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HIGH COURT OF DELHI : NEW DELHI

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Judgment reserved on: 21.11.2007

Judgment delivered on: 02.05.2008

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W.P. (C) No. 2146/2004

Ram Kishan

...Petitioner

Through: Mr. Jose P. Verghese, Advocate

versus

Union of India & Anr.

...Respondents

Through: Mr. Dalip Mehra and Mr. Rajiv
Ranjan, Advocates for
respondent

CORAM:

HON'BLE MR. JUSTICE A.K.SIKRI

HON'BLE MR. JUSTICE VIPIN SANGHI

1. Whether the Reporters of local papers may be allowed to see the judgment?
2. To be referred to Reporter or not?
3. Whether the judgment should be reported in the Digest? No

VIPIN SANGHI, J.

1. The short question involved in this writ petition under Article 226 of the Constitution of India is whether the ad hoc uninterrupted service rendered by the petitioner for a period of about 3 years between the period January, 1995 to January, 1998 prior to the regular selection of the petitioner to the post of Assistant Manager (Business) in Vidhi Sahitya Prakashan, Legislative Department of the Ministry of Law and Justice, Government of India, could be counted or not, for the purpose of considering his eligibility for promotion to the post of Publication-cum-Sales Manager in the said department.

2. Vide notification dated 18th January, 1995, the petitioner, who was serving as Business Executive in Vidhi Sahitya Prakashan, Ministry of Law, Justice and Company Affairs was appointed as Assistant Manager (Business) with effect from 13th January, 1995 for a period of 6 months or till such time as regular arrangement to fill up the post are made in consultation with the UPSC, whichever was earlier. On 24th July, 1995, a similar order appointing the petitioner on adhoc basis as an Assistant Manager (Business) w.e.f. 17th July 1995, again for a period of 6 months or till such time as regular arrangement to fill up the post are made in consultation with UPSC, whichever was earlier was issued. This order also stated that the period of adhoc appointment of the petitioner will not vest in him any right to claim for regular appointment. Thereafter, from time to time similar notifications were issued intending the adhoc appointment of the petitioner.

3. On 23.01.1998, the respondent issued another notification regularly appointing the petitioner as Assistant Manager "*on promotion basis*" on the recommendation of the UPSC w.e.f. the forenoon of 21.01.1998 until further orders. This notification also stated that he would be on probation for a period of two years w.e.f. 21.01.1998. The said order reads as follows: -

"New Delhi, the 23rd January, 1998.

NOTIFICATION

No.A.12023/1/95-VSP(Admn.): On the
recommendation of Union Public Service

Commission, the Secretary, Legislative Department is pleased to appoint Shri Ram Kishan, permanent Business Executive and officiating as Assistant Manager on ad-hoc basis in the Vidhi Sahitya Prakashan, Legislative Department, Ministry of Law & Justice to officiate as Assistant Manager in the said Prakashan on promotion basis with effect from the forenoon of 21st January, 1998 and until further orders in the scale of Rs.6500-200-10500.

2. He will be on probation for a period of two years w.e.f. 21.1.1998.

Sd/- (SHIV BHAGWAN)
Under Secretary to the Govt. of India”

4. The next promotional post, from the post of Assistant Manager (Business) is the post of Publication-cum-Sales Manager. Under the recruitment rules the post of Publication-cum-Sales Manager is a Group-A selection post. The said post is to be filled by promotion, failing which by transfer on deputation (including short term contract) and filling both, by direct recruitment. The promotional channel is to be exhausted from amongst Superintendent (Printing) and Assistant Manager (Business) working in Vidhi Sahitya Prakashan with 8 years regular service in the respective grades.

5. The respondent issued an advertisement dated 05.07.2003 in pursuance to their decision to fill post of Publication-cum-Sales Manager in Vidhi Sahitya Prakashan by transfer on deputation (including short term contract). This action of the respondent was not to the liking of the petitioner as, according to him, he was eligible for filling up the said post by promotion.

Accordingly, the petitioner filed the Original Application bearing No.1726/03 before the Central Administrative Tribunal, Principal Bench, New Delhi (the Tribunal), wherein he sought the relief of quashment and setting aside of the advertisement dated 05.07.2003 issued by the respondent and the decision of the respondent to fill up the post of Publication-cum-Sales Manager by transfer on deputation (including short term contract) and also a direction to the respondent to fill up the said post as per rules by promotion. He also sought a direction to the respondent to count the service rendered by him w.e.f. January, 1995 onwards on the post of Assistant Manager (Business) for the purpose of ascertaining his eligibility for being considered for promotion to the post of Publication-cum-Sales Manager and to promote him to the said post.

