

(1996) 10 GAU CK 0004

Gauhati High Court

Case No: C.R. No. 311 of 1998

Mihir Lal Choudhuri and Others

APPELLANT

Vs

State of Tripura and Others

RESPONDENT

Date of Decision: Oct. 18, 1996

Acts Referred:

- Constitution of India, 1950 - Article 14, 16

Citation: (1998) 3 LLJ 658

Hon'ble Judges: N.S. Singh, J

Bench: Single Bench

Advocate: S. Roy, for the Appellant; G.C. Chakraborty, B. Choudhuri and S. Das, for the Respondent

Final Decision: Partly Allowed

Judgement

N.S. Singh, J.

An order of promotion dated December 16, 1988 of Shri Ajit Kumar Gupta and Shri Ajit Kumar Debnath, the fourth and Fifth respondents in this case, to the post of Superintending Engineer (Electrical) under Power Department, Government of Tripura on ad hoc basis for a period of six months from the date of taking over the charges or till the post is filled upon regular basis, whichever is earlier as well as thermal seniority list of Executive Engineers (Electrical) under the Power Department, Government of Tripura, published on December 16, 1988, placing the names of the Respondents No. 4 to 6 over the three petitioners and also the order of regular appointment of the fifth and sixth respondents to the post of Superintending Engineer (Electrical), appointment of the fourth respondent to the post of Additional Chief Engineer (Electrical) on ad hoc basis, are the main subject matters challenged in the present writ petition.

2. According to the petitioners, they are degree holders in Electrical Engineering and they were appointed as Assistant Engineers (Electrical) as direct recruits through

Tripura Public Service Commission and subsequently they were promoted to the rank of Executive Engineer (Electrical) and that they are all eligible for promotion to the post of Superintending Engineer (Electrical) on the basis of their past meritorious and satisfactory services and also in accordance with their seniority. It is also the case of the writ petitioner that on the basis of the merit list prepared by a duly constituted Departmental Promotion Committee on January 21, 1981 for appointment to the post of Executive Engineer (Electrical) on regular basis, they are more meritorious than the Respondents No. 4, 5, 6 and 7.

3. In 1982, Public Works Department, Government of Tripura, published a tentative seniority list of the Executive Engineers (Electrical) as in Annexure-A to the writ petition, wherein the names of the petitioners appear at serial Nos. 8, 9 and 10 respectively and whereas the names of the Respondents No. 4, 5, 6 and 7 appear at serial Nos. 12, 14, 16 and 18. According to the writ petitioners, because of promotions, retirements and resignation of serving Executive Engineers (Electrical), the petitioners No. 1, 2 and 3 should be listed at serial No. 1, 2 and 3 in the relevant seniority list of Executive Engineers (Electrical) on the basis of merit list. However, the Respondents No. 1 to 3 have taken hasty steps to modify the seniority position as in the said tentative seniority list and have surreptitiously passed an order on December 16, 1988, behind the back and knowledge of the petitioners thereby placing the Respondents No. 4, 5 and 6 above the petitioners and on the very same day by another order of December 16, 1988, the said Respondents No. 4 and 5 have also been promoted to the post of Superintending Engineer (Electrical) on ad hoc basis without considering the case, of the writ petitioners for such promotion. The writ petitioners went on to state that the fourth respondent, Shri Ajit Kumar Gupta filed a writ petition before this Court being Civil Rule No. 127 of 1981 for a direction to the authority concerned for placing him above the present writ petitioners in the seniority list of Executive Engineers (Electrical). But the said case was dismissed as being infructuous on January 9, 1989.

