

PETITIONER:
T. VIJAYAN AND ORS.

Vs.

RESPONDENT:
DIV. RAILWAY MANAGER AND ORS.

DATE OF JUDGMENT: 15/04/2000

BENCH:
D.P.Wadhwa, S.S.Ahmad

JUDGMENT:

S.SAGHIR AHMAD, J.

The dispute in the present appeals relates to the question of inter se seniority between direct recruits and promotees on the post of First Fireman working under the Divisional Railway Manager, South Central Railway, Hubli, Karnataka. Recruitment on the post of Fireman "A", as indicated in the Railway Establishment Manual, was to be made originally to the extent of 50 per cent by direct recruitment and remaining 50 per cent by promotion. Subsequently, the rule of recruitment was altered and it was provided that post of Fireman "A" would be filled up 100 per cent by promotion. On 15.11.1985, Railway Recruitment Board advertised 66 posts of Apprentice Fireman "A". The appellants applied for the posts and were ultimately selected by the Railway Recruitment Board. In 1988, they were appointed as Apprentice Fireman and were placed on two years' training. After completion of training, they were appointed as First Fireman on 18.7.1990 except appellants 10 and 28 who were absorbed on 20.10.1990 and 21.3.1991 respectively. Another direct recruit who has been arrayed as respondent No.148 in this appeal, was appointed on 5.9.1990. The process of recruitment to the other 50 per cent of vacancies by promotion was started sometime in April, 1987 and respondents 4 to 143 who were working as Fireman "B" were appointed, pending regular selection for promotion, on ad hoc basis, between 1987-1990. It may be mentioned here that pursuant to the recommendation of the Fourth Pay Commission, the posts of Fireman "A" and Fireman "B" were merged and designated as First Fireman while the post of Fireman "C" was redesignated as Second Fireman with effect from 1.1.1986 vide Notification dated 3.11.1987. In 1990, the appellants after completion of two years' training were appointed as First Fireman and were placed on probation. The process of selection for promotion on the post of First Fireman continued and as a result of that selection, respondents 4 to 143 were promoted and by order dated 18.1.1992, their ad hoc promotion was regularised with effect from 16.12.1991. On 11th of January, 1993, a provisional seniority list of First Fireman, as on 31.12.1992, was published wherein all the appellants were shown below the contesting respondents 4 to 143. This seniority list was challenged by the appellants before the Central Administrative Tribunal but the Tribunal by its impugned judgment dated 13.3.1996 dismissed the petition.

The Tribunal found that the placement of appellants below respondents 4 to 143 was perfectly valid. It is this judgment which is challenged before us in this appeal. Learned counsel for the appellants has contended that the appellants were appointed on the post of First Fireman in 1990 while the respondents 4 to 143 were regularised on the post of First Fireman by order dated 18.1.1992 and, therefore, the appellants would rank senior to respondents 4 to 143 in terms of para 302 of the Railway Establishment Manual. Learned counsel for the contesting respondents has contended that respondents who were subsequently selected for regular promotion had been promoted to the post of First Fireman in 1987 on ad hoc basis which was permissible under the Rules and the process of selection for making promotion on the post of First Fireman consumed sufficiently long time and on being ultimately selected for promotion, services of respondents 4 to 143 were regularised. They, it is contended, would be entitled to reckon their seniority on the post of First Fireman with effect from the date of their ad hoc appointment. The entire period of service for which they worked in ad hoc capacity will have to be counted towards seniority as these respondents could legally be promoted to the post of First Fireman in ad hoc capacity. Ad hoc promotions were permissible under the Railway Establishment Manual and, therefore, the promotion of respondents 4 to 143 to the post of First Fireman being in consonance with the provision of the Railway Establishment Manual would enure to the benefit of these respondents for purpose of determination of their seniority vis-a-vis the direct recruits. The only question which is involved in these appeals is whether respondents 4 to 143 are entitled to reckon the period of ad hoc service towards their seniority and whether they have been properly shown as senior to the present appellants and respondent No. 148 in the seniority list issued by the Railway Administration. From the facts as brought on record, it appears that prior to 1.1.1986, recruitment to the post of First Fireman was made in the following manner: "i. 50% of the vacancies filled by selection procedure from fireman B studied up to 8th standard and below 45 years of age. ii. 50% by Departmental Examination from all Fireman B and C who are Matriculate and have three years of Railway Service. iii. If the Departmental examination failed to provide enough Matriculate for the 50% quota, direct recruitment to be made through RRB." But, with effect from 1.1.1986, the post of First Fireman in the scale of Rs.950-1500 was to be filled up 100 per cent by promotion from amongst Second Fireman in the scale of Rs.825-1200. The shortfall, if any, was to be made good by direct recruitment through Railway Recruitment Board. These instructions were issued through the Railway Board's letter dated 3.11.1987. Pending issuance of this letter, the Headquarter Office of the South Central Railway, Secunderabad, issued instructions in April, 1987, that the vacancies of First Fireman in the scale of Rs.950-1500 shall be filled up by promoting Second Fireman in the scale of Rs.825-1200 purely on ad hoc and temporary basis. On the recommendations of the Fourth Pay Commission, which were given effect to from 1.1.1986, the cadres of Fireman 'A' and Fireman 'B' were merged and were re-designated as 'First Fireman' while the post of Fireman 'C' was redesignated as 'Second Fireman'. The appellants were appointed as Apprentice Fireman and deputed for training for a period of two years from 24.6.1988. After completion of two years' training, the appellants were subjected to suitability test and were posted as First Fireman in the scale of Rs.950-1500

