

(2012) 05 JH CK 0003
In the Jharkhand High Court
Case No : C.W.J.C. No. 1863 of 1996 (R)

Bimal Kumar Dey and Others	Vs	APPELLANT
The Chairman, Hindustan Copper Ltd. and Others		RESPONDENT

Date of Decision : 14-05-2012

Acts Referred:

Constitution of India, 1950 — Article 12, 14, 16, 226
Industrial Disputes Act, 1947 — Section 12(3)

Citation : (2013) 1 AJR 388

Hon'ble Judges : Prakash Tatia, C.J; Aparesh Kumar Singh, J

Bench : Division Bench

Advocate : M.M. Pal, for the Appellant; P.K. Bhowmik, Md. Hatim, A.K. Das and Mr. R. Krishna, for the Respondent

Final Decision : Dismissed

Judgement

1. Heard learned counsel for the parties. This matter has come-up before this Court because of the fact that the learned Single Judge vide order dated 04.01.2002 referred the matter for answering the following question:

One of the questions, as raised is whether the nominees of the workmen who retired on reaching the age of superannuation and the nominees of the workmen who have already completed certain years of services can be appointed on preferential ground and such scheme, if any on record, is violative of Articles 14 and 16 of the Constitution of India or not?

2. The learned Single Judge was of the view and observed that in the facts and circumstances as the vires of the scheme at Clause 4.1.2. (iv) and (v) of the Recruitment and Promotion Rules, 1994, as contained in Annexure-D/2, are to be tested, it is desirable that the matter be heard by a Division Bench.

3. The brief facts of the case are that the petitioners, who are four in numbers and their father were employees of the respondent-Company i.e., Hindustan Copper Limited, Kolkata and they were working in Ghatshila area of District-East

Singhbhum, the then State of Bihar and now in the State of Jharkhand. The petitioners' father applied for voluntary retirement obviously before their actual date of superannuation and at that time they made request for employment of their nominees, who are the petitioners herein. The petitioners' name, therefore, registered as nominee of their fathers, In the year 1986, Voluntary Retirement Scheme was prepared by the Company and under that Scheme certain benefits have been provided to the employees offering voluntary retirement including employment of their respective nominees. After retirement of fathers of these petitioners, the petitioners got employment on temporary basis and they received wages as temporary worker. The petitioners after some time submitted their representations for regular appointment and according to the petitioners, they were given assurance but in fact they were not given regular appointment. It is also submitted that a list was prepared by the respondent-Company on 19.5.1990 containing the names of the petitioners and on 13.6.1990, they were interviewed but subsequently their names were withdrawn from the list without any information and without any reason shown to them by the Management. Rest of the candidates, whose names were in the list dated 19.5.1990 have been given appointment against the regular posts. In the background of these facts, the petitioners preferred a writ petition being C.W.J.C. No. 3684 of 1992(R) before this Court. This Court after taking note of the contentions of the petitioners referred above and the stand of the respondent-Company stating therein that as back as in the year 1947, a system of recruitment in the Company was prescribed under an Award (Annexure-A to the counter affidavit and in course of time, another bipartite agreement dated 18.8.1973(Annexure-B) was arrived at between the Management and recognized Labour Union whereby it was agreed that appointment may be given to certain class of persons who are family members or relatives of employees of the Company upon their nomination by the employees and employees having 08 years service be allowed to enlist their nominees for recruitment on preferential basis. However, the Central Government in the year 1986 emphasized reduction of manpower and issued directives and banned further employment, except for vacancies in essential services like hospital, etc. However, on other side, the Union started pressing for their demand for employment to family members of the employees. Therefore, on 26.4.1990, the matter was discussed in the Head-Office of the Company at Kolkata and after considering all the relevant factors, it was decided to relax selectively the ban on recruitment in phased manner and to consider the cases of nominees of those employees, (i) who died while in service/retired on attaining the age of superannuation and (ii) eligible land oustees. In view of the said decision, dated 26.4.1990, a notice dated 19.5.1990, referred above, was issued and nominees were invited to attend interviews. It is submitted that the ban on recruitment was lifted only with respect to those categories of persons mentioned in Annexure-D appended to the counter affidavit to the writ petition C.W.J.C. No. 3684 of 1992(R) and it did not include the nominees of employees who opted for voluntary retirement and inadvertently, the names of the petitioners, who were nominees of employees who took voluntary retirement, were wrongly included in