4. As soon as the tentative seniority list as in Annexure-A to the writ petition, was published on January 3, 1982, the fourth respondent also filed a petition under Misc. Case No. 170 of 1982 in connection with Civil Rule No. 127 of 1981 before this Court praying for injunction restraining the respondent State from preparing/finalising the seniority list of Executive Engineers (Electrical)", and accordingly, this Court passed an order on July 8, 1982, restraining the State respondent from preparing/finalising the said seniority list. Thereafter, the State Respondent filed another petition being Civil Misc. Case No. 1369 of 1987 before this Court for vacating the said injunction order and later on this Court passed an order on December 2, 1987 vacating the order of injunction of July 8, 1982, thereby allowing the State respondent to prepare/finalise the seniority list of the Executive Engineers (Electrical). It is also further contended by the writ petitioners in their writ petition that unusually the fourth and fifth respondents have been given appointment and promotion to the post of Superintending Engineer (Electrical) by an order dated December 16, 1988 as

in Annexure-E to the writ petition, on ad hoc basis without considering the case of the writ petitioners and that the respondent Government also finalised the seniority list of Executive Engineers (Electrical) on the same day of the order of promotion of the fourth and fifth respondents changing the seniority position of the Executive Engineers (Electrical) as on July 3, 1982, without any justification. According to the writ petitioners, the appointment of the fourth and fifth respondents to the post of Superintending Engineer (Electrical) is an appointment under back door policy and the respondent Government had violated its own office Memorandum dated December 1, 1988, as in Annexure-B to the writ petition, wherein the respondent Government specifically directed that ad hoc appointments should not be resorted to normally and only in case of urgency ad hoc appointments may be made after intimating the Appointment & Services Department of the Government of Tripura for not finalising the recruitment rules and since there is already rules for recruitment to the post of Superintending Engineer, (Electrical), no appointment on ad hoc basis should be made. Moreover the Respondents No. 1 to 3 had also made unusual favouritism to the fourth and sixth respondents most illegally thereby appointing them on promotion on ad hoc basis to the post of Additional Chief Engineer (Electrical) and Superintending Engineer (Electrical) respectively under orders of June 25, 1993, as in Annexures-H & I respectively to the writ petition. Similar thing had happened in the Cases of fourth and fifth respondents, who have been given appointment to the post of Superintending Engineer (Electrical) on regular basis most illegally under a Government order/ Notification dated July 30, 1990 as in Annexure-G to the writ petition. Over and above this, the third respondent issued a Notification on March 4, 1989, as in Annexure-C to the writ petition, whereby the seventh respondent, Shri Achinta Ghosh Roy has been afforded regular appointment in the post of Executive Engineer (Electrical) on regular basis w.e.f. September 6, 1980 (afternoon) and on the same date the respondent Government had amended the final seniority list of the Executive Engineers. (Electrical) making the said seventh respondent, Shri Achinta Roy Ghosh as senior to the writ petitioners most illegally and arbitrarily as in Annexure-D to the writ petition, the writ petitioners contended. Hence, the petitioners made the prayer in the writ petition for setting aside those orders as in Annexures-C, D, E, F, G, H and I.

5. Shri S. Roy, the learned counsel for the petitioners at the very outset contended that the seniority of the petitioners and that of the Respondents No. 4, 5, 6 and 7 in the grade of Executive Engineer (Electrical) should be fixed and determined on the basis of the merit list prepared by a duly constituted competent Departmental Promotion Committee held on January 21, 1981 for appointment to the post of Executive Engineer (Electrical) on regular basis as in Annexure-F to the writ petition. Shri Roy also submitted that in view of the tentative seniority list of the Executive Engineer (Electrical) published on July 3, 1982, as in Annexure-A to the writ petition, the names of the petitioners appear at serial Nos. 8, 9 and 10 whereas the names of