vide letter dated 18.7.1990 issued by the Divisional Officer of the South Central Railways (Personnel Branch). This letter, relating to the absorption of the appellants on successful completion of the prescribed training, contains a note at the foot, that the absorption of the Apprentice Fireman on the post of First Fireman was subject to the conditions, inter alia, that : "Their absorption and seniority is subject to the outcome of the Application pending before CAT/Bangalore and finalisation of the selection to the post of First Fireman in progress." The appellants have also filed a copy of letter dated 22.10.1990 relating to the absorption of an Apprentice Fireman, P.P. Sailendran, and in this letter also, it is mentioned that his absorption was subject to the condition, inter alia, that : "(i) His absorption and seniority is subject to the outcome of the Application 430/421/90 pending before CAT/Bangalore and finalisation of the Selection to the post of First Fireman in progress." It is not disputed that all the appellants were individually issued similar letters and in all the letters, the above condition was clearly indicated. In the counter affidavit filed on behalf of the official respondents in this Court, it has been stated, inter alia, as under : "the petitioners were informed that their absorption and seniority would be subject to finalisation of selection to the post of I Fireman by promotion from departmental candidates which was under process." It is also to be noticed that the existing mode of recruitment which provided that "50 per cent of the vacancies were to be filled up by selection from amongst Fireman 'B' and the remaining 50 per cent were to be filled through departmental examination from amongst Fireman 'B' and 'C' who were Matriculates and had three years' regular service, while the shortfall, if any, was to be made good by direct recruitment", was altered in 1987 by the Railway Board by its letter dated 3.11.1987 and it was provided that the vacancies in the grade of First Fireman (Rs.950-1500) would be filled up cent per cent by promotion of Second Fireman (Rs.925- 1200), without any restriction as to age or qualification and the shortfall, if any, would be made good by direct recruitment through Railway Recruitment Board. Pending issuance of Railway Board's letter dated 3.11.1987, since the posts of First Firemen were needed to be urgently filled up in the exigencies of administration, the Headquarters Office of the South Central Railway issued instructions in April, 1987 to fill up those vacancies by promoting Second Fireman on ad hoc and temporary posts. While some of the respondents had already been appointed on ad hoc basis, the remaining came to be appointed in that capacity after the issuance of Railway Board's letter dated 3.11.1987 as regular selection was not immediately possible on account of non-availability of the respondents who were on duty as First Fireman "on line". In order to make regular selection on the post of First Fireman, the Selection Committee had to meet eighteen times on different dates between 31.5.1990 and 14.10.1991. Respondents 4 to 143 were consequently selected and their appointment on the post of First Fireman was regularised on 18.1.1992 with effect from 16.12.1991. Now, para 216 of the Railway Establishment Manual provides as under : "216. A. Ad hoc promotion against selection and non-selection posts :-- (i) Ad hoc promotions should be avoided as far as possible both in selection and non-selection posts, and where they are found inescapable and have to be made in the exigency of service, they should be resorted to only sparingly and only for a short duration of 3 to 4 months. The ad hoc promotion

