

REPORTABLE

IN THE SUPREME COURT OF INDIA
CIVIL APPELLATE JURISDICTION
CIVIL APPEAL No.9412 OF 2019
(Arising out of SLP(C) No. 30061 of 2017)

SIRAJ AHMAD**...APPELLANT(S)****VERSUS****STATE OF UTTAR PRADESH & ANR. RESPONDENT(S)**

J U D G M E N T

Leave granted.

2. Heard the learned Counsels for the parties.
3. The appeal challenges the Judgment and Order dated 11.09.2017, passed by the division bench of Allahabad High Court in W.P.(Service Bench) No. 1020 of 2015, thereby dismissing the Writ Petition filed by appellant.
4. The facts giving rise to the present appeal are as under:
The appellant was appointed on ad-hoc basis on the post of Junior Engineer in the pay scale of Rs. 485-860/-

by order dated 30.03.1987, issued by Respondent No. 1. It is not in dispute that the said Order was issued with prior approval of the Governor of Uttar Pradesh. It is also not in dispute, that the said appointment was made after the post was advertised and after the appellant underwent the selection process conducted by the State under the provisions of U.P. Development Authorities Centralized Services Rules, 1985 (hereinafter referred as "the said Rules"). Pursuant to the selection and appointment, the appellant joined with the Agra Development Authority on 08.04.1987. While in service the appellant obtained the degree in B.Sc.-Engineering from Aligarh Muslim University, Aligarh on 08.06.1987. The appellant thereafter through proper channel communicated the respondents the fact regarding obtaining of requisite qualification and being eligible for consideration for promotion, to the post of Assistant Engineer (Civil), in the Centralised Services under Sub Rule (3) of Rule 24 of the said Rules. It is the case of the appellant, that the State Government had sought information from all the Development Authorities vide communication dated 25.09.1987 with regard to the

number of Junior Engineers possessing the degree of Bachelor of Engineering / A.M.I.E. In compliance to the said communication the Vice-Chairman of Agra Development Authority informed the State Government that in Agra Development Authority appellant was the only Junior Engineer, who was possessing the degree of Bachelor of Engineering.

5. Since the appellant was not promoted, he made various representations to the State seeking promotion. The appellant had claimed the promotion from 18.01.1995, i.e. the date on which the juniors to the appellant were promoted. The appellant's claim for promotion came to be rejected on 16.04.2015. Hence the appellant approached the division bench of the High Court by way of Writ Petition. The petition came to be rejected. Hence, the present appeal.

6. Shri P.S. Patwalia, learned Senior Counsel appearing on behalf of appellant submits, that the appellant's services already stood regularised from 23.11.2002 and as such in view of the law laid down by the Constitution Bench of this

Court in the case of ***Direct Recruit Class – II Engineering Officers Association vs. State of Maharashtra and others***¹, the appellant was entitled for promotion by treating his continuous service from the date of initial appointment.

7. The learned Senior Counsel further submits that, as a matter of fact the Allahabad High Court itself, in the case of ***Rajendra Prasad Dwivedi vs. State of U.P. and others***², vide judgment and order dated 19.08.2011, had directed the State Government to consider the case of said Shri Dwivedi for promotion to the post of Assistant Engineer after completion of 10 years of service as Junior Engineer, provided they had a B.E./A.M.I.E. degree.

8. It is further submitted, that vide subsequent Order dated 09.11.2011, the Allahabad High Court had modified its Order in view of the Judgment of the Constitution Bench of this Court in ***Direct Recruitment of Class – II Engineering Officers Association*** (supra), wherein it is observed, that the petitioner therein, i.e. Rajendra Prasad

¹1990 (2) SCC 715

²Writ Petition No. 3421 of 1996

Dwivedi, became eligible for promotion to the post of Assistant Engineer as soon as he obtained qualification of A.M.I.E. in 1993. He submits, that vide said Order, it was held that if the promotion was given to any other Junior Engineer, junior to the petitioner therein, the petitioner therein was also eligible for promotion from the said date along with consequential benefits. The learned Senior Counsel submits that the learned Single Judge who passed the Order in the case of Rajendra Prasad Dwivedi was the same learned Judge heading the bench in the case of present appellant and, as such, there was no reason as to why the appellant ought not to have been given the same benefit.

9. Per contra, Mr. V. Shekhar, learned Senior Counsel, appearing on behalf of the State submits that, under the rules it was necessary that the appointment was made with concurrence of U.P. Public Service Commission. He submits, undisputedly the appellant's appointment was not made with the concurrence of U.P. Public Service Commission. It is therefore submitted, that as such the appellant's appointment will have to be termed as illegal.