the Respondents No. 4, 5, 6 and 7 appear at serial No. 12, 14, 16 and 18 in the said seniority list and moreover, in view of the seniority position of the writ petitioners as well as the private respondents as in Annexure F to the writ petition, the writ petitioners were expecting that the tentative seniority list as in Annexure-A to the writ petition would be made final keeping the position shown in the said tentative seniority list intact. According to Mr. Roy, the Notification/ impugned order of March 4, 1989, as in Annexure-C to the writ petition, treating and declaring the Respondent No. 7, Shri Achinta Ghosh Roy, to have been appointed to the grade of Executive Engineer (Electrical) on regular basis w.e.f. September 6, 1980 (afternoon) and placing his seniority position at serial No. 7 above the writ petitioners, is absolutely illegal order and the same is violative of Articles 14 and 16 of the Constitution of India. It is also submitted by Mr. Roy that in view of the Government Office Memorandum dated December 1, 1988 as in Annexure-B to the writ petition, the ad hoc appointments should not be resorted to but the respondent Government had given appointment to the Respondents No. 4 and 5 to the post of Superintending Engineer (Electrical) on promotion on ad hoc basis by an order dated December 16, 1988, as in Annexure-E to the writ petition, and subsequently they have been given regular appointment to the said post of Superintending Engineer (Electrical) under a Government order of July 30, 1990, as in Annexure-G to the Writ petition. According to Mr. Roy, it is an unusual favouritism to the Respondents No. 4 and 5 and it is a clear case of discrimination meted out by the respondent Government in the matter of promotion. The ad hoc appointment of fourth respondent, Shri Ajit Kumar Gupta to the post of Additional Chief Engineer (Electrical) under a Government Order of June 25, 1993, as in Annexure-H to the writ petition, as well as the appointment of the sixth respondent, Shri Rupak Roy Barman to the post of Superintending Engineer (Electrical), as in Annexure-1 to the writ petition, are liable to be struck down for being violative of Articles 14 and 16 of the Constitution of India, Mr. Roy contended.

6. In support of his contention, Mr. Roy relying on a decision of the Apex Court, rendered in [A.K. Bhatnagar and Others Vs. Union of India \(UOI\) and Others](#), submitted that the Respondents No. 4, 5 and 6, whose past ad hoc services cannot be taken into account in computing inter se seniority since they remained out of the cadre until their regularisation. Mr. Roy also drew my attention to a decision of the Apex Court rendered in J. & K. Public Service Commission and Ors. v. Dr. Narinder Mohair and Ors., reported in 1994 LLJ 780 wherein, the Apex Court held that regularisation of ad hoc appointees without being subjected to open competitive examination to be held by Public Service Commission, purportedly done in relaxation of recruitment rules and in violation of statutory rules is invalid and ultra vires of the rules. Relying upon these two decisions, Shri Roy, the learned counsel for the petitioners submitted that the impugned orders of ad hoc appointments dated December 16, 1988 and June 26, 1993, appointing the Respondents No. 4, 5 and 6 respectively to the post of Superintending Engineer (Electrical), are liable to be

set aside as the same are violative of relevant recruitment rules.

7. In reply, Mr. G.C. Chakraborty, the learned senior counsel for the Respondents No. 4, 5, 6 and 7 submitted that the particulars given in the tentative seniority list, as in Annexure-A to the writ petition are correct and as such the writ petitioners have no ground to challenge the seniority after admitting its correctness, particularly the material dates figuring in the list. According to Mr. Chakraborty, the dates of promotions of the petitioners as well as the private respondents of the post of Executive Engineer (Electrical) were properly reflected in the impugned final seniority list as in Annexure-E to the writ petition and as such the impugned final seniority list is an attempt to remove the apparent anomalies of the seniority position of the incumbents appearing in the tentative seniority list. Therefore, there is no irregularity or illegality in the impugned final seniority list, Mr. Chakraborty contended. Mr. Chakraborty further contended that the recommendations of the said Departmental Promotion Committee as in Annexure-F to the writ petition, have not been accepted by the Government for the following reasons :-

a) According to the CCR the DPC should consider yearwise candidates for different years and not at a lot and clubbing all of them together;

b) In the instant case of Asstt. Engineers (Electrical) DPC has violated these rules;

c) The DPC has not followed these principles although these principles were adopted by the DPC in October, 1980 while it considered the promotion case for Asstt. Engineers (Civil) and thereby adopted double standard and infringed Article 14 of the Constitution;

d) Mixing up of Eligible candidates of 3 years together for consideration for promotion is against law and Constitution. In the instant case candidates eligible for promotion for the years 1979, 1980, 1981 were considered together when each year there were vacancies against substantive posts. Thereby inequals have been made equals by D.P.C. violating constitutional guarantee under Articles 14 and 16;

e) As the D.P.C. did not do what their duty required them to do it was void recommendation.

