
(2015) 05 JH CK 0043

In the Jharkhand High Court

Case No : Writ Petition (S) No. 6243 of 2014

Bipin Bihari Singh

APPELLANT

Vs

The State of Jharkhand and Others

RESPONDENT

Date of Decision : 21-05-2015

Acts Referred:

Constitution of India, 1950 — Article 14, 16, 309, 311(2)

Citation : (2015) 2 LLN 687

Hon'ble Judges : Aparesh Kumar Singh, J

Bench : Single Bench

Advocate : Delip Jerath and Rajesh Kumar, for the Appellant; Mohan Kumar Dubey, JC to AG, Advocates for the Respondent

Final Decision : Disposed off

Judgement

Aparesh Kumar Singh, J.—Heard counsel for the parties.

2. Petitioner in the present writ application, has approached this Court for completion of the process of appointment to the post of Director by way of promotion by considering his case as he is the senior most official in the Directorate of Mines and that the Notification dated 25.10.2014 i.e. Jharkhand Mining Engineering Services Rules, 2011 (as amended in 2014) be held as not applicable to the case of the petitioner for the purposes of promotion. The post of Director is lying vacant and was being occupied in officiating capacity by the petitioner since 01.04.2008.

3. As it appears from the submissions of the parties and certain relevant materials brought to the notice of the Court, prior to the Notification of 25.10.2014, the post of Director was a part of the cadre structure, as per the 2011 Rules also. The amended 2011 rules notified on 10.11.2014 however has restructured the cadre and the highest post in the Jharkhand Mining Engineering Services is the post of Additional Director (Mines) which starts from the lowest hierarchy of Assistant Mining Officer Class-II.

4. It is submitted by the learned counsel for the petitioner that though, the petitioner was senior most person since 2008 and the post was vacant and his case was under consideration by the Government vide Annexure-12, as per the affidavit filed by the respondent in an earlier writ petition being WPS No. 798/2009 in which the petitioner was the respondent, petitioner was never granted such promotion and now the post has itself been abolished. This is not permissible in law and has taken away the rights of the petitioner to be promoted to the higher post in the hierarchy as was existing at the time he entered the service. Therefore, he has approached this Court. Learned counsel for the petitioner also points out that on previous instances also, this petitioner had to approach this Court and in one of the writ petitions i.e. WPS No. 1477/2002, learned Single Judge of this Court remitted the matter to the respondent State of Jharkhand with a direction to fill up the post of Deputy Director, Mines and Additional Director of Mines on regular basis or at least on ad-hoc/officiating basis within a specific period. On that occasion, petitioner was complaining that he is being given only current charge of the post of Deputy Director since 1977, though he is otherwise entitled for promotion to the said post holding the substantive post of District Mining Officer for sufficient length of time. Learned counsel for the petitioner has relied upon judgments rendered by the Hon'ble Supreme Court in the case of Y.V. Rangaiah and Others Vs. J. Sreenivasa Rao and Others, AIR 1983 SC 852 : (1983) 2 LLJ 23 : (1983) 1 SCALE 296 : (1983) 3 SCC 284 as also in the case of Nirmal Chandra Bhattacharjee and Others Vs. Union of India (UOI) and Others, (1991) 5 JT 35 : (1990) 2 SCALE 548 : (1991) 2 SCC 363 Supp and in the case of State of U.P. and Others Vs. Mahesh Narain Etc., AIR 2013 SC 1778 : (2013) 137 FLR 316 : (2013) 3 JT 546 : (2013) LabIC 2181 : (2013) 3 SCALE 218 : (2013) 4 SCC 169 : (2013) 2 SCC(L&S) 212 : (2013) 2 SCT 671 : (2013) 2 SLJ 387 : (2013) AIRSCW 2297 to submit that the practice of filling up of higher post in ad-hoc manner, is not proper. Learned counsel by relying upon the aforesaid judgments submits that the action of the respondents had resulted in deprivation of chance of promotion as the petitioner was not promoted within time when the petitioner became eligible, though the respondent State had taken steps towards that, as would be evident from Annexure-12 to the writ petition.