6. The case of the petitioner was that the post of Assistant Manager (Business) has fallen vacant in May, 1994, but the petitioner was promoted on ad-hoc basis only on 18.01.1995. His ad-hoc promotion to the post of Assistant Manager (Business) had been continued from time to time without interruption, and he was regularly promoted to the post of Assistant Manager (Business) vide order dated 23.01.1998. The next promotional post of Publication-cum-Sales Manager fell vacant on 01.03.2003. The petitioner contended that if his entire service as Assistant Manager (Business) is counted w.e.f. 18.01.1995, he had the requisite experience of 8 years on the post of Assistant Manager (Business) on the relevant date and

was, consequently, eligible to be considered for promotion to the post of Publication-cum-Sales Manager. The petitioner contended that in spite of his representations dated 12.03.2003 and 05.05.2003 for being promoted to the post of Publication-cum-Sales Manager, the respondent had proceeded to issue the advertisement dated 05.07.2003 for filling up the post of Publication-cum-Sales Manager by transfer on deputation (including short term contract). The petitioner claimed that since he was eligible having more than 8 years of service as Assistant Manager (Business) and was available for being considered for promotion, he should have been considered and promoted rather than adopting the next method prescribed for filling up the post i.e. by transfer on deputation (including short term contract). The petitioner in support of his case relied upon the decision of the Supreme Court in ***Direct Recruit Class II Engineering Officers' Association v. State of Maharashtra & Ors.*** (1990) 2 SCC 715 and ***T. Vijayan & Ors. v. Divisional Railway Manager & Ors.*** (2000) 4 SCC 20. The petitioner specifically relied upon sub-para (B) of para 47 of ***Direct Recruit*** (supra) wherein the Supreme Court had held “*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*”.

7. The Tribunal after considering the respective

submissions of the parties and after perusing the records of the respondents summoned by it from UPSC gave a finding that the petitioner had been interviewed on 04.11.1996 by the UPSC and vide letter dated 13.04.1995 it did not recommend him for appointment to the post of Assistant Manager (Business) in the respondent department. The UPSC also advised the respondent department for initiating action for filling up the post as per the provisions contained in the recruitment rules.

8. The Tribunal was of the opinion that the appointment of the petitioner on ad-hoc basis to officiate as Assistant Manager (Business) was not in accordance with the recruitment rules. The mere fact that subsequently he had been given regular promotion in the year 1998, did not mean that the earlier period of officiation could be treated as regular service rendered by the petitioner for considering his eligibility for further promotion and seniority. The Tribunal did not agree with the petitioner's submission that because he had officiated on the promotion post of Assistant Manager (Business) uninterruptedly, he should be given the benefit of seniority and eligibility for further promotion. The petitioner had not disputed the statement made by the respondent that even though his suitability was examined by UPSC in the year 1996 for regular promotion to the post of Assistant Manager (Business), he had not been recommended. The Tribunal also held that when the petitioner was given ad-hoc promotion in the year 1995 for 6 months/three

months on each occasion, the same was purely an administrative requirement, without following the recruitment rules, and the same had been continued from time to time since there was no regular incumbent. The Tribunal also held that the petitioner's case was not covered by principle (B) contained in para 47 of the judgment of the case of **Direct Recruit** (supra), but was covered by the corollary to the first principle itself, which reads *"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"*.

9. Consequently, the Tribunal rejected the Original Application filed by the petitioner.

10. Before us the submission of the petitioner once again is that since his initial appointment, which was made on ad hoc basis was continued uninterruptedly and eventually he was duly selected to the post of Assistant Manager (Business), he should not be made to suffer on account of the failure of the respondent in undertaking the selection process earlier even though the vacancy for the post of Assistant Manager was existing. He has also argued that his case is covered by the principle stated in paragraph(B) of para 47 of the judgment in the case of **Direct Recruit** (supra).

11. On the other hand, learned counsel for the respondent has supported the decision of the Tribunal. He has also relied on the decision of the Supreme Court in **Dr. Anuradha Bodi and others v.**

Municipal Corporation of Delhi and Others, (1998) 5 SCC 293 and ***Swapan Kumar Pal and Others V. Samitabhar Chakraborty and Others***, (2001) 5 SCC 581.

