

REPORTABLE

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APEAL NO. 3620 OF 2009
(Arising out of SLP (C) No. 2848 of 2006)



State of Rajasthan and Ors.

...Appellants

Versus

Jagdish Narain Chaturvedi

....Respondent

WITH

Civil Appeal No. 3621/2009 @ SLP (C) No.23661/2003
Civil Appeal No. 3622/2009 @ SLP (C) No.24062/2003
Civil Appeal Nos. 3624-25/2009 @ SLP (C) No.24124-24125/2003
Civil Appeal No. 3626/2009 @ SLP (C) No.24750/2003

Civil Appeal No. 3627/2009 @ SLP (C) No.214/2004
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Civil Appeal No. 3631/2009 @ SLP (C) No.5654/2005
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J U D G M E N T

Dr. ARIJIT PASAYAT, J

1. Leave granted.
2. In these cases the State of Rajasthan had questioned correctness of the judgment rendered by different benches of the Rajasthan High Court allowing the Writ Petitions filed by the respondent in each case. The basic issue was whether ad hoc appointment or appointments on daily wage or work charge basis are appointments made to the cadre/service in accordance with the provisions contained in the recruitment rules contemplated by the Government Orders dated 25.1.1992 dated 17.2.1998. It is the stand of the appellants that they are not, while the respondents contend to the contrary. The cases at hand relate to the appointments made under the Rajasthan Subordinate Offices Ministerial Staff Rules, 1957 (in short the 'Ministerial Staff Rules'), the Rajasthan Engineering Subordinate Service (Irrigation Branch) Rules, 1967 (in short the 'Irrigation Branch Rules'), the Work Charged Employees Services Rules, 1964 (in short Work Charged Rules), the Rajasthan Agricultural Subordinate Service Rules, 1978 (in short the 'Subordinate Rules'), the Rajasthan Forest Subordinate Service Rules, 1963 (in short the 'Forest

Subordinate Rules'), Rajasthan Panchayat Samiti and Zila Parishad Service Rules, 1959 (in short the 'Panchayat Service Rules') and the Rajasthan Secretariat Ministerial Service Rules, 1970 (in short the 'Ministerial Service Rules').

3. Stand of the appellants essentially is that the stagnation benefits are given from the date of regularization. It is submitted that this question has been decided in State of Haryana v. Haryana Veterinary & AHTS Association and Anr. (2000 (8) SCC 4). It is the stand of the State that the stagnation benefits are given since chance of promotion is not there. There is no question of any regularization if the proficiency test is not passed. Circulars relied upon by the employees refer to regular service.

4. In the Notification dated 29.3.1995 paras 3, 4 and 5 are of relevance. Para 3 refers to regular service while para 4 states about 10% of benefit to 10% to all the eligible employees and para 5 is the most crucial as it relates to the benefit being given after regular appointment. Initially, the period fixed was 15 years, later it was made to three different periods of 9 years, 18 years and 27 years. Subsequent Notification is dated 25.1.1992 which talks of

promotion. Obviously, the promotion has to be from the existing cadre in service.

5. Stand of the appellants is that the appointments can be related to the existing cadre/service and in case of ad hoc and work charge service there is no reference to any cadre. The recruitment rules specifically refer to existing cadre/service. This position is clarified by a Notification dated 3.4.1993. The crucial paragraph is para 3 which speaks of action being taken in accordance with the recruitment rules. By a Notification of 17.2.1998, all previous orders were superseded.

6. Stand of the appellants in essence is that the High Court confused regular appointment made to the cadre/service with appointment to the post. It is also submitted that if there was no regularization there was no scope for any promotion. With reference to Rule 25(4) it is submitted that the same relates to prospective employment as is evident from the expression “occurrence of vacancy”. Starting point therefore is when the employee is born in the cadre/service. Ad hoc employees had no right to the post.

7. It is submitted that though reference was made to 1992 circular the same was misread. Since it was a wrong decision there is no question of any negative equality.