5. Respondents in their counter affidavit have stated that in the earlier writ petition being WPS No. 3943/2012, preferred by the petitioner himself, there was a direction to prepare a seniority list within a stipulated period. The petitioner has pursued a contempt petition which is pending. Respondents categorically state that by way of policy decision, Jharkhand Mining Engineering Services Rules, 2011 has been notified on 10.11.2014 and the cadre post of mining cadre has been revised. The revised cadre structuring is also furnished at paragraph-6 of the counter affidavit which shows that the post of Additional Director, Mines is highest promotional post in the cadre now. At para-7, respondents also state that the State Government has declared the post of Director, Mines as Ex-Cadre post and appointment to this post shall be made by way of adopting selection process

through Jharkhand Public Service Commission. It is stated that the petitioner is also not debarred of the opportunity to appear before the Commission and if he is found suitable, he can also succeed in getting appointed to the said post of Director, Mines. Respondents further state that by Notification No. 302 dated 04.03.2015, petitioner has been removed from the post of Officiating Director, Mines (Annexure-A) and one S.P. Negi, Indian Forest Service Officer has been posted on the same post and he has already joined. It would also be evidenced from Para-11 of the same affidavit that the petitioner has recently been charge-sheeted in CBI Case No. RC 219/2012(E) 0012 and sanction of prosecution has been granted by Government of Jharkhand through Department of Law (Justice) vide order No. 56/J dated 05.12.2014. Therefore, his continuation on the said post was not in the public interest.

6. These are the material facts canvassed and noticed hereinabove in order to arrive at a decision on the prayer made by the petitioner seeking direction upon the respondents to complete the process of promotion to the post of Director, Mines while considering his case also as he is the senior most official in the Directorate.

7. In the first place, it is to be noted that the respondent Government being the employer, is well within its jurisdiction to enact amendment to 2011 Rules, notified on 10.11.2014 by which, the cadre structure has been revised. The authority of the employer to enact rules regarding recruitment, promotion, cadre restructuring of a particular service, cannot be questioned. The other issue is, whether because of revision in the cadre structuring, any vested right of the petitioner has been denied or not? It is trite to observe that an employee under the State or its instrumentalities, has a right to be considered for such promotion. A rule which merely affects the chances of promotion does not amount to a change in service condition.

8. In the instant case, the post of Director has been declared as Ex. Cadre post pursuant to the amendment to the Rules of 2011. Petitioner has not been able to show that on the basis of earlier prevalent rules, there were statutory interdict to conduct promotional exercise for the higher post in the Directorate of Mines within a statutorily fixed time frame, though, he claims that he was eligible since 2008 for such promotion. He has not been able to show that the respondents were under a legal obligation to conduct exercise of such promotion as per the fixed time schedule conferred by the Rules which governs the service condition of such employee. The Rules of 2011 as amended through notification dated 10.11.2014 appears to have the prospective effect as there is no retrospective indentment either expressly or implicitly made out from the language of the Rule. It has been painstakingly argued that that the amended rules fundamentally changed the applicant's prospects of promotion. However, what is ignored is that promotion already granted to the petitioner have not been taken away. In so far as future chances of promotion are concerned, no vested right accrues as chance of promotion is not a condition of service. The legal position in

this regard has been summed up after a thorough survey of the earlier precedents on the issues by the Hon"ble Supreme Court in Dhole Govind Sahebrao and Others Vs. Union of India (UOI) and Others(2015) 4 AD 361 : (2015) LabIC 2122 : (2015) 4 SCALE 259 : (2015) 4 SCJ 245 : (2015) 2 SCT 695 . The opinion of the Hon"ble Supreme Court as contained in paragraph-22 (i) (iv), 22.1, 22.2(v), 23 and 24 are quoted hereunder:

"22(i) First of all, we may advert to the decision rendered by this Court in State of Maharashtra and another Vs. Chandrakant Anant Kulkarni and others, AIR 1981 SC 1990 : (1981) LabIC 1568 : (1981) 2 LLJ 433 : (1981) 3 SCALE 1445 : (1981) 4 SCC 130 : (1982) 1 SCR 665 : (1981) 2 SLJ 280 , wherein a three Judge Bench of this Court held as under:

"16. Mere chances of promotion are not conditions of service and the fact that there was reduction in the chances of promotion did not tantamount to a change in the conditions of service. A right to be considered for promotion is a term of service, but mere chances of promotion are not. Under the Departmental Examination Rules of STOs, 1954, framed by the former State Government of Madhya Pradesh, as amended on January 20, 1960, mere passing of the departmental examination conferred no right on the STIs of Bombay, to promotion. By passing the examination, they merely became eligible for promotion. They had to be brought on to a select list not merely on the length of service, but on the basis of merit-cum-seniority principle. It was, therefore, nothing but a mere chance of promotion. In consequence of the impugned orders of reversion, all that happened is that some of the STIs, who had wrongly been promoted as STOs Grade III had to be reverted and thereby lost a few places. In contrast, the conditions of service of ASTOs from Madhya Pradesh and Hyderabad, at least so far as one stage of promotion above the one held by them before the reorganisation of States, could not be altered without the previous sanction of the Central Government as laid down in the Proviso to sub-section (7) of Section 115 of the Act."

