

8

ORIGINAL APPLICATION NO: 227 OF 1988

Date of decision: 8th May, 1991

Miss Snehalata Tripathy Applicant

- Versus -

Union of India and others Respondents

.....

For the Applicant

: M/s. J.K.Misra,
N.C. Misra,
Advocates.

For the Respondents

: Mr. R.C. Rath, Additional
Standing Counsel
(Railway Administration)

• • • • •

C O R A M:

THE HONOURABLE MR. B.R.PATEL, VICE-CHAIRMAN

A N D

THE HONOURABLE MR. N. SENGUPTA, MEMBER (JUDICIAL)

● ● ● ● ● ● ●

1. Whether reporters of local papers may be permitted to see the Judgment? Yes.
2. To be referred to the reporters or not? *yes*
3. Whether Their Lordship's wish to see the fair copy of the judgment? Yes.

• • • • •

(9)

J U D G M E N T

B.R.PATEL, VICE CHAIRMAN: The grievance voiced by the applicant is that even though she has been working as Midwife (Leave Reserved) on Ad-hoc basis with effect from 30-10-1978 at Railway Headquarter Hospital at Khurda Road of the South Eastern Railway she has not yet been regularised and confirmed while Respondents 12 and 13 who joined the service later have been regularised and confirmed in service. She has moved the Central Administrative Tribunal (C.A.T.), Cuttack Bench for her regularisation and confirmation in service as Midwife with retrospective effect and to declare her senior to Respondents 12 and 13. She has also prayed for allotment of a Government quarters to which she is entitled.

2. The Respondents in their counter affidavit have stated that the Railway Administration has allotted her a suitable quarters on 19-8-1988 on her refusal of the quarters allotted to her earlier on 20-3-1988. Since this position has not been controverted, we accept the information furnished by the Railway Administration and hold that there is no further relief to be granted to the applicant on this account. In regard to her claim for seniority



12

= 3 =

over Respondents 12 and 13, the Respondents have maintained that the recruitment to the post of Midwife is done through the Railway Service Commission/Railway Recruitment Board (R.S.C/R.R.B) and as the applicant has not been so recruited she has no right to be regularised as a Railway Servant having seniority over Respondents 12 and 13 who have since been regularised as Midwives by the Railway Service Commission. In paragraph-15 of the counter affidavit it has been mentioned that Respondents 12 and 13 along with the applicant were locally recruited by the Authority of Khurda Road Division to get over the acute shortage of Midwife at Khurda Road Hospital and as no Railway Service Commission empanelled candidates were readily available. But Respondents 12 and 13 subsequently applied to the Railway Service Commission in response to their advertisement for regular Recruitment to the posts of Midwife and were found suitable by the Commission and were empanelled for regular appointment. According to the recommendation of the Railway Service Commission, the services of the Respondents were regularised with effect from 5-1-1980 vide Office order dated 1-12-1980 (Annexure- D). The applicant did not apply to the Railway Service Commission and she has not been empanelled by the said commission

Signature

11

=4=

and as such her regularisation in service, according to the Respondents, does not arise. They have further submitted that an ad-hoc employee cannot have seniority over the regular employees who have come through the regular recruitment process. They have further contended that the question of confirmation arises in respect of regular Railway servant not for the person who is only on ad-hoc service.

3. Mr. J.K.Misra, the learned Counsel for the applicant has very strenuously argued that since the applicant was appointed on 26-10-1978/30-10-1978 and Respondents 12 and 13 were appointed on 16-11-1978 and 18-12-1982 respectively, the applicant should be senior to these respondents. He has further said that the applicant has been continuing on adhoc basis without and break for over ten years/her service should be regularised and she should be given seniority over Respondents 12 and 13. In this connection he has cited the judgment of the Hon'ble Supreme Court in the case of Narendra Chadha Vs. Union of India and others reported in AIR 1986 SC 638. In this judgment the Hon'ble Supreme Court have observed in paragraph 14 of their judgment that "but we, however, make it clear that it is not our view that whenever a person is appointed in a post without following the Rules prescribed for appointment to that post, he should be treated as a person regularly appointed to that post

Mr. Misra

Such a person may be reverted from that post". However, considering the special features of the case before them, they decided that those who have been continuing in higher post for fifteen to twenty years ~~xxxxxx~~^{12/1} ~~delivered~~^{12/1} it would be certainly unjust to hold that they have no sort of claim to such posts and could be reverted unceremoniously ~~and~~ treated as persons not belonging to the service at all, particularly where the Government is endowed with the power to relax the Rules to avoid unjust results.

