
(2014) 02 CAL CK 0079

In the Calcutta High Court

Case No : A.S.T.A. 77 of 2012, A.S.T. 126 of 2012 and C.A.N. 4617 of 2012 and M.A.T. 817 of 2012 (Arising out of W.P. No's. 3056 and 19975 (W) of 2010)

Bikash Ranjan Mahato and Others

APPELLANT

Vs

Basudeb Ghosh and Others
 Pradip Bhattacharya and Others Vs Partha Sarathi Dhar and Others

RESPONDENT

Date of Decision : 03-02-2014

Acts Referred:

Constitution of India, 1950 — Article 14 16

Citation : (2014) 1 CALLT 533 : (2014) 2 CHN 588 : (2014) 2 WBLR 920

Hon'ble Judges : Subrata Talukdar, J;Nishita Nirmal Mhatre, J

Bench : Division Bench

Advocate : Bikash Ranjan Bhattacharya, Mr. Subir Sanyal, Mr. Dibbendu Chatterjee and Mrs. Jhuma Chakraborty, for the Appellant; Murari Mohan Das and Mr. Mrinal Kanti Sardar, Soumya Majumder, Sumanta Biswas, Supratim Laha for the Respondent Nos. 1 and 2, for the Respondent

Final Decision : Dismissed

Judgement

Subrata Talukdar, J.—These batch of appeals arise out of a common judgment and order dated 5th March, 2012 passed in 4 separate writ petitions by a Learned Single Judge of this Court. The substance of the dispute in the 4 writ petitions before the Learned Single Judge pertained to promotion and seniority of a section of employees in the Kolkata Metropolitan Development Authority (KMDA) and the Kolkata Metropolitan Water and Sanitation Authority (KMWSA). The employees in the KMDA who are diploma engineers in the posts of technical assistants and their counterparts in the KMWSA who are in the posts of Sub-Assistant Engineers are aggrieved by the retrospective promotions and seniority granted to qualified engineers within their cadre on repatriation to their parent bodies after serving on deputation at several Urban Local Bodies (ULBs).

2. The Learned Single Judge was, inter alia, pleased not to disturb the promotions already granted to the writ petitioners at the point of sending them

on deputation. However, the Learned Single Judge was pleased to direct the authorities to compute the seniority of each of the employees in the promotional cadre of the parent department, including the deputationists with reference to their standing in the gradation list in the base cadre. It is relevant to record in this regard that the promotional rule of seniority in both the KMDA and the KMWSA is on the principle of seniority-cum-merit which applies to the employees who are before this Court.

3. The factual background to the dispute is as follows. Such background essentially covers the factual scenario in both the departments, viz. the KMDA and the KMWSA.

4. By order dated 4th August, 2004 addressed by the Deputy Secretary to the Principal Accountant General (A & E), West Bengal it was, inter alia specified by the order of Governor that 40 posts of Assistant Engineers/Executive Engineers in 40 ULBs of Kolkata Metropolitan area has been decided to be filled up initially for 2 years from qualified engineers on deputation. The salaries and allowances of the deputationists will be borne by the respective ULBs.

5. Pursuant to the said order dated 4th October, 2004, the Board of the KMDA at his 146th meeting dated 8th October, 2004 vide agenda item no. 21 conveyed its decision to act on the proposal of the Government. The contours of the said decision dated 8th October, 2004 are essentially as follows:-

a) The qualified engineers would be deputed to ULBs which would lead to reduction in the salary burden of KMDA;

b) That 37 engineers having B.E. (or equivalent) degrees may be considered for deputation. Each incumbent would be promoted a step above on the eve of his posting on deputation and such promotion will take effect in the ULBs and not in the parent organization. Such promotion will have permanent effect in the parent organization and the incumbent will be considered to have been promoted in the parent organization on his/her completion of 5 years of continuous and satisfactory service in the ULBs;

c) Two Technical Assistants with B.E. degrees in the parent organization (viz. KMDA) will be allowed to join on deputation on the above conditions although they were yet to complete 2 years of service.

Pursuant to the aforementioned policy decisions dated 4th October, 2004 and 8th October, 2004 by order dated 14th October, 2004 addressed by the Deputy Secretary, Establishment, KMDA to all Chief Engineers/Sector Heads of KMDA options were directed to be obtained from qualified engineer officers (having B.E. degrees in the posts of Technical Assistants/Sub-Assistant Engineers) with the request to furnish their willingness or otherwise in the prescribed proforma. It is relevant to mention here that the last paragraph of the said order dated 14th October, 2004 states that the decision of the authority "may kindly be circulated among the qualified engineer officers (having B.E. degrees etc.)...