8. According to Mr. Chakraborty, the petitioners were in 1979, in 1980 and in a portion of 1981 under the Respondents No. 4 to 7, who were all acting as Executive Engineer (Electrical) at the relevant time and as such the petitioners as Assistant Engineers (Electrical) were given in ACR "very good" by the Respondents No. 4 to 7 and the Executive Engineers (respondents No. 4 to 7) were given "good" by the Superintending Engineer (Electrical). Mr. Chakraborty went on to contend that the decision of the respondent Government is supported by the law declared by the Apex Court in a case between [Union of India, etc. etc. Vs. N.P. Dhamania, etc. etc.](#), in which the Apex Court held that recommendation of the Departmental Promotion Committee is advisory in nature, it is not binding on Appointing Authority, however,

the Appointing Authority must record reasons for differing from the recommendations and the said reasons need not be communicated to the concerned officers. It is also submitted by Mr. Chakraborty that the ad hoc appointment of the Respondents No. 4, 5 and 6 to the post of Superintending Engineer (Electrical) as well as the ad hoc appointment of the fourth respondent to the post of Additional Chief Engineer (Electrical), were made due to the exigencies of services and that such appointment under a policy decision of the Government is not liable to be interfered unless the Court is satisfied that the competent authority has acted arbitrarily in making such appointment.

9. Relying upon a decision of the Apex Court rendered in [Director, Lift Irrigation Corporation Ltd. and Others Vs. Pravat Kiran Mohanty and Others](#), Mr. Chakraborty submitted that the writ petitioners have no fundamental right to promotion and that there is only right to be considered for promotion and it is the authority, who is to examine the matter and decide the same in accordance with law. Therefore, the writ petitioners cannot claim for promotion to higher post as of right, Mr. Chakraborty contended.

10. It is well settled that the seniority shall be counted from the date of regularisation and not from the date of ad hoc appointment. This principle of law finds its place in a case between Excise Commissioner, Karnataka and Anr. v. V. Sreekanta, reported in 1993 LLJ 717 in which the Apex Court in paragraph 14 of its judgment held thus:-

"After-giving our anxious consideration to the respective contentions of the parties it appears to us that the writ petitioner/respondent, Sri V. Sreekanta, was appointed as a local candidate through Employment Exchange in view of the specific sanction of the Government for such ad hoc appointment. The terms of appointment in the context of sanction of the said posts by the Government, in our view, clearly demonstrate that such appointment of the said respondent and other employees in 1968 was ad hoc appointment given to local candidates being sponsored by the local Employment Exchange. It was only on October 26, 1971, the said respondent became eligible to be recruited in the said class III post, and such appointment/regularisation of his ad hoc appointment was made possible because of the framing of the said special rules of recruitment in 1970. In our view, Mr. Narasimha Moorthy is justified in his submission that the respondent was not entitled to claim seniority from, the date of his initial appointment on ad hoc basis but he was only entitled to claim seniority from the date of his subsequent appointment or regularisation under the said special rules of, recruitment in 1970. It appears to us that under Rule 3 of the said special rules of recruitment of 1970, the respondent, having possessed the minimum qualifications prescribed by the said special rules of recruitment for recruitment to Class III posts and the said respondent having been appointed on or after January 1, 1965 as a local candidate to a Class III post and having put in a continuous service of one year prior to

October 1, 1970, was eligible to be appointed under the said special rules of recruitment and the respondent was given such appointment with effect from October 26, 1971 under the said special rules of recruitment of 1970. The said respondent was entitled to be treated as direct recruit properly made under the said special rules of 1970 only from October 26, 1971 and the service rendered by him prior to the said date was only on the basis of ad hoc employment not made in accordance with the rules of recruitment. In the aforesaid circumstances, the decision of the Division Bench of the Karnataka High Court appears to be clearly erroneous and we have no hesitation in setting aside the same. Learned Single Bench of the Karnataka High Court, in our view, has rightly dismissed the writ petition and we affirm the said decision. The appeal is accordingly allowed without any order as to costs."