In the case before us, the applicant was similarly circumstanced with respondents 12 and 13 being locally recruited but did not subsequently apply to the commission when opportunity came her way to get ^{her} self regularly recruited as Respondents 12 and 13 did. Mr. Misra then referred to the judgment of the Hon'ble Supreme Court in the case of Union of India Vs. Anususekhar Guin reported in AIR 1989 SC 377. The case before the Hon'ble Supreme Court was that twenty six Officers belonging to the cadre of Assistant Station Engineers or holders of other equivalent posts in the All India Radio had applied to the Delhi High Court challenging the inter se seniority list published on 30th of April, 1977 and asked for a direction for preparation of a fresh seniority list taking into consideration the length of regular service. The writ petition was subsequently transferred to the Central Administrative Tribunal under section 29 of the

B. N. Misra

Administrative Tribunals Act. The Tribunal had held that "it would be equitable dispensation of justice to fix the inter se seniority between the direct recruits and the promotees on the basis of length of continuous service followed by regular appointment to that grade. Where a part of such continuous service in the grade followed by regular appointment was of ad hoc or temporary nature and even in excess of the quota fixed, that period of service would also count for seniority subject, however, to the only condition that service would be that the appointment has been made on the basis of a regularly constituted selecting body and was not fortuitous nor out of turn". In the case before us ^{the} ~~this~~ selection and the subsequent appointment of the candidate was not on the basis of a regularly constituted selecting body like the Railway Service Commission and as such this judgment would in no way afford any relief to the applicant. Mr. Misra has referred to the judgment of the Hon'ble Supreme Court reported in AIR 1989 SC 278 wherein it has been held by the Hon'ble Supreme Court that adhoc appointment followed by regularisation can be counted for seniority in the absence of any specific rule to the contrary. We agree with Mr. R.C. Rath the learned Additional Standing Counsel (Railway Administration) for the Respondents that this does not apply to the present case which is a matter of inter se seniority between an adhoc employee and those who have started with adhoc service but soon after were

[Signature]

=7=

regularised through the prescribed recruitment procedure. On hearing the learned Counsel for the parties we have come to the conclusion that Once an incumbent is appointed to a post according to rule, his seniority will have 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 was 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. The Hon'ble Supreme Court have indicated the legal position in their judgment reported in AIR 1990 SC 1607 in the case of Direct Recruit Class-II Engineering Officer's Association and others Vs. State of Maharashtra and others, according to which "if an appointment is made by way of stop-gap arrangement, without considering the claim of all the eligible available persons and without following the rules of appointment, the experience on such appointment cannot be equated with the experience of a regular appointee, because of the qualitative difference in the appointment. To equate the two would be to treat two unequals as equal which would violate the equality clause". As the appointment of the applicant was not on the basis of the rules of appointment i.e. through the Railway Service Commission