6. Options were submitted by willing qualified engineers serving in the posts of Technical Assistants in KMDA and Sub-Assistant Engineers in KMWSA. Pursuant to receipt of such options the willing qualified engineers were promoted a rank above to the posts of Assistant Engineers or Executive Engineers, as the case may be and deputed to the respective ULBs. On repatriation after completion of tenure with the ULBs the promotee employees maintained their retrospective promotions and seniority even in the parent department thereby superseding the writ petitioners.

7. Aggrieved by such retrospective promotions and seniority being maintained on repatriation to the parent department in favour of the private respondents essentially in the posts of Assistant Engineers, the Writ Petitioners challenged such action by filing a batch of Writ Petitions before the Learned Single Judge praying, inter alia as follows:-

a) Mandamus commanding the respondents to withdraw, rescind/cancel Clause 3 of the deputation orders posting the deputationists on repatriation with retrospective effect in the promotional posts against the direct quota;

b) Mandamus commanding the respondents to publish draft gradation list in the promotional posts of Assistant Engineer (Civil) by following the final gradation list dated 5th June, 2002 in respect of the feeder cadre of Technical Assistants without giving effect to Clause 3 of the deputation posting order; and

c) Other reliefs in support of or incidental to the main reliefs.

Clause 3 of the order of posting on deputation reads as follows;

On completion of uninterrupted and satisfactory tenure of 5 years deputation, in the Urban Local Bodies as Assistant Engineer the concerned Technical Assistant/Sub-Assistant Engineer on his reversion will be placed to the respective posts of Assistant Engineer (Civil) in KMDA/KMWSA/KIT on appointment against direct quota with retrospective effect from the date of his joining as Assistant Engineer(Civil) in the LBs.

8. The criterion for appointment to the promotional posts of engineers in KMDA has been settled at the 67th meeting of the authority held on 28th March, 1981. To the promotional post of Assistant Engineers (which is the question before us now) the appointment is either from direct recruitment from B.E. or equivalent degree holders or 8 years service as Technical Assistant. The procedure for promotion for the promotees shall be seniority-cum-merit or in the case of direct recruits through the direct recruitment procedure. It is not disputed by the parties that the rule adopted by the authority for promotion to the posts of Assistant Engineer holds the field till date.

9. Shri Bikash Ranjan Bhattacharya, learned Senior Counsel appearing for the appellants in one set of appeals has argued that the Learned Single Judge could not have granted relief to the Writ Petitioners who approached the Court belatedly. He draws our attention to a letter dated 15th October, 2009 written by

one Ashish Roy, Assistant Engineer (Civil) and addressed to three of his colleagues in the base cadre of Technical Assistants, including some of the Writ Petitioners enclosing photocopies of the order dated 3rd January, 2005 issued in his name by the Chief Executive Officer, KMDA and the order dated 4th October, 2004 of the Deputy Secretary, Municipal Affairs Department. By the said letter the said Shri Ashish Roy drew the attention of his colleagues in the base cadre to the issue of illegal accrual of retrospective promotional seniority in favour of the deputationists.

10. Shri Bhattacharya has argued that the said letter dated 15th October, 2009 is the foundation of the cause-of-action sought to be agitated in the Writ Petitions. He further argues that the order of promotion on deputation was issued in 2004 and the deputationists joined their posts in the ULBs in the year 2005. The Writ Petitions have been filed at a point of time when the deputationists were on the verge of completing their entire tenure in the ULBs and were poised to be promoted in their promotional posts on repatriation to the parent department.

11. Shri Bhattacharya persuades us to take notice of the knowledge of the policy of 2004 pertaining to promotion on deputation of qualified engineers which was widely circulated and therefore was known to the Writ Petitioners. He asserts that the Writ Petitioners cannot be allowed to unsettle a settled position after such a long lapse of time.

