

## **Reportable**

**\* IN THE HIGH COURT OF DELHI AT NEW DELHI**

**+ W.P.(C) No.1482 of 2001**

**% Judgment Reserved On: 15<sup>th</sup> September, 2011**  
**Judgment Pronounced On: 18<sup>th</sup> November, 2011**

SHRI I.P. DHAWAN

. . . PETITIONER

Through: Mr. R.V. Sinha and Mr. A.S.  
Singh, Advocates.

VERSUS

GOVT. OF NCT OF DELHI & ORS.

. . . RESPONDENTS

Through: Mr. J.C. Malik, Advocate for R-  
5.  
Ms. Barkha Babbar, Advocate  
for R -1 to 4.

### **CORAM :-**

**HON'BLE MR. JUSTICE A.K. SIKRI**

**HON'BLE MR. JUSTICE SIDDHARTH MRIDUL**

1. Whether Reporters of Local newspapers may be allowed to see the Judgment?
2. To be referred to the Reporter or not?
3. Whether the Judgment should be reported in the Digest?

### **A.K. SIKRI, J.**

1. The petitioner belongs to Delhi Administration Subordinate Service (hereinafter referred to as 'DASS'). In the year, 1986, he was working in various Departments of erstwhile Delhi Administration. In the Jail Department, some vacancies for the posts of Assistant Superintendents were

created and the Service Department vide letter No.F.10(2)(84)-SIIP dated 17.4.1986 asked for nomination from amongst the members of DASS for selection to the said posts. On the basis of Annual Confidential Report (ACR) dossiers and interview, 24 certain officials including the petitioner were selected for the post of Assistant Superintendent (Jail) against the newly created posts vide order dated 19.6.1986. The petitioner was, at that time, in the pay scale of ₹330-560/- and on promotion, he was placed in the pay scale of ₹425-700/-, which was attached to the post of Assistant Superintendent. The pay of the petitioner was fixed vide letter dated 12.8.1986 in the said pay scale under FR 22(1).

2. The case of the petitioner that he was selected on promotion basis, although he was not in the feeder cadre for promotion to the aforesaid post. Still he was promoted in relaxation of Rule which was permissible as per Note – 4 appended to the extant Recruitment Rules.
3. In July, 1989, eleven vacant posts of Assistant Superintendent were filled up by direct recruitment. The petitioner along with other officials who were given *ad hoc* promotion kept on working in the said position and this *ad*

*hoc* promotion was extended from time to time. However, sometime in December, 1989, they were asked to exercise their option. However, it was on the condition that they will not claim benefit of past services for the post of seniority. 13 Assistant Superintendents including the petitioner signed the declaration to this effect and on that basis, these persons were absorbed in the DASS cadre. However, thereafter, the petitioner along with others made representation dated 26.5.1993 for counting their seniority from the date of initial appointment, which was rejected. Obviously, as the petitioner was not given seniority from the date of initial appointment, but from the date of absorption, all such persons including the petitioner were ranked junior to the Assistant Superintendents, who were appointed by way of direct recruitment in the year 1989 and also in 1990 and 1992. Challenging the action of the official respondents in rejecting their requests, the petitioner approached the Tribunal, but the Tribunal dismissed his OA vide impugned orders dated 27.12.2000.

4. Perusal of the order would reveal that the factor, which is weighed with the Tribunal is that the petitioner was appointed as an Assistant Superintendent in 1986 purely on

*ad hoc* basis when he did not even fulfil the eligibility conditions in the Rules. The Tribunal, thus, followed Constitutional Bench judgment of the Supreme Court in the case of **Direct Recruit Class II Engg. Officers' Asscn. Vs. State of Maharashtra** 1990 (2) SC 264 as explained by a subsequent judgment of the Supreme Court in the case of **State of W.B. and Others Vs. Aghore Nath Dey and Others** (1993) 3 SCC 371 and held that when the initial appointment could not be made as per rules, the petitioner was entitled to count the seniority for the said period. In the process, following facts were also noted by the Tribunal:

"6. As in the present case, applicants' initial appointment as Asstt. Supdt. (Jail) by order dated 19.6.86 was specifically limited to the period till regular incumbents became available, notwithstanding that they worked continuously as Asstt. Supdts. (Jail) till they were permanently absorbed vide order dated 31.7.92, they would be hit by the corollary to proposition 'A' of the Direct Recruits' case (*supra*) and would therefore not be entitled to count their seniority from 19.6.86."