He therefore submits, that the High Court has rightly refused to take into consideration the services of the appellant, prior to the date on which his services came to be regularised.

10. The facts in the present case are not in dispute. Undisputedly the appellant's initial appointment in the year 1987 was after the advertisement was issued for the posts in Centralised Services constituted under the said Rules. It is also not in dispute, that the appellant was selected after he underwent the entire selection process by competing with other persons, who had also applied for the said post. The only issue that the learned Judges of the division bench have found against the appellant is that the appellant's selection was not made in due consultation with the U.P. Public Service Commission.

11. This court in the case of ***State of M.P. and ors. vs. Lalit Kumar Verma***³, after considering the Judgment of Constitution Bench of this Court in the case of ***Secy., State of Karnataka vs. Uma Devi***(3)⁴, observed thus :

³(2007)1 SCC 575

⁴ (2006) 4 SCC 1

“12. The question which, thus, arises for consideration, would be: Is there any distinction between “irregular appointment” and “illegal appointment”? The distinction between the two terms is apparent. In the event the appointment is made in total disregard of the constitutional scheme as also the recruitment rules framed by the employer, which is “State” within the meaning of Article 12 of the Constitution of India, the recruitment would be an illegal one; whereas there may be cases where, although, substantial compliance with the constitutional scheme as also the rules have been made, the appointment may be irregular in the sense that some provisions of some rules might not have been strictly adhered to.”

12. It can thus be seen that this court has held that the distinction between irregular appointment and illegal appointment is clear. It has been held that in the event appointment is made in total disregard to the constitutional scheme and the recruitment rules framed by the employer, where the employer is a “State” within the meaning of Article 12 of the Constitution of India, the recruitment will be illegal one. It has however been held, that where although, substantial compliance with the constitutional scheme, as also the rules have been made, the appointment would become irregular in as much as the some provisions of some rules have been adhered to.

13. Subsequently another bench of this Court in the case of ***State of Karnataka and Others vs. M. L. Kesari and Others***⁵ also had an occasion to consider the issue. The Court observed thus :

“7. It is evident from the above that there is an exception to the general principles against “regularisation” enunciated in *Umadevi (3)* [(2006) 4 SCC 1] , if the following conditions are fulfilled:

(i) The employee concerned should have worked for 10 years or more in duly sanctioned post without the benefit or protection of the interim order of any court or tribunal. In other words, the State Government or its instrumentality should have employed the employee and continued him in service voluntarily and continuously for more than ten years.

(ii) The appointment of such employee should not be illegal, even if irregular. Where the appointments are not made or continued against sanctioned posts or where the persons appointed do not possess the prescribed minimum qualifications, the appointments will be considered to be illegal. But where the person employed possessed the prescribed qualifications and was working against sanctioned posts, but had been selected without undergoing the process of open competitive selection, such appointments are considered to be irregular.”

14. This court held, that where the appointment are not made or continued against sanctioned posts or where the

persons appointed do not possess the prescribed minimum qualifications, the appointment will be considered to be illegal. However, when the person employed possessed the prescribed qualifications and is working against the sanctioned posts, but had been selected without undergoing the process of open competitive selection, such appointments are considered to be irregular.

15. As already discussed herein above, the appellant had applied in pursuance to the advertisement issued by State for the post in the Centralised Services under the provisions of the said rules. The appellant had participated in the selection process along with the other competitors. The appellant was possessing the requisite qualification and was selected after competing with others and was appointed against the sanctioned posts for a period of One year. Undisputedly the appellant thereafter has continuously rendered his services, till the date of regularisation of his services i.e. on 23.11.2002 and even thereafter till date. As such appellant's case would be on a much better pedestal than the one which falls for consideration in the case of **M.L. Kesari** (Supra).

16. It can thus be seen that the only issue which is found against the appellant is that prior to appointment there was no concurrence of the U.P. Public Service Commission. It can thus be seen that the appointment of the appellant at the most can be termed as irregular and not illegal.