8. Learned counsel for the respondent in each case on the other hand submitted that similar issues were decided earlier and the special leave petitions had been dismissed. Further, in the case of LDCs also, the State did not question the correctness of the decision.

9. A few provisions of the Rajasthan Absorption of Surplus Personnel Rules, 1969 (in short the 'Rules') need to be noted.

10. Rule 3(a) refers to ad hoc appointment and reads as follows:

“Ad hoc appointment means temporary appointment made without selection of the candidate by any of the methods of recruitment provided under the relevant service rules, or any orders of Government where no service rules exist and otherwise than on the recommendation of the Commission if the post is in its purview.”

11. It needs to be noted that there is no scope for raising an issue that executive instructions can override the rules. The law is to the contrary. The Notification dated 3.4.1993 speaks of “in accordance with recruitment rules”.

Clarification was necessary because of doubts regarding regular appointment. It is made clear that the period rendered in the existing cadre before regular employment in accordance with the relevant recruitment rules to the post is because of change of cadre the previous period is not counted so there is no question of giving the benefit to ad hoc employees and the appointment letters which were illustratively filed indicate that the appointments were till regular appointment was made. Ad hoc appointment is not made in terms of the requirements of the rules. The benefit is extended to avoid stagnation. In case of ad hoc employees, stagnation is till the regularization is made. The stress in the present case is on regular appointment to cadre/service. As rightly contended by learned counsel for the State, the High Court confused itself with appointment to post. The question of promotion arises only when appointment is a regular appointment. Appointment to the post is not relevant; on the other hand, what is relevant is the period relatable to the cadre of the service.

12. Rule 25(4) relates to prospective appointment as is clear from the expression 'occurrence'. Therefore, the starting point has to be as noted above, when the employee is born in the cadre, as observed by this Court in Dr. Chanchal Goyal (Mrs.) v. State of Rajasthan (2003 (3) SCC 485), Santosh Kumar and Ors. v. G. R. Chawla and others (2003 (10) SCC 513) and A.G.

Sainath Reddy v. Govt. of A.P. & Ors. (2003 (4) SCC 625). Ad hoc employee has no right to the post and ad hoc appointment does not count for the purpose of seniority.

13. The High Court has referred to the cases of the LDCs. It is clear on reading of the decision of the High Court that though the same was decided on the factual background of 1992 circular it mis-construed the same. Wrong decision does not create a right. There is no question of negative equality. (See Indian Council of Agricultural Research & Anr. v. T.K. Suryanarayan & Ors. (1997 (6) SCC 766), Gursharan Singh and Ors. v. New Delhi Municipal Committee and Ors. (1996 (2) SCC 459) and Chandigarh Administration and Anr. V. Jagjit Singh and Anr. (1995 (1) SCC 745). Methods of recruitment are in Rule 5. The standard procedure is contained in Rules 16 and 17. Rule 22 refers to the recommendation and Rule 23 relates to the appointment to the service. Rule 23 speaks of deemed regularization and after 7.11.1975 procedure has to be followed. Sub-Rule (9) is of considerable importance. It speaks of appointment on regular basis on availability of vacancy, the requirement to pass a performance test and the number of chances given for such post. Rule 27 speaks of appointment to the service. Rule 28 speaks of urgent temporary appointment when no post be filled up by direct recruitment or by promotion

immediately. There is no conceptual difference between the two. The High Court has equated them. The Haryana Veterinary case (supra) has been distinguished by the High Court saying that the appointment in this case was not de hors by relying of Rule 28. The decision is fundamentally wrong because the conceptual difference between Rule 23 and Rule 28 has been lost sight of. In paras 7, 9, 10, 11 and 12 of the Haryana case it has been observed as follows:

“7. Coming to the circular dated 2-6-1989, issued by the Financial Commissioner and Secretary to the Government of Haryana, Finance Department, it appears that the aforesaid circular had been issued for removal of anomalies in the pay scale of Doctors, Deputy Superintendents and Engineers, and so far as Engineers are concerned, which are in Class I and Class II, it was unequivocally indicated that the revised pay scale of Rs 3000 to Rs 4500 can be given after completion of 5 years of regular service and Rs 4100 to Rs 5300 after completion of 12 years of regular service. The said Financial Commissioner had issued yet another circular dated 16-5-1990, in view of certain demands made by officers of different departments. The aforesaid circular was issued after reconsideration by the Government modifying to some extent the earlier circular of 2-6-1989, and even in this circular it was categorically indicated that so far as Engineers are concerned, they would get Rs 3000 to 4500 after 5 years of regular and satisfactory service and selection grade in the scale of pay of Rs 4100 to Rs 5300, which is limited to the extent of 20% of the cadre post should be given after 12 years of regular and satisfactory service. The aforesaid two circulars are unambiguous and unequivocally indicate that a government servant would be entitled to the higher scale indicated therein only on completion of 5 years or 12 years of regular service

and further the number of persons to be entitled to get the selection grade is limited to 20% of the cadre post. This being the position, we fail to understand how services rendered by Rakesh Kumar from 1980 to 1982, which was purely on ad hoc basis, and was not in accordance with the statutory rules can be taken into account for computation of the period of 12 years indicated in the circular. The majority judgment of the High Court committed serious error by equating expression “regular service” with “continuous service”. In our considered opinion under the terms and conditions of the circulars dated 2-6-1989 and 16-5-1990, the respondent Rakesh Kumar would be entitled for being considered to have the selection grade on completion of 12 years from 29-1-1982 on which date he was duly appointed against a temporary post of Assistant Engineer on being selected by the Public Service Commission and not from any earlier point of time. The conclusion of the majority judgment in favour of Rakesh Kumar, therefore, cannot be sustained.

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9. Under the Recruitment Rules which had been made in exercise of powers conferred by the proviso to Article 309 of the Constitution “member of service” means an officer appointed substantively to a cadre post and includes in case of a direct appointment an officer on probation or an officer who having successfully completed his probation awaits appointment to a cadre post. In case of an appointment by transfer an officer who is on probation or who having successfully completed the probation awaits appointment to a cadre post.

10. Under Rule 6 of the Recruitment Rules, recruitment to the service in the cadre post could be made both by way of direct appointment as well as by promotion in the proportion from different sources mentioned in the said Rule. Sub-rule (3) of Rule 6 authorises appointment to a cadre post as stopgap

arrangement from sources other than the allotted source when a candidate from the allotted source is not available from sources 1 and 3, but such appointee is liable to be reverted to his original cadre when a candidate from the allotted source is available and the period of service rendered by such person shall not be reckoned for the purpose of his seniority.

11. Sub-rule (4) of the Rule thus enables the State Government to fill up a short-term vacancy in the exigencies of public service after recording reasons for a period not exceeding six months in each case, without resorting to the select list prepared under Rule 9.

12. Under Rule 8 appointment to the service has to be made by way of direct recruitment strictly in the order of merit indicated by the Public Service Commission depending upon the number of vacancies available in the cadre.”

14. In that case also, sub-Rule 3 of Rule 6 and sub-rule (4) of Rule 6 are of relevance. The High Court was clearly wrong in saying that the appointment was made de hors the Rules. In Ram Ganesh Tripathi and Ors. V. State of U.P. and Ors.(1997 (1) SCC 621 at para 7) it was stated as follows:

“7. Rule 21-A provides for regularisation of service of ad hoc employees by treating them as persons appointed in the service on the date of their regularisation. Rule 9 provides that a person appointed under that rule shall be entitled to seniority only from the date of appointment after selection in accordance with the said Rules and shall, in all cases, be placed below the employees appointed in accordance with the procedure for direct recruitment prior to the appointment of such persons under those Rules. In view of these statutory Rules, the

Government could not have treated the respondents and other ad hoc employees whose services were regularised on 17-5-1985 as persons regularly appointed from an earlier date. Nor could the Government have counted seniority from an earlier date either for promotion to the higher post or for the purpose of giving selection grade.”