the list (Annexure-E) and on realising the same, a fresh notice dated 30.5.1990 was issued containing the names of the eligible candidates. The contention of respondent-Company was that the petitioners, who are the nominees of the persons who took the voluntary retirement had no locus-standi to raise any claim relating to the employment against the Management and the Company being a Public Sector Undertaking, the question of appointment of nominees on preferential basis was certainly violative of the provisions of the Constitution. The Division Bench thereafter, rejected the claim of the writ petitioners by observing that in the opinion of the Court, in exercise of power under Article 226 of the Constitution of India, the High Court cannot direct the petitioners' appointment in a regular manner, which would be against the principles of natural justice as also against the provisions of Article 16 of the Constitution of India. However, the High Court while dismissing the writ petition C.W.J.C. No. 3684 of 1992(R) observed that the Company, in the facts and circumstances of the case, should consider the petitioners' case as to providing relaxation in age limit as and when steps are taken up for filling up the vacant posts in a regular manner.

4. When the petitioners found that the respondent-Company was going to give the appointments to as many as 105 persons without advertising the posts on preferential basis to the ex-employees of the Company then, they preferred this present writ petition C.W.J.C. No. 1863 of 1996(R). Initially, in the writ petition, petitioners sought relief only to the extent that opportunity to all eligible candidates be given by the respondent-Company by advertising the posts in question in regular manner and no preferential appointment be given to other persons discriminating the petitioners who are also nominees of the former employees of the respondent-company. This Court found from the Recruitment Promotion Rules, 1994 that certain preferential treatment has been given to the five categories of the persons under Clause 4.1.2, out of which the preference given to the nominees in Sub Clause (iv) and (v). Clause 4.1.2, prima-facie, appears to be in violation to the provisions of Article 14 and 16 of the Constitution of India and therefore, to adjudicate upon the validity of the above two clauses i.e., (iv) and (v) of 4.1.2, of the Rules of 1994 the matter has been referred to this Division Bench.

5. Learned counsel for the petitioners has relied upon several judgments of Hon"ble Supreme Court which are as follows:

- 1) in the case of Gazula Dasaratha Rama Rao Vs. The State of Andhra Pradesh and Others, .
- 2) in the case of Central Inland Water Transport Corporation Limited and Another Vs. Brojo Nath Ganguly and Another,
- 3) in the case of Yogender Pal Singh and others Vs. Union of India others,
- 4) in the case of Umesh Kumar Nagpal Vs. State of Haryana and Others,
- 5) in the case of Auditor General of India and others Vs. G. Ananta Rajeswara

Rao,

6) in the case of Director of Education (Secondary) and another Vrs. Pushpendra Kumar and others reported in AIR 1998 SC 2230

7) in the case of Raghunath Rai Bareja and Another Vs. Punjab National Bank and Others,

8) in the case of I.G. (Karmik) and Others Vs. Prahalad Mani Tripathi,

9) in the case of Dr. M.S. Patil Vs. Gulbarga University and Others, .

