance of the recruitment Rules for both direct recruits and promotees. It is held that there cannot be any relaxation of the basis or fundamental rules of recruitment. That was a case where the Rule permitting relaxation of conditions or service came for consideration and it was held by a three Judges Bench that the Rule did not permit relaxation of the recruitment Rules. In Syed Khalid Rizvi v. Union of India, (1993) Supp (3) SCC 575, the Apex Court observed. 'The condition precedent, therefore, is that there should be an appointment to the service in accordance with Rules and by operation of the Rule, undue hardship has been caused.... it is already held that the condition of recruitment and conditions of service are distinct and the latter is preceded by an appointment according to the Rules. The former cannot be relaxed.' Thus, according to the Apex Court there is distinction between the conditions of recruitment and conditions of service. Appointment has to be made in accordance with the recruitment Rule and thereafter, there may be relaxation in the service condition. Similarly, in State of Orissa v. Sukanti Mohapatra [1993] 2 SCC 486, it was held that though the power of relaxation stated in the Rules was in regard to 'any of the provisions of the Rules' this did not permit relaxation of the rule of direct recruitment without consulting the Commission and the entire ad hoc service of a direct recruit could

not be treated as regular service. In Dr. M.A. Hague v. Union of India (1993) 2 SCC 213 and in Jammu Kashmir Public Service Commission v. Dr. Nahnder Mohan (1994) 2 SCC 630, it has been emphatically laid down that the Rule relating to recruitment could not be relaxed. The judgment in the matter of Suraj Prakash Gupta (supra) has also reiterated the principle laid down by the Apex Court that there cannot be any relaxation of the conditions of recruitment. The conditions of recruitment and conditions of service are distinct. The Government has the power to relax conditions of service, whereas the conditions of recruitment cannot be relaxed even though the Rule intends to do so.'

(Emphasis is supplied)

13. In the case at hand, though Rule 33 speaks of relaxation of 'any of the provisions these rules', yet the fact remains that a close reading of Rule 33 gives no indication that even the rules of recruitment can be relaxed. What is also worth noticing is that for relaxing the rules, Rule 33 makes it mandatory to have consultation the Public Service Commission. In the instant case, there has been no consultation between the Department concerned and the State Public Service Commission. Without such consultation, the rules cannot be relaxed, in this regard, reference may be made to State of Orissa v. Sukanti Mohapatra, (1993) 2 SCC 486.

14. In other words, in the case at hand, there is nothing in Rule 33 to indicate that the Government can relax the provisions of the rules relating to recruitment. Viewed from this angle, it is clear that Rule 33 does not empower the State Government to relax the qualifying period of service of a Junior Engineer for promotion to the post of Assistant Engineer. This apart, no relaxation under Rule 33 is possible without consultation with the Arunachal Pradesh Public Service Commission. In the case at hand, there was, admittedly, no such consultation; hence, question of relaxation did not arise at all in the case of the petitioner.

15. In the face of the fact that Rule 33 does not speak of relaxation of the provisions for recruitment, it logically follows that the minimum qualifying period fixed under Rule 11(8) for promotion to the grade of Assistant Engineer from the grade of Junior Engineer cannot be relaxed even if the Government wanted to do

so. Hence, the petitioner could not have been accorded promotion until before he had completed the qualifying period of service on 11.8.2000.

16. As has already been indicated above, minimum qualifying period of service, which a person has to put in under Rule 11(8) as Junior Engineer for being considered for promotion to the post of Assistant Engineer, is eight years in the grade of Junior Engineer. Since the petitioner was, admittedly, appointed on 11.8.1992, he became eligible for promotion to the post of Assistant Engineer on 11.8.2000. He was, however, allowed to officiate as Assistant Engineer since 16.7.1997 and he has been promoted, eventually, as Assistant Engineer on 12.3.2001. Since the qualifying period of service required for promotion to the post of Assistant Engineer had not been relaxed by State Government nor Rule 33 permits such relaxation, it is logical to interfere that the notwithstanding the fact that the petitioner had been officiating as Assistant Engineer since 16.7.1997, he had not become eligible for such promotion until 11.8.2000 and the period of service, which the petitioner had put in as Assistant Engineer between 16.7.1997 and 10.8.2000, were contrary to the relevant recruitment rules. Thus, in the light of the position of the law as discussed above, the petitioner could not have been given promotion on or before 11.8.2000. Notwithstanding, therefore, the fact that the petitioner has officiated uninterruptedly with effect from 16.7.1997 till he was promoted on 12.3.2001, the period of service with effect from 16.7.1997 till 10.8.2000 : cannot be reckoned for the purpose of fixing seniority of the petitioner on the promotional post of Assistant Engineer.

17. However, what is, now, of paramount importance to note is that the order, dated 12.3.2001, whereby the petitioner has been given regular promotion indicates that higher pay scale shall be available to the petitioner from the date of his joining. In view of the fact that the petitioner has continued to officiate in the promotional post of Assistant Engineer from 16.7.1997 uninterruptedly till 12.3.2001, when he was, eventually, granted regular promotion, it is logical to infer that there was a promotional post available for absorbing the petitioner on 11.8.2000, i.e., the date on which the petitioner became eligible for such promotion, but the department concerned, for no justified reasons, kept the said promotional post filled up from 11.8.2000 till 12.3.2001 on officiating basis. In

short, there is no reason why the petitioner was not accorded promotion with effect from 11.8.2000. Viewed from this angle, it is clear that the denial to give benefit of promotion to the petitioner with effect from 11.8.2000 is wholly unjust, grossly illegal and highly improper and if the same is allowed to continue, it will cause serious miscarriage of justice.

18. However, even if the petitioner's promotion, as indicated hereinbefore, takes effect from 11.8.2000, his promotion will be on a date later than the dates of appointment of the private respondents as Assistant Engineers. Hence, the appointments of the private respondents as Assistant Engineers have, in no way, caused any prejudice to the case of the petitioner. Thus, the seniority position of the private respondents in the grade of Assistant Engineers cannot be interferred with even if the petitioner is granted promotion with effect from 11.8.2000.

19. In the result and for the reasons discussed above, this writ petition partly succeeds. The impugned order, dated 12.3.2001 (Annexure F to the Writ Petition) is hereby directed to be modified and the official respondents are hereby directed to accord regular promotion to the petitioner to the post of Assistant Engineer with effect from 11.8.2000.

20. With the above observations and directions, this writ petition shall stand disposed of.

21. No order as to costs.

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