15. There is another hurdle on the way of the writ petitioners. When the order of regularization was passed, according to learned counsel for the writ petitioners-respondents the initial appointment was a substantive appointment. If that was the position, there was need to take the proficiency test which undisputedly all the respondents have taken. If initially the appointment was a substantive appointment, the respondents-writ petitioners could have challenged when the order of regularization was passed. There was no challenge to the order of regularization and benefits therefrom and there was no challenge to the order of regularization in any of the cases. If the plea of the respondents-writ petitioners is accepted it would mean that in their cases the regularization was done long back. There was no challenge at the relevant point of time. Therefore, the belated approach only for the sake of getting advantage of ad hoc or work charge service cannot be countenanced. The present stand that the initial appointment was substantive appointment is contrary to the factual position because in each case the proficiency test was undertaken and

the appointment letter shows that the appointment was till selected candidates join.

16. Additionally, even if the proficiency test is passed the question of eligibility is of relevance, “when the vacancy occurs”. So far as daily wage services are concerned there is no scale of pay and the lowest figure scale of pay has to be given. According to fundamental Rule 9(4), ‘cadre’ means the strength of a service or part of service sanctioned as a separate unit. (See Chakradhar Paswan v. State of Bihar (1988 (2) SCC 214).

17. In order to become “a member of service” candidate must satisfy four conditions, namely (i) the appointment must be in a substantive capacity; (ii) to a post in the service i.e. in a substantive vacancy; (iii) made according to rules; (iv) within the quota prescribed for the source.

18. Ad hoc appointment is always to a post but not to the cadre/service and is also not made in accordance with the provisions contained in the recruitment rules for regular appointment.

19. Although the adjective 'regular' was not used before the words 'appointment in the existing cadre/service' in para 3 of the G.O. dated 25.1.1992 which provided for selection pay scale the appointment mentioned there is obviously a need for regular appointment made in accordance with the Recruitment Rules. What was implicit in the said paragraph of the G.O when it refers to appointment to a cadre/service has been made explicit by the clarification dated 3.4.1993 given in respect of point No.2. The same has been incorporated in para 3 of the G.O. dated 17.2.1998.

20. Rules 23, 27 and 28 of Ministerial Service Rules read as under:

23. Appointment to the Service.-, (1) Subject to the provisions of rules 6, 6A, 6B and 6C, except in respect of the posts of Stenographers the Appointing Authority shall appoint candidates who stand highest in the order of merit in the list prepared under rule 22, provided that he is satisfied after such enquiry as may be considered necessary that such candidates are suitable in all other respects for such appointment:

Provided that subject to the provisions of rule 6, the Appointing Authority shall appoint candidates to the post of Stenographers from the list prepared under sub-rule (2-A) of rule 22 provided that he is satisfied after such enquiry as may be considered necessary that such candidates are suitable in all other respects for such appointment.

(2) Notwithstanding anything contained in rule 7 the persons appointed temporarily as Lower Division Clerk up to 7.11.75. who have been continuously holding such posts or higher posts

shall be deemed to have been appointed regularly on temporary basis provided they fulfil other conditions prescribed in the Rules. They shall be eligible to be appointed substantively as Lower Division Clerks according to the date of their temporary appointment and on occurrence of permanent vacancies and their work being found satisfactory:

Provided that a person working temporarily as Lower Division Clerk whose work is not found satisfactory shall be liable to be removed from service.

(i) by giving him one month's notice if he has served temporarily in connection with the affairs on the State for less than three years; and

(ii) by following the procedure as laid down in the Rajasthan Civil Services (Classification, Control and Appeal) Rules, 1958, if he has served for more than three years. All person appointed temporarily as Lower Division Clerks after 31-3-1978 shall be required to seek regular recruitment through the Competitive examination as prescribed in the Rules.