(iv) More recent in time, is the judgment rendered by another three Judge Division Bench in S.S. Bola and others Vs. B.D. Sardana and others, AIR 1997 SC 3127 : (1997) 6 JT 637 : (1997) 5 SCALE 90 : (1997) 8 SCC 522 : (1997) 2 SCR 507 Supp : (1997) AIRSCW 3172 : (1997) 7 Supreme 427 . The majority opinion in the above judgment was rendered by Justice K. Ramaswamy. In the process of consideration, he observed as under:

"145. It is true that the Rules made under the proviso to Article 309 of the Constitution can be issued by amending or altering the Rules with retrospectivity as consistently held by this Court in a catena of decision, vz., B.S. Vadera Vs. Union of India (UOI) and Others, AIR 1969 SC 118 : (1968) 17 FLR 411 : (1970) 1 LLJ 499 : (1968) 3 SCR 575 ; Raj Kumar Vs. Union of India (UOI) and Others, AIR 1975 SC 1116 : (1975) 30 FLR 11 : (1975) LabIC 669 : (1975) 4 SCC 13 : (1975) 3 SCR 963 : (1975) 7 UJ 343 ; K. Nagaraj and Others Vs. State of Andhra Pradesh and Another, AIR 1985 SC 551 : (1985) 51 FLR 166 : (1985) 1 LLJ 444 :

(1985) 1 SCALE 31 : (1985) 1 SCC 523 : (1985) 2 SCR 579 : (1985) 1 SLJ 277 ; T.R. Kapur and Others Vs. State of Haryana and Others, AIR 1987 SC 415 : (1986) JT 1092 : (1986) LabIC 238 : (1987) 2 LLJ 25 : (1986) 2 SCALE 1051 : (1986) 1 SCC 584 Supp : (1986) SCC 584 Supp : (1987) 1 SCR 584 , and a host of other decisions. But the question is whether the Rules can be amended taking away the vested right. As regards the right to seniority, this Court elaborately considered the incidence of the right to seniority and amendment of the Act in the latest decision in Ashok Kumar Gupta v. State of U.P. [1977(5) SCC 201], reliving the need to reiterate all of them once over. Suffice it to state that it is settled law that a distinction between right and interest has always been maintained. Seniority is a facet of interest. The rules prescribed the method of selection/recruitment. Seniority is governed by the existing rules and is required to be worked out accordingly. No one has a vested right to promotion or seniority but an officer has an interest to seniority acquired by working out the Rules. It would be taken away only by operation of valid law. Right to be considered for promotion is a rule prescribed by conditions of service. A rule which affects that promotion of a person relates to conditions of service. The rule merely affecting the chances of promotion cannot be regarded as varying the conditions of service. Chances of promotion are not conditions of service. A rule which merely affects the chances of promotion does not amount to change in the conditions of service."

22.1. Consequent upon the above detailed consideration, Justice K. Ramaswamy recorded his conclusion in paragraph 153. On the issue in hand, sub-paragraph AB of Paragraph 153 is relevant and is being extracted hereunder:

"AB. A distinction between right to be considered for promotion and an interest to be considered for promotion has always been maintained. Seniority is a facet of interest. The rules prescribe the method of recruitment/selection. Seniority is governed by the rules existing as on the date of consideration for promotion. Seniority is required to be worked out according to the existing rules. No one has a vested right to promotion or seniority. But an officer has an interest to seniority acquired by working out the rules. The seniority should be taken away only by operation of valid law. Right to be considered for promotion is a rule prescribed by conditions of service. A rule which affects chances of promotion of a person relates to conditions of service. The rule/provision in an Act merely affecting the chances of promotion would not be regarded as varying the conditions of service. The chances of promotion are not conditions of service. A rule which merely affects the chances of promotion does not amount to change in the conditions of service. However, once a declaration of law, on the basis of existing rules, is made by a constitutional court and a mandamus is issued or direction given for its enforcement by preparing the seniority list, operation of the declaration of law and the mandamus and directions issued by the Court is the result of the declaration of law but not the operation of the rules per se."

