

(2016) 08 GAU CK 0085

In the Gauhati High Court

Case No : Writ Petition (C) No. 5272 of 2014 and 6498 of 2010

Bharat Sanchar Nigam Ltd. (BSNL)

APPELLANT

Vs

Ambika Bezbaruah

RESPONDENT

Date of Decision : 16-08-2016

Acts Referred:

Constitution of India, 1950 — Article 226

Citation : (2017) 1 NEJ 222

Hon'ble Judges : Mr. Hrishikesh Roy and M.R. Pathak, JJ.

Bench : Division Bench

Advocate : Mr. B.C. Pathak, Mr. B. Pathak, Ms. J. Phukan, Ms. P. Dey, Mr. R. Thandani, Advocates, for the Petitioner; Mr. P.P. Baruah, Advocate. Mr. B. Chaudhury, Asstt. SGI, Mr. G. Goswami, Ms. B. Devi, Mr. H.K. Das and M.K. Dutta, Advocates, for the Respondent Nos

Final Decision : Allowed

Judgement

Hrishikesh Roy, J.(Oral) - Heard Mr. B. Pathak, the learned standing counsel BSNL representing the writ petitioners. Also heard Mr. P.P. Baruah, learned advocate representing the respondents in the WP(C) No.5272/2014. The private respondent Nos.1 - 22 in the WP(C) No.6498/2010 are represented by the learned counsel Mr. G. Goswami.

2. The challenge in the WP(C) No.5272/2014 is to the direction dated 09.04.2014 in the O.A. No.59/2010 whereby the learned Central Administrative Tribunal (hereinafter referred to as the "CAT") has directed the employer to ante-date the promotion of the eight telecom mechanics of Assam Circle from the date, when they instituted the WP(C) No.620/2004. The Tribunal issued further direction for disposal of representation of the applicants, for retrospective promotion from even earlier period. But through the speaking order passed on 06.06.2014, the representation for retrospective promotion was rejected on the ground that the telecom mechanics of Assam Circle, who were the applicants in the O.A. No.59/2010, are not similarly situated with the telecom mechanics of the N.E.

Circle. Those who are impacted by the speaking order have not challenged the speaking order of the Deputy General Manager, BSNL and therefore, in the WP(C) No.5272/2014, we are concerned only with entitlement to promotion for the respondent/applicants, from the date of institution of the WP(C) No.620/2004.

3. The challenge in WP(C) No. 6498/2010 is to the direction issued by the CAT on 03.08.2010 (Annexure 9) in the OA NO. 222/2009 whereby the learned Tribunal has directed the employer to hold screening test for considering the promotion for the 22 applicants, under the Telecom Technical Assistants Recruitment Rules, 1998 (hereinafter referred to as the "1998 Rules") by considering that the applicants have acquired vested right to be considered under the 1998 Rules and therefore, promotion for them should not be considered under the Telecom Technical Assistant Recruitment Rules, 2001 (hereinafter referred to as the "2001 Rules").

LITIGATION HISTORY

4. The issues raised in the two cases should be considered in reference to the previous litigation history and therefore, same are being noted at the outset. Initially, Ambika Bezbaruah and 10 others, who are telecom mechanics of Assam Circle, filed the WP(C) No.620/2004 where they applied for consideration of their promotion to the post of TTA's in accordance with the 1998 Rules. The academic eligibility of the earlier Rules was replaced by the 2001 Rules, which prescribed 10+2 as an eligibility for promotion and therefore, the writ petitioners who did not possess the academic qualification of 10+2, applied for consideration of their promotion to TTAs for the vacancies prior to 2001, under the 1998 Rules.

5. In order to protect the interest of the 11 writ petitioners, interim order was passed on 22.12.2004 in the Misc. Case No.3633/2004 whereby, while the respondents were allowed to proceed with the recruitment process, the 11 posts of TTA's of Assam Circle were directed to be kept vacant. When the WP(C) No. 620/2004 was finally disposed of on 26.05.2006 the Court observed that the writ petitioners should not be considered on the eligibility criteria specified by the 2001 Rules. Accordingly, having regard to the procedure in the 1998 Rules, direction was issued for holding the qualifying screening test for promotion, in terms of the earlier norms. But Court also specified that this direction is meant only for the 11 petitioners in the WP(C) No.620/2004.