(3) Notwithstanding anything contained in rule 7, the persons who were appointed temporarily, in connection with the general strike in accordance with the orders/instructions issued by the State Government and were holding the posts of Lower Division Clerks on 27.11.1975 and, who have not passed the prescribed test conducted by the Appointing Authority under the rules applicable to them at the time of their appointment shall be given one more chance to pass the prescribed test in accordance with the rules applicable to them before coming into force of the rules amended Vide Notification No.F.2(45)DOP/ B-1/72, dated 7.11.1975 published in the Rajasthan Rajpatra, dated 27.11.1975, for being appointed substantively as Lower Division Clerks according to the date of their temporary appointment on occurrence of permanent vacancies provided that the service of persons who, fail to pass the said test to be held by the Appointing Authority shall be liable to be terminated by giving one month's notice or pay and

allowances in lieu thereof, if they have served temporarily in connection with the affairs of the State for less than three years; and three months notice of pay and allowances in lieu thereof if they have served temporarily in connection with the affair of the State for more than three years."

(4) Notwithstanding anything contained in rule 5, all persons working as Lower Division Clerk during the period from 8.11.1975 to 31.3.1978 on ad-hoc basis and who could not appear in or pass the competitive/qualifying examination held by the Commission as yet, shall on availability of permanent vacancies, be made permanent subject to the condition that they pass a Performance. Test conducted by the Appointing Authority in accordance with the syllabus prescribed in Part-V of Schedule-II. Such persons shall be allowed three chances to pass the said test.

(5) Notwithstanding anything contained in Rule 5, all persons working as Lower Division Clerk during the period from 1.4.1978 to 31.3.1980 on ad hoc basis and who could not appear in or pass the competitive/qualifying examination held by the commission as yet, shall on availability of permanent vacancies, be made permanent subject to the condition that they pass a performance test conducted by the Head of Department concerned in accordance with the syllabus prescribed in Part IV of Schedule-II. Such persons shall be allowed three chances to pass the said test:

Provided that if a person fails to pass the said test in three chances he shall be liable to be removed from the services
:

(i) by giving him one month's notice, if he served temporarily in connection with the affairs of the State for less than three years, and

(ii) by allowing procedure as laid down in Rajasthan Civil Services (Classification, Control and Appeal) Rules, 1958, if he has served for more than three years.

(6) Notwithstanding anything contained in Rule 5, all persons working as Lower Division Clerks during the period from, 1.4.1980 to 31.12.1984 on urgent temporary basis and who have not passed the competitive examination held by the commission as yet shall on availability of permanent vacancies be made permanent subject to the condition that they pass qualifying examination conducted by the Commission in accordance with syllabus prescribed in Part-IV of Schedule-II.

Provided that the Commission shall not recommend any candidate who has failed to obtain a minimum of 35% marks in each of the compulsory and optional papers in the Lower Division Clerks' Examination;

Provided further that if a person fails to pass the said examination his services shall be terminated on the expiry of 30 days from the date of receiving list of successful candidates by the Deputy Secretariat to the Government, Department of Personnel and Administrative Reforms (B-I) Department.

(7) Notwithstanding anything contained in rule 5, all persons working as Lower Division Clerks during the period from 1.4.80 to 31.12.84 on urgent temporary basis and who have not passed or appeared in the qualifying examination conducted by the Commission under sub-rule (6) of rule 23 on availability of permanent vacancy be made permanent subject to the condition that they pass a performance test conducted by the Appointing Authority within a period of three years in accordance with the provisions of the rules. Such persons shall be allowed three

chances to pass the said test to be availed within a period of three years;

Provided that if a person fails to pass the said test in three chances to be availed within a period of three years he shall be liable to be removed from services.

(8) Notwithstanding anything contained in rule 5 handicapped persons appointed on the post of L.D.C. during the period from 1.4.80 to 31.3.88 shall on availability of permanent vacancy be made permanent by the Appointing Authority on their work being satisfactory.

(9) Notwithstanding anything contained in rule 5, all persons appointed as L.D.Cs. on ad-hoc basic or on daily wage basis during the period from 1.1.85 to 31.3.90 and are still working as such on the date this amendment comes into force shall be appointed on regular basis on availability of vacancy subject to the condition that they pass a performance test conducted by *the* Appointing Authority within a period of three years in accordance with the provisions of the rules. Such persons shall be allowed three candidates to pass the said test to be availed within a period of three years;

Provided that if a person fails to pass the said test in three chances to be availed within a period of three years, he shall be liable to be removed from services.