6. Learned counsel for the petitioner submitted that Hon"ble Supreme Court clearly held that in the matter of appointment in Government employment or even in the Company run by the Government who may have commercial activities or not, the appointment should be given only by following the complete transparent procedure so as to make the posts available to all the eligible candidates and any right to any candidate on the basis of "descent" is impermissible as it will violate the rule of equality and violative of Article 14 and 16 of Constitution of India. Relying upon a judgment delivered in the case reported in Central Inland Water Transport Corporation Limited and Another Vs. Brojo Nath Ganguly and Another, , it has been submitted that any agreement in violation to the above Rule of law is void as it is violative of Article 14 and 16 of the Constitution of India. Therefore, even if Management and the Union have entered into agreement, may be under purported scope of Industrial Disputes Act, 1947, that agreement is contrary to the provision of Constitution of India, and such agreement cannot be given effect to and is liable to be declared ultra-vires of the Article 14 and 16 of the Constitution. It is also submitted that it has been held by the Hon"ble Supreme Court in the judgment reported in Dr. M.S. Patil Vs. Gulbarga University and Others, , no person can claim any adverse possession over the posts which he occupied in illegal or under absolute void Rules and, therefore, passing of the time is irrelevant as in the above case the Hon"ble Supreme Court quashed the appointment of the employees who were appointed about 17 years ago.

7. Learned counsel for the petitioners vehemently submitted that in fact it is a case of grave contempt which will be apparent from the facts of this case itself. It is submitted that the petitioners have preferred writ petition-on 01.07.1996 and notices were issued to the respondents on 15.10.1996. This Court passed the interim order on 15.10.1996 that "In the meantime, any appointment shall be subject to the result of this application." In spite of the said interim order, appointments were given on 26.7.1997 out of the list of nominees published on 27.5.1996. However, those appointments were only as trainee and not regular appointment, Thereafter, this Court on 11.5.1998 admitted the writ petition and further passed the specific order that no further appointment will be made by the Corporation on dependency grounds as per the Scheme, which is in question. Learned counsel for the petitioners submitted that any regular appointment given after the order dated 11.5.1998 is, therefore absolutely in contravention to the

purport of the order of this Court and therefore, in the facts and circumstances of the present case where petitioners, not only approached this Court but also succeeded in obtaining interim orders and the respondents being fully aware of this order have passed the order of confirmation of time some of the employees, that will not affect the right of the present writ petitioners.

8. Learned counsel appearing for the private respondents, who are impleaded private parties by the order of this Court submitted an application stating therein that some of the employees have already died, two employees already took voluntary retirement and that application was disposed of and the names of eight respondents have been deleted. Deletion of names of these respondents who died during the pendency of this writ petition cannot affect maintainability of the writ petition because of the reason that petitioners are only four in numbers and questioning the appointment of 105 respondents and, therefore, this writ petition was heard on merit.

9. Learned counsel for the private respondent vehemently submitted that the appointments were given according to the long standing, not only practice, but procedure which was being followed by virtue of the award passed as back as in the year 1947 and thereafter, the rules were framed in the year 1990 and thereafter in the year 1994. The difference between the rules of 1990 and 1994 is only that in the rules of 1990, the requisite period of service of the employee was 10 years whereas in the rules of 1994, requisite period of service for becoming eligible for obtaining appointment of employees' nominee was reduced to 8 years from 10 years. It is also submitted that rules of 1990 was in fact not challenged in earlier round of litigation and in fact the petitioners themselves tried to take benefit of the rules which was denied to the petitioners by the order passed by the Division Bench of this Court in the petitioners' writ petition No. 3864 of 1992. It is also submitted that in the said judgment it has not been held that the rules of 1990 were ultra-vires or unconstitutional, rather, it has been observed that the petitioners cannot get any appointment on the preferential basis and in case the Company decides to give appointment in regular manner, then the petitioners' case can be considered and only by relaxing the age limit for the petitioners.

10. It is submitted that in exceptional circumstances, a decision was taken by the Management in the meeting dated 19th August, 1994 by arriving at a settlement u/s 12(3) of the Industrial Disputes Act. 1947 and thereafter, a meeting was convened which was attended by the representatives of the Management of the Company and the employees and it was decided that as a one time measure, recruitment of total 106 nominees falling in different categories mentioned in the decision taken in the meeting dated 27.05.1996 be recruited. Therefore, by decision dated 27.05.1996, the Management did not take any decision to obtain any person under regular appointment. It is also submitted by learned counsel for the private respondents that in fact the Company was not running well and, therefore, had to close down three mines and was running only one mine. This