12. In this regard it is pertinent to notice the circulation dated 14th October, 2004 by the Deputy Secretary, Establishment, KMDA to all the heads of sector of KMDA inviting options from the qualified engineers only in connection with the policy decision dated 8th October, 2004. The circulated order dated 14th October, 2004 makes it amply clear that it is to be circulated among the qualified engineers (having B.E. degrees etc.) i.e. Technical Assistants/Sub Assistant Engineers, Assistant Engineers with request to furnish their willingness as per proforma. Therefore, the contents of the said letter makes it amply clear that the same was for a limited circulation among the qualified engineer officers only and, the Writ Petitioners being diploma holders were not within the zone of consideration and hence can be reasonably expected not to have complete knowledge of the proposal for sending the deputationists on promotion till the ramifications of such proposal was brought to their notice by the said letter of Ashish Roy dated 15th October, 2009.

13. Shri Amitava Chaudhuri, learned Counsel for the KMWSA has supported the stand of Shri Bhattacharya on the acquiring of knowledge by the Writ Petitioners of the promotional policy on deputation and the delay in filing the Writ Petitions. Relying on his affidavit-in-opposition filed against WP 3058 (W) of 2010 he has argued that the circular in connection with the promotional policy on deputation was sent to all heads of sector of the KMWSA by the Deputy Secretary, Establishment, KMDA dated 14th October, 2004.

14. As already observed by us above in this judgment the said circulation dated

14th October, 2004 is identical in respect of KMWSA in as much as the options were invited from amongst the qualified engineers and the policy was to be circulated amongst them only.

15. In our minds we cannot fault the Writ Petitioners, who are the private respondents in this batch of appeals to have complete knowledge of the avenues of promotion on deputation designed by the authorities in favour of the qualified engineers. The authorities in their wisdom decided at first to create a separate class of qualified engineers from amongst the engineers-both diploma and degree holders-in the base cadre of Technical Assistants. Thereafter the authorities formulated their policy of 8th October, 2004 and despatched it for limited circulation to the qualified engineers in the base cadre with instructions to submit their willingness.

16. In the above circumstances the diploma holders in the base cadre of Technical Assistants can be reasonably expected to be hit by the full impact of such retrospective promotion and seniority granted on repatriation to the qualified engineers at a time when it is made known to them. Such information was brought to their notice by the letter dated 15th October, 2009 of the said Ashish Roy and without delay they filed the Writ Petitions.

17. With reasonable certainty it can be held that the diploma engineers in the base cadre rested their faith in the authority not to disturb the rule of promotion which was seniority-cum-merit although the authority may have sent the qualified engineers on deputation. However, when it was discovered that they are suffering the ignominy of being superseded by their juniors in the promotional posts and such supersession being a continuing cause-of-action, we hold that the Writ Petitions are not belated and the Learned Single Judge was correct in so holding.

18. Sri Soumya Majumdar appearing on behalf of the private respondents in one set of appeals has argued that the moot question is whether the deputationists, who are the appellants before us can be sent on promotion and such promotion can be regularized on repatriation to the parent cadre in violation of the statutory rules. He says that condition no. 3 in the order of deputation granting retrospective promotion in the parent cadre on repatriation is de hors settled principles of service jurisprudence on this issue. Such retrospective promotion in the parent cadre has the effect of undermining the primacy of the gradation list in gross violation of Articles 14 & 16 of the Constitution of India.

19. He relies on a decision reported in *Tukaram Kana Joshi and Others* thr. *Power of Attorney Holder Vs. M.I.D.C. and Others*, at paragraphs 11 & 12 thereof to stress the point that in all cases the doctrine of delay and laches is not a constitutional limitation, more so, when the cause-of-action is continuous and the situation shocks the judicial conscience.

20. He argues that in the name of following an instruction of the Municipal Affairs Department, the authority, viz. KMDA has, in effect, followed a policy of pick and

choose from amongst the qualified engineers on the plea of lessening of the salary burden which was to be borne by the respective ULBs during the period of deputation. Such plea cannot be a weapon to destroy the foundational right of the Writ Petitioners protected by the superior service rule expecting to be promoted on the principle of seniority-cum-merit.

21. Shri Partha Sarathi Dhar, one of the respondents in the appeal, appears in person by filing written notes of submission. His argument is similar to the arguments advanced by Shri Majumder to the effect that retrospective promotion and seniority cannot be granted to the deputationists on repatriation in the parent cadre in violation of the superior rule. He relies upon several judgments of the Honorable Apex Court including the celebrated judgment of D.S. Nakara and Others Vs. Union of India (UOI), to make the point that the State cannot unreasonably classify employees to convey a benefit to a group of such employees depriving the others.