should be ordered only from amongst senior most suitable staff. As a rule a junior should not be promoted ignoring his senior. (ii) The following further guidelines should be adhered to while ordering ad hoc promotions:- (a) In case of non-selection posts which are filled on the basis of seniority cum suitability while there is no provision for any lengthy waiting list. The processing involved being not unduly cumbersome or time consuming the post shall be filled after following the prescribed procedure quickly. When these posts are to be filled by trade test, this should be conducted systematically. Necessity for adhoc promotion is thus obviated. (b) In regard to selection posts, it is essential that all the selection should be conducted regularly as per extant instructions. While there is no objection to adhoc promotions being made in leave vacancy and short duration vacancy, ad hoc promotion against regular promotion should be made only after obtaining Chief Personnel Officer's approval. Proposal sent to Chief Personnel Officer for ad hoc promotion against regular vacancy should indicate detailed justification as to why regular selection could not be held. Chief Personnel Officer should keep record of having accorded approval to such ad hoc promotion and review the progress made in filling up these posts by selected persons every month. Chief Personnel Officer should also review selection to all posts afresh, whether such posts are controlled either at the Divisional level or at extra Divisional level. He should also keep the record of the categories where he has to approve ad hoc promotions and these records should be available to the Board's Officer on their visit to Railways. (Board's letter No. E(NG) II/81/RC-1/1 dated 1.4.1981) (c) Notification for adhoc promotions against selection posts should specifically include a remark to the effect that the person concerned has not been selected for promotion and that his temporary promotion gives him no right for regular promotion and that his promotion is to be treated as provisional. For the purpose of drawing his pay which should not be drawn for more than three months without General Manager specific sanction. The General Manager should issue provisional sanction for periods exceeding six months at a time and these powers should be exercised by the General Managers/Additional General Managers personally or by his senior Dy. General Manager. (Board's letter No. E(NG) 1-73-PM-1/222 dated 23.2.1974; E-55/PM-1/19/3 dated 11.1.1955; E(NG) I-79-PM 1-105 dated 26.4.79 & E(NG) I-77-PM 1-117 dated 17.10.77) (iii) In any case no second ad hoc promotion shall be allowed. (Board's letter NO. E(NG) 1-85/PM/5-III dated 23.8.1985)" The above para indicates that ad hoc promotion is permissible pending regular selection. Once ad hoc promotion is found to be permissible under the Rules and respondents 4 to 143 were promoted on ad hoc basis in the exigencies of service, pending regular selection, which, incidentally, took sufficient time as respondents 4 to 143 who were on official duty "on line" were not available at one point or at one time to facilitate the selection, the entire period of ad hoc service will have to be counted towards their seniority, particularly as all the respondents (4 to 143) were duly selected and their services were also regularised with effect from 16.12.1991 by order dated 18.1.1992. The concerned employees, including respondents 4 to 143 had already been alerted for the process of selection which had been started in 1988. While making direct recruitment against posts which were advertised in 1985, it was given out to the present appellants that their absorption and seniority was subject,

inter alia, to the finalisation of the selection to the post of First Fireman which was in progress. The appellants, as stated earlier, were selected in 1988 and were put on two years' training as Apprentice whereafter they were absorbed by order dated 18.7.1990 and were issued separate and individual appointment letters in which, it was clearly mentioned that their seniority was subject to the finalisation of the selection for promotion to the post of First Fireman which was in progress. The appellants, in this situation, cannot claim seniority over respondents 4 to 143 who had already been appointed to the posts of First Fireman on ad hoc basis and were after due selection regularised on those posts. This Court in Direct Recruit Class-II Engineering Officers Association & Ors. v. State of Maharashtra & Ors. (1990) 2 SCC 715 = 1990 (2) SCR 900 has laid down in principles (A) and (B) as under : "(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." Applying the above principles to the instant case, since respondents 4 to 143 were promoted on ad hoc basis, and that too in a situation where regular promotion was not immediately possible and since ad hoc promotion was permissible in view of Para 216 of the Railway Establishment Manual quoted above, they are clearly entitled to the benefit of ad hoc service rendered by them on the post of Fireman 'A' or 'First Fireman' for the purpose of reckoning their seniority vis-a-vis the appellants. It may be stated here that a 3-Judge Bench of this Court in State of West Bengal & Ors. v. Aghore Nath Dey & Ors. (1993) 3 SCC 371 considered the principles (A) and (B) as set out above and explained as under : "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 (A). It is clear from conclusion (A) that to enable seniority to be counted 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 stop-gap 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 writ 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. 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 cured at the time of regularisation, the appointee being eligible and 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 rule has to be cured at the first available opportunity, without any default of the employee and the appointee must continue in the post uninterruptedly 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 period of time is intended to be a regular appointment, subject to the remaining procedural requirements of the rules being fulfilled at the earliest."

In *Keshav Dev & Anr. v. State of U.P. & Ors.* (1999) 1 SCC 280 as also *Shri L. Chandrakishore Singh v. State of Manipur & Ors.* (1999) 8 SCC 287 = JT 1999 (7) SC 576, the Constitution Bench decision of this Court in *Direct Recruit Class-II Engineering Officers Association's case* (supra) was followed. In another decision in *Ajit Kumar Rath v. State of Orissa & Ors.* AIR 2000 SC 85 = JT 1999(8) SC 578, to which one of us (S.Saghir Ahmad, J.) was a party, the entire case law was reviewed and it was held that if the ad hoc promotion had been made in accordance with the service rules, the promotees would be entitled to reckon the period of ad hoc service towards their seniority. Learned counsel for the appellants has placed reliance upon a decision of this Court in *C.K. Antony v. B. Muraleedharan & Ors.* (1998) 6 SCC 630 and has drawn our attention to paragraph 6 on page 638. Having regard to the facts of this case and the Service Rules involved therein, the reliance on that decision is wholly misplaced as that decision does not answer the problem involved in the present case which, as pointed out above, is covered by the decisions already discussed above. The Tribunal has also found that according to the mode of recruitment, the shortfall, if any, in the post of First Fireman, which could not be filled up by promotion, would be filled up by direct recruitment and, therefore, direct recruits have to be placed below the promotees in the matter of seniority. This also appears to be reasonable. But since we have already held above that the promotion of respondents 4 to 143 was made in accordance with the Rules and they are entitled to reckon the period of ad hoc service on the post of First Fireman towards their seniority, we need not delve into that question any further. For the reasons aforesaid, we do not find any merit in these appeals which are dismissed, but without any order as to costs.