6. Since relief was confined to the 11 petitioners of the WP(C) No.620/2004, the WP(C) No. 3282/2007 came to be filed by 10 similarly situated telecom mechanics who too were ineligible under the 2001 Rules. In the meantime, the Cont.Cas(C) No.637/2006 was filed by the first group and eventually with the common judgment dated 30.10.2008, both the WP(C) No.3282/2007 and the Cont.Cas(C) No.637/2006 were disposed of. The learned Judge after due consideration noted that 11 posts of TTAs are vacant but promotion of 20 telecom mechanics of both groups are to be considered. Hence direction was

issued to treat the 20 aspirants who approached the High Court as a single group eligible to be considered under the 1998 Rules for the 11 vacancies of TTAs. Consequently, direction was issued to determine the inter-se merit of the 20 aspirants and on that basis, promotions were ordered to be considered.

7. Following the above direction in the WP(C) No.3282/2007 and the Cont.Cas(C) No.637/2006, the respective merit position was determined for the 20 aspirants who appeared in the screening test held on 15.07.2007. Subsequently, promotion orders were issued in order of merit to the top 11 telecom mechanics. According to the learned counsel Mr. B. Pathak representing the BSNL, two telecom mechanics Naushad Ali and Swapan Kr. Baruah, who were amongst the 11 petitioners in the WP(C) No.620/2004 and 9 aspirants from the WP(C) No.3282/2007, by virtue of their performance in the common qualifying test, qualified to be promoted to the 11 vacancies of TTAs, under the 1998 Rules and they were then promoted to the higher cadre.

8. Eventually, few i.e. the remaining nine, who could not be promoted on account of their respective merit position in the screening test held on 15.07.2007, were also considered for promotion to the cadre of TTAs by sending them for induction training, through the communication dated 12.12.2008. This group of 9 telecom mechanics were promoted subsequently w.e.f., 28.02.2009, through the order(s) dated 03.03.2009 and 08.03.2009 respectively.

9. The telecom mechanics, who were promoted to the cadre of TTAs only w.e.f. 28.02.2009 approached the CAT for ante-dating their promotion from 2000. According to the applicants they were deprived of their legitimate expectation of being promoted to the higher cadre, since the year 2000. In the O.A. No.59/2010 the applicant Ambika Bezbaruah and 7 others referred to this Court's direction in the WP(C) No.620/2004 and also the qualifying test conducted by the BSNL on 15.07.2007, where after, the applicants were deputed for induction training. In the written statement filed by the BSNL in the O.A. No.59/2010, the initial vacancy position in the cadre of TTA in different SSAs (Secondary Switching Areas) of Assam Circle were reflected as 67 and it was stated that only 11 of those vacancies were kept apart and the remaining 56 posts of TTAs was filled up by promotion, by holding Limited Internal Departmental Competitive Examination (LICE), under the 2001 Rules. Thus it was projected that apart from the 11 vacancies, no other posts for departmental promotion against 40% quota was available to be filled up under the 1998 Rules. According to the BSNL, for the vacancies which occurred on or after 2009, the applicants cannot claim as a matter of right to get promotion with retrospective effect from the year 1999-2000. It was specifically projected that the applicants secured lower positions in the screening test held on 15.07.2007 in the merit list for the 11 available vacancies of telecom mechanics and therefore they cannot claim retrospective promotion. It was also averred that although all the 20 telecom mechanics otherwise passed in the screening test held on 15.07.2007, only because 11 vacancies were available, those placed at Sl.Nos.1 to 11 in the

merit list could be promoted at first instance to the cadre of TTA.

10. In the first round the O.A. No.59/2010 was dismissed by the learned CAT on 31.08.2010 on the principle of constructive res judicata, by referring to the WP(C) No.620/2004 disposed by this Court on 26.05.2006.