22. This brings us to the second important question of violation of statutory rules, if any, committed by the authority.

23. Shri P.S. Bose, learned Senior Counsel appearing for KMDA, has stressed that while sending the qualified engineers on deputation the authority took recourse to Regulations 3 & 4 of the Service Regulations. Regulation 3 reads as follows:-

Relaxation and Interpretation-

1. Nothing in this regulations shall be construed to limit or abridge the power of the authority to dispense with or relax the requirement of any of these regulations to such extent and subject to such conditions as the authority may consider necessary for dealing with a case in a just and equitable manner.

2. The power of interpreting these regulations is reserved to the Authority.

24. Regulation 4 of the said service regulations reads as follows:-

Power of the authority-

If the provisions of these regulations are found to be inadequate in dealing with an issue concerning the terms and conditions of service of an employee, the matter shall be referred to the authority and its decision shall be final.

25. Relying on the aforementioned regulations Shri Bose argues that apart from the accrual of knowledge by the Writ Petitioners on the policy decision to promote on deputation, the Authority was within its powers to exercise its powers of relaxation under the service regulations. The Authority could only persuade the qualified engineers to join on deputation if they were assured that their promotional posts will be protected on repatriation to the parent cadre.

26. Our attention has also been drawn to the definition of deputation in the service regulations. The same reads as follows:-

Deputation means releasing an employee from the duty of the posts held by him

for the purpose of special temporary duty under the authority or under any other legal or statutory body or public sector undertaking or Central or State Government, or to undergo a course or training or instruction or to attend a conference or symposium in the interests of the authority in or out of India.

27. Rule 68(3) under chapter VIII of the Service Regulations pertaining to the general conditions of transfer reads as follows:-

An employee transferred to foreign service shall during such service continue to remain in the cadre in which he was included immediately before his transfer and may be given regular or officiating promotion in that cadre as the authority competent to order such promotion may decide.

28. We further find that clause 4 of the Kolkata Metropolitan Water and Sanitation Authority (Service and Recruitment) Regulations, 1968 are *pari materia* with the provisions of clauses 3 & 4 of the KMDA (Service Regulations). Clause 4 of the KMWSA (Service and Recruitment) Regulations, 1968 reads as follows:-

Nothing in this regulations shall be construed to limit the powers of the authority to dispense with or relax the requirement of any of these regulations to such extent and subject to such conditions as the authority may consider for dealing with a case in a just and equitable manner.

29. We cannot be unmindful of the fact that the promotions granted must be in terms of the rules having the force of statute. We cannot also be unmindful of the fact that powers of relaxation, although enshrined in the service regulations cannot extend to an extent so as to unsettle the superior rule.

30. In this connection we notice the law settled that the power of an authority to relax the provisions cannot be read in a manner so as to dilute the concept of primacy of the rules since such power is the creation of the rule itself and the condition of its exercise is structured by that guidance.

31. We also notice that although the power of relaxation is conferred on the authority in the regulations, such power can only be used in validation of and, not in derogation of the superior rule of promotion on seniority-cum-merit basis consistently followed by the authority since 1981. We find that on the plea of exercising its powers of relaxation as an one-time measure, such power of relaxation has, in effect, undone the primacy of the superior rule. The power has not been exercised "in a just and equitable manner" as mandated by the rule of relaxation.

32. We therefore cannot help but hold that the retrospective promotion and seniority granted to the deputationists on repatriation to their parent cadre is an action in violation of the superior rule. Promotion has been recognized as a condition of service and such condition of service cannot be at the receiving end of an arbitrary treatment by the authority.

33. We find that the Writ Petitioners (the respondents in this appeals), if allowed to suffer the retrospectivity in promotion and seniority granted to the appellants shall be compelled to undergo a perpetual injustice. Firstly, they were not considered to be within the zone of qualified engineers eligible to be sent on deputation. Therefore no option was sought from them and they were deprived of promotion to the step above on the basis of such option although they were similarly circumstanced like the appellants in the base cadre of Technical Assistants.

34. Secondly, the appellants on repatriation were placed above the Writ Petitioners in the promotional cadre and as such the gradation list of 2002 in the base cadre of Technical Assistants became unsettled. In this regard we find merit in Sri Majumdar's contention that the primacy of the gradation list must be maintained and powers of relaxation cannot be allowed to unsettle such primacy. We also note that the definition of deputation and the conditions of foreign service contained in the regulations do not grant a licence to the authority to supplant the superior rule. We therefore find no merit in these appeals and, accordingly the same are dismissed. There will be no order as to costs.