5. Before we advert to the arguments of the counsel for the petitioner challenging the aforesaid decision, it would be appropriate to take note of the relevant Rules and the nature of appointment of the petitioner.
6. As per the Recruitment Rules, the post of Assistant Superintendent (Jail) is a selection post for which essential

educational qualification is a degree from a recognized University. There are essential physical standards for female and male candidates also prescribed. 25% of the posts are to be filled up by the promotion, failing which by the direct recruitments and 75% by direct recruitments failing which by deputation. For promotion, feeder cadre is Head Warders/Head Matrons who should have five years regular service in the grade with ten years regular service as Warder/Matron. For those who are recruited by way of transfer or deputation, it is prescribed that such officials should be holding analogous or similar post in the present department of other States.

7. It is an admitted case of the parties that the petitioner and others who were appointed on *ad hoc* basis in the year 1986, did not fulfil the aforesaid qualifications. In fact, they were not working in Jail Department, but various other Departments. No doubt, there was paucity of Assistant Superintendents in Jail Department and for this purpose, the official respondents wanted the willingness of those officials working in other Department to come and man the posts of Assistant Superintendent (Jail) and pursuant thereto, the petitioner and other respondents joined the services here.

At the same time, however, they were taken Assistant Superintendents (Jail) by way of interim measure till appointments are made from regular incumbents. That is very clearly provided in orders dated 19.6.1986 vide which the petitioner was selected for the post of Assistant Superintendent (Jail). At that time, he was working as Junior Accountant in Pay and Accounts office and the order dated 19.6.1986, *inter alia*, provided following conditions:

"These officials will hold the post till the appointments are made from the regular incumbents."

It was also specifically provided that the officials will not be entitled for any seniority. This *ad hoc* arrangement was extended vide orders dated 26.11.1987 on same terms and conditions.

8. Admittedly, when certain other persons were appointed by way of recruitment in the years 1989, 1990 and 1992, the petitioner was still continuing on *ad hoc* basis which could be possible only because of the reason that certain more posts were still lying vacant. This was also the reason for which steps were taken to absorb these persons as Assistant Superintendent (Jail) and the petitioner with some other persons were absorbed in these posts which occurred

sometime in the year 1992. That too when these 13 Assistant Superintendents had given categorical declaration that they would be opting for absorption in Jail Department and would leave the DASS cadre without claiming any benefit of past services for the purpose of seniority. On these facts, it is clear that normally, the petitioner would not be entitled to benefit for past services having regard to the Constitution Bench judgment of the Supreme Court in ***Direct Recruit Class II Engg. Officers' Assn. (supra)***.

9. Notwithstanding the aforesaid position , the contention of the learned counsel for the petitioner is that when the petitioner was initially appointed on *ad hoc* basis to the post of Assistant Superintendent (Jail) vide orders dated 19.6.1986, the Selection Committee had relaxed the essential educational qualification and physical standards as prescribed in the Rules. Further, when the case of the petitioner and other persons were processed for absorption, the same was in recognition of service rendered by them. Therefore, the past service should be counted. In support, the learned counsel referred to the judgment of the Supreme Court in the case of ***State of U.P. & Ors. Vs. Dr. Deep Narain Tripathi & Ors.*** JT 1996 (4) S.C. 320 and submitted

that when *ad hoc* service was followed by regular service, in relaxation of the provision, the petitioner's past service should be counted.