11. Regarding the "seniority", the Apex Court had laid down certain Principles of law to the extent that a junior employee superseding senior on merit basis and the subsequent promotion of senior not on merit basis, such senior cannot claim seniority over juniors who Were earlier promoted. This principle of law also finds its place in a case between State of U.P through the Secretary, U.P Vidhan Sabha, Lucknow, Appellant v. Onkar Nath Tandon and Ors., Respondents, reported in AIR 1993 SC 1171, wherein the Apex Court held thus :-

"if a junior supersedes a senior on merit basis his senior cannot claim seniority in the higher cadre on his being promoted at a subsequent date unless it is shown that he was left out from consideration on the earlier occasion when he ought to have been considered."

12. As discussed above, it is an admitted position that under Annexure-A to the writ petition, that is the tentative seniority list of Executive Engineers (Electrical), the date of regular appointment of the Petitioners No. 1, 2 and 3 to the post of Executive Engineer (Electrical) are shown as February 28, 1981, February 27, 1981 and February 25, 1981 respectively and whereas the dates of regular appointment of the Respondents No. 4, 5, 6 and 7 are shown as February 24, 1981, February 24, 1981, February 24, 1981 and February 25, 1981 respectively and the dates of ad hoc appointment of the Respondents No. 4, 5 and 6 to the post of Executive Engineer (Electrical) are shown as June 2, 1978, June 1, 1978 and October 31, 1978 respectively and whereas the date of ad hoc appointment of the seventh respondent in the post of Executive Engineer (Electrical) is not shown or reflected in the said tentative seniority list as in Annexure-A to the writ petition.

13. Applying, rather relying upon the decisions of the Apex Court mentioned above, the seniority of the petitioners as well as the Respondents No. 4 to 7 in the grade of Executive Engineer (Electrical) should be counted from the date of their regular appointment. Therefore, in my considered view, there is no illegality or irregularity in fixing the seniority of the Respondents No. 4, 5, 6 and 7 with that of the writ petitioners in the impugned final seniority list of December 16, 1988, as in

Annexure-E to the writ petition. So far the impugned order dated March 4, 1989, as in Annexure-C to the writ petition regularising the service of the seventh respondent Shri Achinta Ghosh Roy, in the post of Executive Engineer (Electrical) on regular basis with retrospective effect from September 6, 1980 (AN) is an illegal order inasmuch as he never served or worked as Executive Engineer (Electrical) on ad hoc basis at any point of time prior to his regular appointment to the post of Executive Engineer (Electrical) on February 25, 1981 and such appointment with retrospective effect is irregular appointment and the same is against the existing relevant: Recruitment Rules. Therefore, the fixation of his (Shri Achinta Ghosh Roy, the seventh respondent) seniority and placing him at serial No. 7 in the impugned order dated March 4, 1989, as in Annexure-D to the writ petition is also an illegal order.

14. For these reasons stated above, the impugned order of March 4, 1989, as in Annexure-D to the writ petition to the extent of placing the seventh respondent, Shri Achinta Ghosh Roy at serial No. 7 above the writ petitioners is declared illegal and void and, accordingly the same is set aside.

15. From the records, it has been revealed that the Respondents No. 4 to 6 have been placed over the petitioners on the basis of material facts admitted by the petitioners, particularly on the basis of the dates of their regular appointment in the Grade of Executive Engineer (Electrical) and that the promotion of the fourth and fifth respondents have been made on exigency of services on ad hoc basis on the basis of seniority. From the records, it is also further revealed that the writ petitioners did not challenge the validity of the regular appointment of the Respondents No. 4, 5 and 6 in the post of Executive Engineer (Electrical) on and from February 24, 1981, February 24, 1981 and February 24, 1981, but not to speak of their retrospective appointment on and from August 30, 1979, August 30, 1979 and January 1, 1980.

16. In that view of the above position, the Respondents No. 4 and 5 by virtue of their regular Appointment with effect from the dates stated above they are eligible for promotion to the post of Superintending Engineer (Electrical) in 1986 as they have completed seven years of regular service as Executive Engineer (Electrical) under the relevant recruitment rules viz. The Tripura Power Engineering Services Rules, 1987. The method of recruitment to the post of Superintending Engineer (Electrical) is laid down under part-IV (C) of the said The Tripura Power Engineering Services Rules, 1987 and the same is quoted below ;-

"C) Superintending Engineer.