12. Having considered the rival submissions of the parties, in our view the impugned decision of the Tribunal cannot be faulted and the same appears to be well reasoned and founded upon the correct legal principles as enunciated by the Supreme Court. Admittedly, the initial appointment of the petitioner to the post of Assistant Manager (Business) was merely an ad hoc appointment. It was not preceded by the process of selection from amongst all the eligible candidates. The said appointment was also not preceded by an interview by the UPSC, which, admittedly, was required under the Rules. Even when the orders appointing the petitioner on ad hoc basis to the post of Assistant Manager (Business) was initially made and continued from time to time, the petitioner was left in no manner of doubt that the said appointment was merely on ad hoc basis and was being made for a limited period or till the regular arrangement to fill up the post is made in consultation with UPSC. The petitioner was also informed that his ad hoc appointment would not confer upon him any right to claim regular appointment in the grade in Vidhi Sahitya Prakashan or in any other office of the Government of India.

13. The Tribunal has given a finding of fact, after perusing the records produced before it that the candidature of the petitioner was rejected by UPSC in the year 1996. The Tribunal notes that the

UPSC had informed the Secretary to the Government of India, Ministry of Law and Justice, Legislative Department, New Delhi vide their letter dated 13.4.1995 that the UPSC after perusal of the particulars of service along with the character roll and bio-data of the petitioner, who was the only eligible officer considered to the post of Assistant Manager in Vidhi Sahitya Prakashan in the Legislative Department of Law and Justice, did not recommend him for appointment after holding talks with him on 4.11.1996. The UPSC had advised the respondent for taking action for filling up the post of Assistant Manager (Business) as per the provision contained in the Recruitment Rules. Merely because the petitioner was subsequently recommended by UPSC for being regularly promoted to the post of Assistant Manager (Business) in the year 1988, the same would not relate back to the date of initial ad hoc appointment of the petitioner to that post, particularly when the candidature of the petitioner was considered and rejected by UPSC in the year 1996. The same cannot be equated with a situation where the incumbent is considered for appointment in accordance with the Rules, but appointed on ad hoc basis which is then continued without any explanation from the employer, and subsequently the incumbent is found eligible and suitable for promotion to the post on a regular basis on which he has been officiating. The express rejection of the petitioner's candidature by the UPSC in 1996 is staring him in the face.

14. In our view the Tribunal was right in rejecting the

submission of the petitioner that his case is covered by the principles set out in para (B) of para 47 of the decision in **Direct Recruits** (*supra*). In fact the case of the petitioner is squarely covered by the corollary to the principle set out in paragraph (A) of para 47 of the said judgment which has already been set out hereinabove. In **Dr. Anuradha Bodi's** case (*supra*), relied upon by the respondent, the petitioners were appointed as General Duty Medical Officers Grade II between 1982 to 1985 on ad hoc basis and on being selected by UPSC were appointed in regular basis w.e.f. 27.6.1991. The Supreme Court applied the corollary in Conclusion(A) in the case of **Direct Recruits** (*supra*) and held that the petitioners initial appointment being ad hoc, they were not entitled to regularisation from the initial date of their appointment. We find that the facts of that case are very similar to those of the present case. The appointment letter in **Dr. Anuradha Bodi** (*supra*) also stated that the appointment was ad hoc and the continuance of ad hoc appointment was for a limited period or till such time the posts are filled up on regular basis, whichever is earlier. The Supreme Court referred to its decision in **State of West Bengal Vs. Aghore Nath Dey**, (1993) 3 SCC 371, wherein the apparent contradiction in corollary to Conclusion (A) and Conclusion (B) of the Supreme Courts decision of **Direct Recruit** (*supra*) was explained in the following words:-

“22. There can be no doubt that these two conclusions have to be read harmoniously, and conclusion (B) cannot cover cases which are expressly excluded by conclusion (A). We may, therefore, first refer to conclusion from the date of

initial appointment and not according to the date of confirmation, the incumbent of the post has to be initially appointed 'according to rules'. The corollary set out in conclusion (A), then is, that 'where the initial appointment is only ad hoc and not according to rules and made as a stopgap arrangement, the officiation in such posts cannot be taken into account for considering the seniority'. Thus, the corollary in conclusion (A) expressly excludes the category of cases where the initial appointment is only ad hoc and not according to rules, being made only as a stopgap arrangement. The case of the wit petitioners squarely falls within this corollary in conclusion (A), which says that the officiation in such posts cannot be taken into account for counting the seniority.