contention of the learned counsel for the private respondents was fully supported by the counsel for the Company as well as by the counsel for the Union and both the counsels also took the same stand that it was one time measure to give appointment in view of the peculiar facts and circumstances as well as in view of the request of the Union. It is submitted that such settlement between the Company and the Union dated 27.05.1996 was also not challenged by the writ petitioners. Learned counsel for the private respondents, for the Company and for the Union, all submitted that the appointments were given in view of the settlement as well as in consonance with the rules of 1990 and 1994 and the scheme which originally came in existence in the year 1947 and if, these rules are declared to be ultra-vires, then the appointments were given by following the rule which was in force at the time of giving appointment, therefore, it cannot be said that these appointments were given by circumventing the direction given by the Division Bench of this Court in petitioners" writ petition.

11. We considered the submissions of the learned counsel for the parties and perused the facts of the case.

12. Though it is a matter referred by a Single Bench to the Division Bench for deciding the validity of Clause-(iv) and (v) of the Rules of 1994 but since these petitioners are harping for their appointment since 1990, we deem it proper to look into the merits of the case also instead of only answering the reference and the remanding the matter back to the Single Judge so as to have another round of litigation before the learned Single Judge and thereafter, before the Division Bench by either of the parties.

13. So far as constitutional validity of Clause (iv) and (v) of Rule 4.1.2 is concerned, it would be appropriate to first quote the scheme which was in existence in the year 1947 by virtue of the award which was published in the Bihar Gazette (Extra Ordinary) dated 28th July, 1947 and the relevant part of the said award is as under :-

The question is whether in the matter of recruitment preference should be given to the relations of employees on the lines of the rules framed by the Adjudicator for the Tinsplate Company. The Company objects to giving such preference as there is a danger of nepotism in it and the door of favouritism will be opened wide. Mr. Dempster urges that if too many relations are appointed by the Company, they will begin to show favour to one another and that will affect the interest of the Company adversely. At present the Company maintains a register in which applications of candidates are entered and under the present system any number of employees" relations can be taken. The objection raised by Mr. Dempster, therefore, loses all force. What he objects to is not the appointment of relations of the employees but preference being shown to recruitment. The Adjudicator did not recommend indiscriminate appointment of employees" relation in the Tinsplate Company. He framed certain rules which are very reasonable and may be reproduced here :-

In making selection as well as in posting to the Works candidates will be given precedence in the following order :-

- (1) Near relation of a worker, such as son, brother, etc., who died in harness or was incapacitated by an accident during employment.
- (2) Men who rendered good service but were retrenched or discharged for want of work.
- (3) Near relation, such as son, brother, etc., of workers about to retire within the next two years.
- (4) Relations of workers who have retired during the past one year.
- (5) Such workers as rendered good service but on account of panic or any other good reason left the Company during the period from 1942 to 1945.

14. It will be relevant to mention here that, that decision was given in the matter of another Company, the Tinsplate Company and it was adopted by the respondent-Company when it was a private Company and not a Public Sector Undertaking. Subsequently, it became Public Sector Undertaking and, therefore, it falls within the definition of the State under Article 12 of the Constitution of India and, therefore, certainly the appointments, if are offered, are required to be tested on the touch stone of the reasonableness in the light of Article 14 and 16 of the Constitution of India. The original thought may be in the Award of 1947 for giving appointment by the private Company but subsequently on its becoming the Public Sector Undertaking of the Government of India, and even after becoming Public Sector Undertaking, the respondent-Company again framed the similar Rules in the year 1990. The relevant portion of rules of 1990 are Clause 2.4 and 4.2.2 which are as under:-

2.4 To ensure compliance with Govt. Policy regarding preferential treatment to certain sections of society.

4.2.2 For the employment of nominees, preference subject to fitness will be given in the following order :-

- i) Nominee of employee who has died in harness or become incapacitated due to permanent total disablement in an accident arising out of an in the course of employment.
- ii) Nominee of employees who have been discharged on medical ground, after putting in a minimum of 10 years service in the Company.
- iii) Nominees of employees who have superannuated after having put in a minimum of 10 years service in the Company.
- iv) Nominees of employees in service who have put in minimum of 10 years service in the Company.