Recruitment to the posts of Superintending Engineer shall be made by promotion of Executive Engineer on the basis of "Selection" failing which by transfer on deputation.

An Executive Engineer possessing a degree in the appropriate branch of Engineering and having seven years regular service in the grade will be eligible for

promotion as Superintending Engineer.

Note :- For eligibility for promotion the Executive Engineers should have passed the Departmental Test Examination prescribed for the post of Executive Engineer."

17. It is also found that the sixth respondent, became eligible for promotion to the post of Superintending Engineer (Electrical) in 1987. Considering the seniority position, the ad hoc appointment to the post of Superintending Engineer (Electrical) was afforded to the fourth, fifth and sixth respondents and as such there is no illegality or infirmity in doing so by the competent authority under impugned orders of December 16, 1988 and June 25, 1993 as in Annexures-E & I respectively to the writ petition.

18. I have perused the relevant file being No. F.55 (30)-TPSC/89 dated July 26, 1990 relating to the proceedings of the concerned Departmental Promotion Committee, held on December 11, 1989 for selection of Executive Engineers (Electrical) of the Department of Power for Promotion as Superintending Engineer (Electrical). From the available materials on record, it has been revealed that three vacancies in the grade of Superintending Engineer (Electrical) for general category were available prior to 1986. In addition, two more vacancies in the rank of Superintending Engineer (Electrical) were also available due to increase of Cadre strength as per provision of Tripura Power Engineering Service Rules, 1987. Thus the total number of vacancies comes to five and out of five vacancies one is reserved for S.T. and one for S.C. In paragraph 4 of the Government of India's decision (i) below paragraph X.7 of appendix 29 of C.S.R. Vol-III speaks for preparation of yearwise panel by the Selection Committee where they have not met a number of years in case of promotion. As the Selection Committee could not meet for preparation of yearwise panel for a number of years for promotion to the grade of Superintending Engineer (E), the following procedures are to be followed by the Committee:

(i) Determination of the actual number of regular vacancies that arose in each of the previous year/years immediately preceding and the actual number of regular vacancies proposed to be filled in the current year separately.

(ii) Consideration in respect of each of the years those officers only who would be within the zone of consideration with reference to the vacancies of each year starting with the earliest year onwards.

(iii) Preparation of a "select list" for each of the years starting with the earliest year onwards.

(iv) Preparation of a consolidated "select list" by placing the select list of the earlier year above the one for the next and so on.

19. From the records it is also seen that the concerned Departmental Promotion Committee had followed the above procedures at the time of selection of the Executive Engineers (Electrical) for promotion to the post of Superintending

Engineer (Electrical) and accordingly the present fourth and fifth respondents including one Shri Ranjit Lodh have been recommended for promotion to the post of Superintending Engineer (Electrical) under Power Department, Government of Tripura and accordingly the respondent Government accepted the recommendation and issued the impugned order of July 30, 1990, as in Annexure-G to the writ petition. After proper application of my mind in this matter, I find no irregularity or incorrectness or impropriety in the impugned order of July 30, 1990 (Annexure-G to the writ petition.)

20. Under Service jurisprudence, it is not just and proper to allow an official/Govt. servant to hold a post on ad hoc basis continuously for a long period and years together without filling in the post on regular basis to the prejudice of the other eligible officials/Govt. servants for appointment to the said post on regular basis as per relevant Service Rules.

21. For the foregoing reasons, I am of the view that one post of Additional Chief Engineer (Electrical) and one post of Superintending Engineer (Electrical) are to be filled upon regular basis in accordance with the relevant Service Rules. In view of the above position, I direct the concerned respondents-Government to fill up the said posts of Additional Chief Engineer (Electrical) as well as Superintending Engineer (Electrical) on regular basis in accordance with the relevant Service Rules after considering the case of all eligible officers for that purpose within a period of 3 (three) months from today.

22. In the result, the impugned orders of March 4, 1989, as in Annexures-C and D to the writ petition, are set aside. But, the writ petitioners could not make out a case to justify the interference of the other impugned orders as in Annexures-E, G, It and to the writ petition.

23. With the above observation and direction, the writ petition is partly allowed. No costs.