27. Appointment to the Service:- Appointment by promotion to the posts in the services, specified in the Schedule appended with these Rules, shall be made by the Appointing Authority on the occurrence of the vacancies as determined under rule 8 from amongst the persons selected under Rules 25 and 26, as the case may be.

28. Urgent temporary appointment:- A vacancy in the service which cannot be filled in immediately either by direct recruitment or by promotion under the rules may be filled in on

urgent temporary basis "by the Government or by the authority competent to make appointments" as the case may be, by appointing in an officiating capacity thereto an officer eligible for appointment to the post by promotion or by appointing temporarily thereto a persons eligible for direct recruitment to the services, where such direct recruitment has been provided under the provisions of these Rules:

Provided that such an appointment will not be continued beyond a period of one year without referring the case to the Commission for concurrence where such concurrence is necessary, and shall be terminated immediately on its refusal to concur.

Provided further that in respect of the service or a post in the service for which both the above methods of recruitment have been prescribed, the Government or the authority competent to make appointment, as the case may be shall not, save with the specific permission of the Government in the Department of Personnel in the case of State Services and Government in the Administrative Department concerned in respect of other services, till the, temporary vacancy against the direct recruitment quota by a whole-time appointment for a period exceeding three months otherwise than out of persons eligible for direct recruitment and after a short-term advertisement.

(2) In the event of non-availability of suitable persons fulfilling the requirements of eligibility for promotion, Government may notwithstanding the condition of eligibility for promotion required under sub-rule (1) above, lay down general instructions for grant of permission to fill the vacancies on urgent temporary basis subject to such conditions and restrictions regarding pay and other allowance as it may direct. Such appointments shall however be subject to concurrence of the Commission as required under the said sub rule."

21. The High Court failed to appreciate that the Recruitment Rules made a distinction between appointments made to the cadre/service in accordance with the relevant Recruitment Rules which are regular and appointments made de hors the regular Recruitment Rules which are ad hoc.

22. So far as the dismissal of some special leave petitions summarily it is made clear that, it does not affect the jurisdiction of the Supreme Court to grant special leave to appeal and allow the same. It is well settled that a decision which is per incuriam is not 'law' declared in terms of Article 141 to have a binding effect. (See Prabhakar Rao v. State of A.P. (1985 Supp 2 SCR537), State of Maharashtra v. Digambar (1995 (4) SCC683), Union of India v. K.N. Sivadas (1997 (7) SCC 30), State of U.P. v. Synthetics and Chemicals Ltd. (1991 (4) SCC 139) and Punjab Land Development and Reclamation Corporation Ltd. v. Presiding Officer, Labour Court (1990 (3) SCC 682).

23. Apart from Haryana Veterinary case (supra) the position in law as stated in State of Punjab v. Ishar Singh (2002 (10) SCC 674) and State of Punjab v. Gurdeep Kumar (2003 (11) SCC 732) clearly lay down that while reckoning the required length of service the period of ad hoc service has to be excluded. It is relevant to note that the first selection scale of pay was excluded several

years back on completion of 9 years of service subsequent to regularization. After long lapse of time i.e. after nearly 8 years it was not open to be canvassed that the second selection scale of pay ought to be granted after the concerned employees having put in 18 years of service from the date of ad hoc appointment.

24. Above being the position the appeals and transfer petitions deserve to be allowed which we direct.

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25. It is a case of the respondent in the present case that though his case was heard alongwith other cases which are disposed of today, in the instant case the test was in the year 1981. The regularization was in 1982 and first selection grade was given in 1991 and the second was given in 2000. That being so, the respondent is entitled to the benefit which the Government has not granted. The State is directed to consider this question immediately.

26. Appeal is disposed of.

.....J.
(Dr. ARIJIT PASAYAT)

.....J.
(ASOK KUMAR GANGULY)

New Delhi,
May 08, 2009