11. The aggrieved applicants then filed the WP(C) No.2152/2011 to challenge the rejection of the O.A. No.59/2010 by the CAT. The Division Bench noted that while disposing of the WP(C) No.620/2004 on 26.05.2006, the Court did not express any opinion as to whether the promotion of the petitioners shall be retrospective or prospective in nature and only simple direction was issued for considering the promotion in terms of the 1998 Rules. Thus it was observed that the prayer in the O.A. No.59/2010 was not barred by res judicata and accordingly the matter was remanded back to the Tribunal for adjudication of the O.A. No.59/2010, on merit.

12. When the matter was received back, the CAT passed the impugned order on 09.04.2014, whereby direction was issued to firstly consider promotion from a retrospective date, if such promotion was granted to similarly situated employees of the BSNL. Secondly the promotees who had filed the WP(C) No.620/2004, were held entitled to the benefit of promotion to the cadre of TTAs from the date of institution of the WP(C) No.620/2004.

FOLLOW UP AFTER TRIBUNAL'S DIRECTION

13. As earlier noted in the speaking order passed by the Dy. General Manager (A&P) of BSNL on 06.06.2014, the criteria for promotion to the cadre of TTA was considered and it was observed that the telephone mechanics of Assam Circle are not similarly situated as those employed in the North-East Telecom Circle, Shillong. The screening test for promotion for those in the N.E. Telecom Circle was held on 04.03.2000, whereas the screening test of the applicants for the vacancies in the Assam Telecom Circle was held only on 15.07.2007 and that too on direction of the High Court, against 11 vacancies of TTAs. As the applicants in the O.A. No.59/2010 could not secure the required merit position for promotion to the 11 available vacancies, they were accommodated against subsequent vacancies occurring after 2008. Thus it was observed that there is a distinct classification amongst the telecom mechanics of N.E. Telecom Circle and those of the Assam Telecom Circle and therefore retrospective promotion on equality principle was found to be unmerited, by the speaking order dated 06.06.2014.

RIVAL SUBMISSION

14. While the first direction of the CAT by impugned verdict of 09.04.2014 culminated in the speaking order dated 06.06.2014 which remained unchallenged by anyone, since a 2nd direction was issued by the Tribunal to ante-date the promotion from the date of institution of the WP(C) No.620/2004, the BSNL challenge the same by contending the following:

(i) Of the 67 vacancies, only 11 were kept apart on court orders for considering

promotion under the 1998 Rules and the remaining 56 posts of TTAs were filled up through promotion on the criteria specified by the 2001 Rules and thus vacancies being unavailable, promotion can't be ante-dated.

(ii) This Court in the WP(C) No.3282/2007 and the Cont.Cas(C) No.637/2006 had directed that a common merit list amongst 20 aspirants is to be prepared for the 11 vacancies and in the test held on 15.07.2007, the respondents failed to secure the required merit position. Therefore, the respondents and being unsuccessful in the fair opportunity, they are dis entitled to retrospective promotion from the time they filed the WP(C) No.620/2004.

(iii) Since this Court did not stay appointment to the available vacancies, except the 11 posts kept apart, the remaining 56 vacancies were filled up through due process under the 2001 Rules and when vacancies are not available, promotion with retrospective effect can't be granted.

(iv) Granting retrospective promotion to the respondents will disturb the seniority of those who are serving in the cadre of TTAs since last many years and as the respondents are not even born in the cadre of TTA until they were promoted against the subsequent vacancies, they are dis entitled to promotion from an earlier date.

14.1 On the other hand, Mr. P.P. Baruah, the learned counsel for the respondents submits that for the 67 vacancies accruing until 2001, promotion should be considered on the basis of 1998 Rules. Accordingly he argues that the promotion granted to 56 vacancies under the 2001 Rules, is unjustified.

14.2 Since the promotion exercise in Assam Circle was not undertaken for many years, the respondents should not be deprived of their right to promotion when the vacancies were available and accordingly it is argued that the respondents are entitled to the benefit of retrospective promotion at least with effect from the date, when they instituted the WP(C) No.620/2004, to demand promotion.