17. It will be apposite to refer to the following observations of the constitution bench judgment of this Court in the case of ***Direct Recruit Class II Engineering Officers Association*** (supra), the constitution bench has observed thus

“**13.** When the cases were taken up for hearing before us, it was faintly suggested that the principle laid down in *Patwardhan case* [(1977) 3 SCC 399: 1977 SCC (L&S) 391: (1977) 3 SCR 775] was unsound and fit to be overruled, but no attempt was made to substantiate the plea. We were taken through the judgment by the learned counsel for the parties more than once and we are in complete agreement with the ratio decidendi, that the period of continuous officiation by a government servant, after his appointment by following the rules applicable for substantive appointments, has to be taken into account for determining his seniority; and seniority cannot be determined on the sole test of confirmation, for, as was pointed out, confirmation is one of the inglorious uncertainties of government service depending neither on efficiency of the incumbent nor on the availability of substantive vacancies. The principle for deciding inter se

seniority has to conform to the principles of equality spelt out by Articles 14 and 16. In *Baleshwar Dass v. State of U.P.* [(1980) 4 SCC 226: 1980 SCC (L&S) 531: (1981) 1 SCR 449] and *Delhi Water Supply and Sewage Disposal Committee v. R.K. Kashyap* [1989 Supp (1) SCC 194: 1989 SCC (L&S) 253: (1989) 9 ATC 784] , with which we are in agreement. In *Narender Chadha v. Union of India* [(1986) 2 SCC 157: 1986 SCC (L&S) 226: (1986) 1 SCR 211] the officers were promoted although without following the procedure prescribed under the rules, but they continuously worked for long periods of nearly 15-20 years on the posts without being reverted. The period of their continuous officiation was directed to be counted for seniority as it was held that any other view would be arbitrary and violative of Articles 14 and 16. There is considerable force in this view also. We, therefore, confirm the principle of counting towards seniority the period of continuous officiation following an appointment made in accordance with the rules prescribed for regular substantive appointments in the service.”

18. The constitution bench in unequivocal terms holds that, if an appointment is made by way of stopgap arrangement without considering the claims of all the eligible persons and without following the rules of appointment, the experience of such appointment cannot be equated with the experience of a regular appointee, because of qualitative difference in the appointment. It however holds, that if the appointment is made after considering the claims of all eligible candidates and the

appointee continues in the post uninterruptedly till the regularisation of his service in accordance with the rules made for regular substantive appointments, there is no reason to exclude the officiating service for purpose of seniority.

19. The constitution bench concludes thus :

“**47.** 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.
.....”

20. It can thus clearly be seen, that the Constitution Bench in unequivocal terms holds that, 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.

21. It is not in dispute, that except the concurrence of the U.P. Public Service Commission the appointment of the appellant has been made after following the procedure prescribed under the said Rules. The appellant has uninterruptedly served till the regularisation of his service which was made in accordance with the rules. It can thus be seen that the case of present appellant is squarely covered by the judgment of the Constitution Bench in the case of ***Direct Recruit Class II Engineering Officers Association*** (supra).

22. It is further to be noted that the Respondent had issued an office memorandum dated 11.03.1994 thereby, providing for relaxation of the condition which prescribed minimum 10 years service in the post of Junior Engineer. Schedule-3 to the said Rules provided, that for being eligible to the promotion of Assistant Engineer along with the educational qualification a candidate must possess 10

years service, in the post of Junior Engineer on 01st July of the selection year. By the said office memorandum, the Government provided that 5% of the posts out of 50% promotional quota are to be reserved by extending relaxation to such of the Junior Engineers, who have passed B.E. or A.M.I.E. examination. It further provided, that in case candidates possessing B.E. / A.M.I.E. examination were not available, the post should be filled in from non Graduate Junior Engineers. As discussed herein above, it is to be noted that the Government had also sought information from the Development Authorities with regard to the number of persons possessing the requisite B.E. / A.M.I.E. degree. In response to the said communication the Agra Development Authority had intimated the respondent state the name of the appellant being the only person possessing the said qualification.

23. We further fail to appreciate as to how the same High Court could have considered the case of two employees differently when they were similarly circumstanced. It is not in dispute that the present appellant as well as Rajendra Prasad Dwivedi were selected through the same selection

process though their orders of appointment differs. It will be appropriate to refer to the observation made by the Allahabad High Court in Writ Petition No. 3421 of 1996 in the case of ***Rajendra Prasad Dwivedi vs. State of U.P.*** which reads thus:

“Upon perusal of the Government Orders dated 26th of August, 1992 as well as 11th of March, 1994, I find force in the submission of the petitioner, therefore, I am of the view that as soon as the petitioner obtained the qualification of AMIE in 1993, he became eligible for promotion to the post of Assistant Engineer. Though only gaining the qualification does not create right of promotion, but I am of the view that if thereafter any promotion has been given to others particularly junior to the petitioner, the petitioner is liable to be considered for promotion from the said date alongwith consequential benefits.