15

her appointment cannot be equated with the appointment of Respondents 12 and 13 who have subsequently ^{been} selected through the Railway Service Commission. In this connection Mr. Rath has drawn our attention to the Annexure-'C' to the counter affidavit. This is a copy of the letter dated 5-1-1980 issued by the Office of the Chief Personnel Officer, Garden Reach, South Eastern Railway, Calcutta to the Divisional Personnel Officer, South Eastern Railway, Khurda Road on the subject of recruitment of candidates for the post of Midwife in grade Rs. 260-350/- (RS). In this letter it has been mentioned that Respondents 12 and 13 have been found suitable by the selection Board for the post of Midwife as received in the Commission's letter dated 17-12-1979. In view of this, we have no doubt whatsoever that Respondents 12 and 13 have come through the regular recruitment process whereas till now the applicant has not ~~yet~~ been selected by the Railway Service Commission which is the recruiting authority for such posts. We are therefore, unable to accept the plea of Mr. Misra that the applicant should be made senior to the Respondents 12 and 13. The matter of regularisation and confirmation of the applicant in the service is however, a ^{separate} ~~different~~ _{has} matter. Mr. Rath on the other hand ^{has} very vehemently urged that ~~since~~ the applicant was not a regular

Pr. Misra

=9=

Railway servant her services cannot be regularised and she cannot be confirmed ⁱⁿ that service. Mr. Misra has drawn our attention to the judgment of Hon'ble Supreme Court reported in 1990 SC 371 (Bhagawati Prasad, Petitioner Vs. Delhi State Mineral Development Corporation, Respondents). The Petitioners before the Hon'ble Supreme Court were the daily rated workers working in the Respondent-Corporation and it was contended by them that despite their continuous service respondent had resorted to unfair labour practice in creating artificial break in service to deprive them of the benefit of continuous service. In paragraph-6 of their judgment ^{the S.C.} have held that the "Practical experience would always aid the person to effectively discharge the duties and is a sure guide to assess the suitability." Admittedly, the applicant has been working as Midwife since October, 1978 without break. It has also been mentioned by the Respondents in their counter affidavit that the cadre of Midwife is a dying cadre. We have seen the copy of the Railway Board's letter No. E(P&A)I-84/PS-5/MH-I dated 18-8-84 addressed to all the General Managers of the All Indian Railway. The Railway Board have mentioned in this letter that due to general shortage of qualified nursing sisters they had been given the authority to recruit Midwives/Auxiliary Nurses-Cum-Midwives

Handwritten signature

17

=10=

for promotion as Staff Nurses after receiving successful training and obtaining a Diploma in Nursing in a recognized Training School. However, their experience over the last two decades was that the ANMs recruited to service had not been able to qualify in the diploma course, with the result that they were unable to discharge the full functions expected of staff Nurses. Therefore, the Ministry of Railways carefully reviewed and the matter/decided that hereafter there should be no recruitment to the category of Midwife/Auxiliary Nurse-Cum-Midwife in the scale of Rs. 260-350/- (RS).

They have further decided that as and when the serving Midwife/Auxiliary Nurses demit service through retirement, wastage and natural attrition the resultant vacancy should be filled by recruitment in the original grade of Staff Nurse in the scale of Rs. 425-640 (RS) only. This makes it abundantly clear that there would be hence forward no recruitment to the cadre of Midwife and the existing staff would be working till they finally retire . There is no question of any promotion also and as no other avenue for promotion has been provided for them. In view of these the inter se seniority between the Midwives as a matter of only academic interest and on this ground no injustice has been done to the applicant by not giving seniority over Respondents 12 and 13. Since the cadre of Midwife is a dying cadre and the applicant has been working for the last over

B. M. M.

12

=11=

12(twelve) years continuously we consider that in the interest of justice and equity she should be regularised in service and confirmed as Midwife within a period of two months from the date of receipt of a copy of this judgment so that she does not suffer in the matter of pension and other service benefits. It would be hard to deny her even pensionary benefits now that she will have no promotion as she is a member of a dying cadre. When a casual or daily rated worker is eligible for regularisation on the basis of the judgments of Hon'ble Supreme Court denial of regularisation and confirmation in service to the applicant would be, in our opinion, against all cannons of justice and fair play.

4. The application is accordingly disposed of leaving the parties to bear their own costs.

[Signature]
8/5/91
.....
MEMBER (JUDICIAL)

[Signature]
8.5.91
.....
VICE CHAIRMAN

Central Administrative Tribunal, C
Cuttack Bench: K. Mohanty.