15. Representing the 22 respondents in the WP(C) No.6498/2010 who had filed the O.A. No.222/2009 before the Tribunal, Mr. G. Goswami, the learned counsel submits that vacancies accruing while the 1998 Rules occupied the field, must be filled up in due time and delay in the promotion exercise in the Assam Circle, should not adversely impact the telecom mechanics, working in the feeder cadre, who have acquired the vested right for promotion.

DISCUSSION

16. The submission made by the rival counsel have received our earnest consideration. We find that when the WP(C) No.620/2004 was filed, this Court did not stop the employer from making promotion under the 2001 Rules and that is how, 56 vacancies of TTAs were filled up through due process. For the 11 posts kept aside on Court order, direction was issued on 30.10.2008 to prepare a common merit list for 20 aspirants for the 11 vacancies. None had challenged the direction issued by the Court on 30.10.2008 in the WP(C) No.3282/2007 and in

the Cont.Cas(C) No.637/2006 and therefore the preparation of the common merit list of the 20 aspirants following the test held on 15.07.2007 cannot now be questioned. When the respondents have failed to secure the required merit position for the 11 vacancies in pursuant to the selection exercise undertaken on 15.07.2007, the claim made by them for retrospective promotion cannot be a just claim as because, the promotion for the respondents was considered for subsequent vacancies arising after 2008.

17. It is well settled in a catena of decision that a promotion takes effect from the date when it is granted and not from the date of occurrence of vacancy or creation of post. [See: Nirmal Chandra Sinha v. Union of India reported in (2008)14 SCC 29; State of Uttaranchal v. Dinesh Kumar Sharma reported in (2007)1 SCC 683 and State of Uttar Pradesh v. Ashok Kumar Srivastava reported in (2014)14 SCC 720] Thus when we examine the claim for retrospective promotion by referring to the law enunciated by the Apex Court, it is clear enough that the promotion of the respondents cannot take effect from a retrospective date when they were not even born in the cadre of TTA.

18. In so far as the failure of the employer to consider promotion in due time, this Court in the earlier litigation never stopped the employer from going ahead with the promotion exercise for the available vacancies (barring 11 posts), through the orders passed by the Court in the WP(C) No.620/2004. Subsequently a common merit list was also directed to be prepared which led to appointment of 11 amongst the 20 aspirants, who participated in the test held on 15.07.2007, for the 11 vacancies. Therefore in our view retrospective promotion for the respondents will not be justified as it will not only be contrary to the law enunciated by the Apex Court but would also impact the seniority of those, who were regularly promoted to the cadre of TTAs, without any obstruction by the Court.

19. In so far as the 22 respondents in the WP(C) No.6498/2010 are concerned, this group had slept over their rights long after the 1998 Rules was replaced by the 2001 Rules. They claimed promotion many years later in the CAT through the O.A. No.222/2009. But without considering the issue of laches and the adverse impact on the seniority of those in the higher cadre, direction was issued by the learned Tribunal to consider the case of those who failed in due time to assert their rights. Moreover it can't also be overlooked that by that time the 1998 Rules was replaced by the 2001 Rules and turning the clock back for this group who woke up many years later, wouldn't be justified since it will unsettle several settled position. To consider them under the obsolete Rules when not a single vacancy of that period is available also persuade us to interfere with the impugned direction of the CAT in the O.A. No.222/2009.

20. The respondents in both cases do not possess the eligibility of 10+2 standard prescribed by the 2001 Rules and since the 1998 Rules is not in force since 27.07.2001, the Tribunal erred in directing promotion under the obsolete Rule.

21. Taking into account the above discussion and reasoning, we find merit in the submission made by the learned counsel Mr. B. Pathak for the writ petitioners. Accordingly the impugned judgments of the learned Tribunal in the O.A. No.59/2010 and O.A. No.222/2009 are set aside and quashed. The cases are thus allowed by leaving the parties to bear their own cost.