In light of the law laid down by the Hon'ble Supreme Court, in the case referred to here-in-above, I hereby also observe that the fact that the petitioner was not confirmed in the service, shall not come in the way of the petitioner's promotion as an impediment and the petitioners services even on ad hoc basis on the post of Junior Engineer shall be taken into consideration for the purpose of promotion to the higher post. Accordingly a direction is issued to the respondents to consider the petitioner's case for promotion to the higher post from the date of promotion of his junior within two months, after receipt of a certified copy of this order”
(emphasis supplied)

24. The above judgment of the learned Single Judge dated 09.11.2011 was carried in appeal before the division

bench of the said court. The division bench of the Allahabad High Court in Special Appeal No. 75 of 2012 in ***State of U.P. Vs. R. P. Dwivedi*** in its Order dated 13.02.2014 observed thus:

“On due consideration of rival submissions, we find considerable force in the arguments of respondent. The condition of length of ten years' service was relaxed. The respondent, though appointed on ad-hoc basis as Junior Engineer on 24.02.1987, had obtained the degree of AMIE on 10.10.1993 before Sri Sunil Dutt Sharma and Sri Sajid Hasan who passed the examination in 1994. As the vacancies were available and the private respondent was qualified to be considered for promotion in 1993, he should have been considered even prior to the aforesaid persons.”

(emphasis supplied)

25. The State had also carried the said matter by way of Special Leave Petition Civil (CC) No. 13830-31 of 2014 before this court. The SLP also came to be dismissed on 12.01.2015. The state thereafter preferred a Review Petition, seeking review of the Judgment of division bench in the case of ***State of U.P. vs. Rajendra Prasad Dwivedi*** by way of Review Petition No. 188 of 2015. The said Review Petition is also dismissed.

26. The only ground on which the High Court has refused to consider the case of the appellant is that in the

case of Rajendra Prasad Dwivedi, the court had not considered the issue with regard to non-concurrence of the U.P. Public Service Commission. At the cost of repetition as discussed herein above the appointment of the appellant at the most can be considered as irregular and not illegal.

27. It is to be noted that the appellant has obtained the Bachelor of Science (Engineering) degree in the year 1987 and though Rajendra Prasad Dwivedi had obtained the A.M.I.E. in 1993, taking into consideration that Sunil Dutt Sharma and Sajid Hasan had obtained the degree of A.M.I.E. in 1994, the said Rajendra Prasad Dwivedi was held to be entitled for promotion on 18.01.1995 i.e. the date on which the said Sajid Hasan and Sunil Dutt Sharma were promoted as Assistant Engineer from Junior Engineer. We fail to appreciate the approach of the High Court in denying the promotion to the appellant when all the other three i.e. namely Rajendra Prasad Dwivedi, Sajid Hasan and Sunil Dutt Sharma were appointed in the year 1987 through the same selection process and though Rajendra Prasad Dwivedi had obtained the degree in 1993 and Sajid Hasan

and Sunil Dutt Sharma had obtained the same in 1994 whereas the appellant had obtained the said degree in 1987.

28. It could thus be seen that, in view of the office memorandum dated 11.03.1994, the appellant was entitled to be promoted immediately after the issuance of the said office memorandum as he possessed the requisite degree when the said office memorandum was issued. In any case the appellant is entitled to be promoted with effect from 18.01.1995 i.e. the date on which the juniors to him were promoted.

29. As already discussed, the non-concurrence with the U.P. Public Service Commission, at the most would make the appointment of the appellant irregular and not illegal. We are therefore of the considered view that the High Court erred in dismissing the petition of the appellant. The appeal deserves to succeed on more than one ground.

30. Hence, the following order:
(i) The appeal is allowed;

- (ii) The Judgment and Order passed by the High Court dated 11.09.2017 is quashed and set aside;
- (iii) The Order passed by the Respondent No. 1, dated 16.04.2015 is quashed and set aside.
- (iv) It is held and declared that the petitioner is entitled to promotion to the post of Assistant Engineer (Civil) from the date on which his junior possessing the Bachelor of Engineering / A.M.I.E. has been promoted with all consequential benefit.
- (v) In the facts and circumstances, there shall be no order as to costs.

.....CJI.
[S.A. BOBDE]

.....J.
[B.R. GAVAI]

.....J.
[SURYA KANT]

**NEW DELHI;
DECEMBER 13, 2019.**