The Respondent-Company again framed Rules in the year 1994. The relevant

rules of 1994 are Rule 2.3, Clause (c) of Rule 3 and Rule 4.1.2 which are as under :-

2.3 To ensure compliance with Govt. Policy regarding preferential treatment to certain sections of society in recruitment and promotion.

3.0 (c) Nominees means, near relative i.e. Spouse, Son, Daughter (including adopted son and daughter), Brother, Sister, son-in-Law, Daughter-in-Law, Nephew and Niece of an employee.

- i) Who died in harness as a result of work accident, or
- ii) Who met with natural death while in service due to sickness or otherwise, or
- iii) Whose services have been terminated on Medical grounds, or
- iv) Who has put in a minimum number of 8 (eight) years continuous service.

4.1.2 For the employment of nominees, preference subject to fitness will be given in the following orders :-

- i) Nominee of workmen who has died or become incapacitated due to total permanent disablement in an accident arising out of and in the course of employment.
- ii) Nominee of workmen whose services have been terminated on medical grounds due to contraction of occupational disease as defined in Workmen's Compensation Act.
- iii) Nominees of employees whose services have been terminated on medical grounds.
- iv) Nominees of employees who have superannuated after having put in a minimum of 8 years service.
- v) Nominees of employees in service who have put in a minimum of 8 years service.

15. It may be true that in the year 1947, the benefits were offered to very many dependents and even relatives of the workmen working in the Company upon happening of certain events but that provision is not very much relevant even for the purpose of taking help because that was the original thought which was accepted in the year 1994 by the company when it was a private Company and was entitled to decide about eligibility of candidates for appointment and that could have been done solely according to discretion of the Management of the private Company. Whatever may be the thought when the Company was a private Company, it is not a valid concept after Company in terms of the Constitution, prescribes procedure for appointment in Public Sector Undertaking in contravention of the provisions of the Constitution and runs contrary to the Article 14 and 16 of the Constitution of India. By the rules of 1990, the benefits have been given to the (i) male nominees of employees who died in harness as

well as to the (ii) male nominees of employees whose services have been terminated on medical ground and (iii) male nominees of superannuated employees and nominees of employees who have put in minimum of 10 years of service and (iv) further to the female nominees of the employees who died in harness as well as to the (v) female nominees of employees whose services have been terminated on medical ground and (vi) female nominees of superannuated employees and members of employees who have put in minimum of 10 years of service. The validity of the above clauses may not have been questioned and the rules of 1990 contained in Clause 4.2.2 (iii) and (iv) have been kept in the rules of 1994 which we have already mentioned.

16. The Hon"ble Supreme Court in the case of *Gazula Dasaratha Rama Rao Vs. The State of Andhra Pradesh and Others*, and in other matters including in the case of *Yogender Pal Singh and others Vs. Union of India* others, has clearly held that the "descendance" cannot be the reason for giving preferential treatment in the matter of appointment. At this juncture, it will be appropriate to mention here that, if the Clause (iv) and (v) of Rule 4.1.2 of the rules of 1994 is given effect to, then ultimately, if Company runs for a long period, one time may come that all the employees will be only the descendant"s/dependents of former employees of the company rendering the posts as only hereditary posts denying any opportunity to any eligible candidate to take part in the process of selection for appointment in the Government Company. Such rule cannot be allowed to stand in view of the Constitutional provision of Article 14 and 16 as well as in view of the decision given by the Hon"ble Supreme Court. Therefore, Clause (iv) and Clause (v) of Rule 4.1.2 are declared to be unconstitutional. The question referred to us is answered accordingly.