10. We are not impressed with the aforesaid arguments. Learned Tribunal has rightly applied the ratio of Constitutional Bench judgment in ***Direct Recruit Class II Engg. Officers' Assocn. (supra)***. After discussing the issue, the Supreme Court summarized the position in para 44 as under:

"44. To sum up, we hold that:

(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.

(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.

(C) When appointments are made from more than one source, it is permissible to fix the ratio for recruitment from the different sources, and if rules are framed in this regard they must ordinarily be followed strictly.

(D) If it becomes impossible to adhere to the existing quota rule, it should be substituted by an appropriate rule to meet the needs of the situation. In case,

however, the quota rule is not followed continuously for a number of years because it was impossible to do so the inference is irresistible that the quota rule had broken down.

(E) Where the quota rule has broken down and the appointments are made from one source in excess of the quota, but are made after following the procedure prescribed by the rules for the appointment, the appointees should not be pushed down below the appointees from the other source inducted in the service at a later date.

(F) Where the rules permit the authorities to relax the provisions relating to the quota, ordinarily a presumption should be raised that there was such relaxation when there is a deviation from the quota rule.

(G) The quota for recruitment from the different sources may be prescribed by executive instructions, if the rules are silent on the subject.

(H) If the quota rule is prescribed by an executive instruction, and is not followed continuously for a number of years, the inference is that the executive instruction has ceased to remain operative.

(I) The posts held by the permanent Deputy Engineers as well as the officiating Deputy Engineers under the State of Maharashtra belonged to the single cadre of Deputy Engineers.

(J) The decision dealing with important questions concerning a particular service given after careful consideration should be respected rather than scrutinized for finding out any possible error. It is not in the interest of Service to unsettle a settled position."

11. We are concerned herewith Principle (A) and (B). Learned counsel for the petitioner wants the application of principle (B) and submits that the petitioner was appointed as per the Rules as Rules were relaxed and therefore, even when the

appointment was on *ad hoc* basis, initial appointment was not made as per Rules, but he continued the post uninterrupted till relaxation of service in accordance with the Rules, the period of *ad hoc* service should be counted. This very judgment is explained by the Supreme Court in **Aghore Nath Dey (supra)**. In that case also, *ad hoc* service was also followed by regular service. However, the *ad hoc* appointment was made in violation of Rules. The Court explained that in such a circumstance, benefit of *ad hoc* service is not admissible. Contention of the petitioner that once relaxation of Rule permitted and the conditions relaxed, the appointment should be treated as per Rules, is totally misconceived in the facts of this case. Note – 4, which empowers the administrator reads as under:

“Whether the Administrator is of the opinion that it is necessary or expedient so to do, he may, by order for reasons to be recorded in writing relax any of the provisions of the rules with respect to a class or category of persons/posts.”

12. As already pointed out above, the post can be filled up by direct recruitment or promotion or transfer or deputation. The petitioner's case was not by way of direct recruitment; it was not by way of promotion either, as the petitioner did not belong to the feeder cadre. In case of transfer or

deputation, it could be only an official is holding an analogous or similar post in the present department of other states. It is here where relaxation in rules is to be read in that context. In the present case, the petitioner and others belong to DASS and not Jail cadre. There was no question of relaxation. They were brought as Assistant Superintendent (Jail) because of lack of man-power. In normal case, the petitioner and other persons could not have been appointed as Assistant Superintendent (Jail) in any circumstances and even after relaxation. Only because they worked for some years, they were given option to be absorbed. In a case like this, question of counting of *ad hoc* service would not even arise.

13. In view of these facts prevailing in the present case, judgment of ***Dr. Deep Narain Tripathi (supra)*** as relied upon by the petitioner would have no application. This writ petition is devoid of any merit, which is accordingly dismissed.

**(A.K. SIKRI)**  
**JUDGE**

**(SIDDHARTH MRIDUL)**  
**JUDGE**

**NOVEMBER 18, 2011**  
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