23. This being the obvious inference from conclusion (A), the question is whether the present case can also fall within conclusion (B) which deals with cases in which period of officiating service will be counted for seniority. We have no doubt that conclusion (B) cannot include, within its ambit, those cases which are expressly covered by the corollary in conclusion (A), since the two conclusions cannot be read in conflict with each other.

24. The question, therefore, is of the category which would be covered by conclusion (B) excluding therefrom the cases covered by the corollary in conclusion (A).

25. In our opinion, the conclusion (B) was added to cover a different kind of situation, wherein the appointments are otherwise regular, except for the deficiency of certain procedural requirements laid down by the rules. This is clear from the opening words of the conclusion (B), namely, 'if the initial appointment is not made by following the procedure laid down by the 'rules' and the latter expression 'till the regularisation of his service in accordance with the rules'. We read conclusion (B), and it must be so read to reconcile with conclusion (A), to cover the cases where the initial appointment is made against an existing vacancy, not limited to a fixed period of time or purpose by the appointment order itself, and is

made subject to the deficiency in the procedural requirements prescribed by the rules for adjudging suitability of the appointee for the post being qualified in every manner for a regular appointment on the date of initial appointment in such cases. Decision about the nature of the appointment, for determining whether it falls in this category, has to be made on the basis of the terms of the initial appointment itself and the provisions in the rules. In such cases, the deficiency in the procedural requirements laid down by the rules has to be cured at the first available opportunity, without any default of the employee, and the appointee must continue in the post uninterrupted till the regularisation of his service, in accordance with the rules. In such cases, the appointee is not to blame for the deficiency in the procedural requirements under the rules at the time of his initial appointment, and the appointment not being limited to a fixed remaining procedural requirements of the rules being fulfilled at the earliest. In such cases all appointee is not to blame for the initial appointment, and the appointment not being limited to a fixed period of time is intended to be regular appointment, subject to the remaining procedural requirements of the rules being fulfilled at the earliest. In such cases also, if there be any delay in curing the defects on account of any fault of the appointee, the appointee would not get the full benefit of the earlier period on account of his default, the benefit being confined only to the period for which he is not to blame. This category of cases is different from those covered by the corollary in conclusion (A) which relates to appointment only on ad hoc basis as a stopgap arrangement and not according to rules".

15. After reading the explanation given by the Supreme Court in **Aghore Nath** (supra), there can be no manner of doubt that the petitioner's case falls in Corollary (A) to the principle set out in para A and is not covered by the principles set out in para B of para 47 of **Direct Recruit** (supra). It is because his initial appointment was not according to the Rules and was merely an ad hoc appointment as a

stop gap arrangement. To the same effect is the decision of the Supreme Court in **Swapan Kumar Pal** (*supra*).

16. The decision of the Supreme Court in **T.Vijayan & Ors.** (*supra*) relied upon by the petitioner does not apply to the facts of the present case for the reason that the rules in question permitted ad hoc promotion pending regular selection. Regular selection took sufficient time and in the meantime about 140 Railway servants were promoted **after due selection**. The issue that arose was as to whether such promotees would be entitled to count their seniority from the date of their ad hoc promotion in competition with the claim of seniority of the direct recruits whose process of direct recruitment was started during the pendency of the process of regular appointment, but after the making of the ad hoc promotion of the respondents. In these circumstances, the Supreme Court took the view that the ad hoc promotees, **whose promotion was according to the Rules**, were entitled to get the benefit of seniority from the date of their initial ad hoc appointment.

17. We may also refer to the decision of the Supreme Court in **Dr. M. A. Haque & Ors V. UOI**, JT 1993(2) Sc 265. In para 8 of the said decision, the Supreme Court inter alia, observed as follows:-

“8. Since the petitioner-applicants are admittedly not regularly appointed through the UPSC according to the rules but have been directed to be regularised by following the procedure laid down by this Court, it is obvious that they are not appointed to their posts according to the rules. Under no circumstances,

therefore, they fall within the scope of guideline [A] laid down in *Direct Recruit Class II Engineering Officers' Association's case* [supra]. In fact they do not fall under guideline [B] given therein either, since their regularisation is not in accordance with the rules but as a consequence of special procedure laid down by this Court. The expression "in accordance with the rules" or "according to rules" used in the said guidelines [A] and [B] means the rules of recruitment and not the special procedure laid down by this Court....."

18. For our aforesaid reasons, we find no merit in this petition and dismiss the same leaving the parties to bear their respective costs.

(VIPIN SANGHI)
JUDGE

(A.K. SIKRI)
JUDGE

May 02, 2008
RSK/AS