17. So far as claim of the writ petitioners are concerned, the writ petitioners" original claim was based on the direction of this Court contained in writ petition No. 3864 of 1992(R) decided on 25.03.1994. By this judgment dated 25.03.1994, the Division Bench of this Court had already rejected the claim of the writ petitioners and specifically observed that the petitioners can be considered for appointment obviously if the steps are taken for filling-up the vacant posts in regular manner by the respondent-Company. The respondent-Company has not decided to fill-up the vacancies in regular manner and for that purpose they have passed a resolution in the meeting held with the members of the union by drawing resolution u/s 12(3) of the Industrial Disputes Act, 1947. From the minutes as well as from the facts it is clear that this decision was taken in peculiar facts and circumstances of the case of the Union so as to give some benefit to some of the members of employees only and, therefore, at that time, the decision was taken in consonance with the rules which was in existence and the validity of which was not challenged by the petitioners in the writ petition No. 3864 of 1992(R). Not only this, but the writ petitioners themselves sought relief of preferential benefit in the matter of appointment in the same Company wherein they failed and thereafter, in view of the observation of the Division Bench of this Court in the judgment dated 25.03.1994 given in writ petition

C.W.J.C. No. 3864 of 1992(R), have taken a different stand, for their appointment when the steps were taken-up by the respondent-Company for filling up some posts in peculiar circumstances as one time measure and not in regular manner. It may be true that petitioners approached this Court as early as on 1st July, 1996 and this Court passed the interim order on 15.10.1996 and list of the nominees was published on 27.05.1996 and thereafter, appointments were given to 105 workmen vide order dated 26.07.1997 and interim order was again passed by this Court on 11.05.1998 but that will not make much difference because of the reason that, if the petitioners' contention is accepted, then petitioners are only entitled to compete in regular process of selection for the post. If today, after more than 16 years of appointments, appointments of the respondents are quashed and set aside, then at the most these posts may be available in open market wherein these petitioners may compete and thereafter, they may or may not get the appointments. Setting aside of the appointments of these persons will give that much of benefit to the petitioners but at the same time, it may be relevant to mention here that the petitioners, who were already over aged in the year 1994 and that fact has been taken note of by the Division Bench in the writ petition C.W.J.C. No. 3864 of 1992(R), are now in advance age and may be reaching almost nearer to the age of retirement and in that fact situation, by quashing the appointment of 105 or any of the employee and making these posts available in open market for competition wherein the petitioners may be eligible candidates provided the age relaxation is given to that extent of more than 16 years, then in that situation it would be absolutely unreasonable relief, as it will deny the opportunity to compete all other persons who may have become and who were eligible during this entire period of 16 years.

18. In view of the peculiar facts and circumstances of the case and looking to the nature of the post in question which is of trainee/mazdoor/class-III, it will be absolutely inequitable to render these persons jobless who were given appointment not because of their "any misrepresentation and who were given appointment in accordance with the then existing rules, their appointment, after 16 years, cannot be and in our opinion, should not be quashed and set aside even after holding the above rule to be violative of Article 14 and 16 of the Constitution of India and the appointments of these persons are required to be protected. In view of the judgment of Hon'ble Supreme Court delivered in the case of Ganga Ram Moolchandani and Others Vs. State of Rajasthan and Others, , the principle laid down in the judgment delivered in the case Dr. M.S. Patil Vs. Gulbarga University and Others, cannot be applied in the peculiar facts of this case as the appointments have been given in a particular settlement, validity of which was not challenged in the earlier round of litigation and also it has been challenged by way of amendment petition after filing this writ petition.

19. At this juncture, it would be relevant to mention here that we cannot ignore this fact that the respondent-Company who was running four mines, has already closed three mines and only running one mine. It is submitted that two persons

took voluntary retirement and 9 persons have died and no fresh appointment was given by the respondent-Company to any dependent of the employee which clearly indicate that the Company may not have requirement of any employee. Therefore, now it may be inequitable for the Company to go for a fresh process of selection so that these four writ petitioners may get chance for selection provided their age is relaxed to the extent of more than 16 years. In view of the above reasons, it is held that Clause (iv) and (v) of Rule 4.1.2 of the Rules of 1994 is ultra vires of Article 14 and 16 of the Constitution of India. However, the writ petitioners are not entitled to any relief, therefore, the writ petition of the petitioners is dismissed.