22.2. Justice S. Saghir Ahmad concurred with the view expressed by Justice K.

Ramaswamy. A dissenting view was recorded by Justice G.B. Pattanaik. On the subject in hand, however, there was no dissent. The conclusions recorded by Justice G.B. Pattanaik were to the following effect:

"199. To the said effect the judgment of this Court in the case of State of Punjab Vs. Shri Kishan Das, AIR 1971 SC 766 : (1971) LabIC 481 : (1971) 1 LLJ 271 : (1971) 1 SCC 319 : (1971) 3 SCR 389 , wherein this Court observed an order forfeiting the past service which has earned a government servant increments in the post or rank he holds, howsoever adverse it is to him, affecting his seniority within the rank to which he belongs or his future chances of promotion, does not attract Article 311(2) of the Constitution since it is not covered by the expression reduction in rank.

200. Thus to have a particular position in the seniority list within a cadre can neither be said to be accrued or vested right of a government servant and losing some places in the seniority list within the cadre does not amount to reduction in rank even though the future chances of promotion get delayed thereby. It was urged by Mr. Sachar and Mr. Mahabir Singh appearing for the direct recruits that the effect of redetermination of the seniority in accordance with the provisions of the Act is not only that the direct recruits lose a few places of seniority in the rank of Executive Engineer but their future chances of promotion are greatly jeopardised and that right having been taken away the Act must be held to be invalid. It is difficult to accept this contention since chances of promotion of a government servant are not a condition of service. In the case of State of Maharashtra and another Vs. Chandrakant Anant Kulkarni and others, AIR 1981 SC 1990 : (1981) LabIC 1568 : (1981) 2 LLJ 433 : (1981) 3 SCALE 1445 : (1981) 4 SCC 130 : (1982) 1 SCR 665 : (1981) 2 SLJ 280 this Court held: (SCC p. 141 Para 16)

"16. Mere chances of promotion are not conditions of service and the fact that there was reduction in the chances of promotion did not tantamount to a change in the conditions of service. A right to be considered for promotion is a term of service, but mere chances of promotion are not."

201. To the said effect a judgment of this Court in the case of K. Jagadeesan Vs. Union of India and others, AIR 1990 SC 1072 : (1990) 60 FLR 847 : (1990) 1 JT 247 : (1990) 1 LLJ 495 : (1990) 1 SCALE 238 : (1990) 2 SCC 228 : (1990) 1 SCR 444 : (1990) 1 UJ 630 , wherein this Court held:

"The only effect is that his chances of promotion or his right to be considered for promotion to the higher post is adversely affected. This cannot be regarded as retrospective effect being given to the amendment of the rules carried out by the impugned notification and the challenge to the said notification on that ground must fail."

(v). Finally, reference may be made to a decision rendered by this Court in Union of India (UOI) and Others Vs. Col. G.S. Grewal, (2014) AIRSCW 4656 : (2014) 8 JT 70 : (2014) 7 SCALE 498 : (2014) 7 SCC 303 , wherein this Court observed as

under:

28. As pointed out above, the Tribunal has partly allowed the OA of the respondent primarily on the ground that the decision contained in the Government Order dated 23.04.2010 amends the promotion policy retrospectively thereby taking away the rights already accrued to the respondent in terms of the earlier policy. It is also mentioned that the revised policy fundamentally changes the applicant's prospects of promotion. What is ignored is that the promotions already granted to the respondent have not been taken away. In so far as future chances of promotions are concerned, no vested right accrues as chance of promotion is not a condition of service. Therefore, in the first instance, the Tribunal will have to spell out as to what was the vested right which had already accrued to the respondent and that is taken away by the Policy decision dated 23.4.2010. In this process, other thing which becomes relevant is to consider that once the respondent is permanently seconded in DGQA and he is allowed to remain there, can there be a change in his service conditions vis-a-vis others who are his counterparts in DGQA, but whose permanent secondment is not in cloud? To put it otherwise, the sole reason for issuing Government Policy dated 23.4.2010 was to take care of those cases where permanent secondment to DGQA was wrongly given. As per the appellants, since the respondent had suffered final supersession, he was not entitled to be seconded permanently to DGQA. This is disputed by the respondent. That aspect will have to be decided first. That apart, even if it be so, as contended by the appellants, the appellants have not recalled the permanent secondment order. They have allowed the respondent to stay in DGQA maintaining his promotion as Colonel as well, which was given pursuant to this secondment. The question, in such circumstances, that would arise is whether the respondent can be treated differently even if he is allowed to remain in DGQA viz. Whether not allowing him to take further promotions, which benefit is still available to others whose permanent secondment is not in dispute, would amount to discrimination or arbitrariness thereby offending Articles 14 and 16 of the Constitution of India. In our opinion, these, and other related issues, will have to be argued and thrashed out for coming to a proper conclusion.

23. It is apparent from a collective perusal of the conclusions recorded in the judgments extracted in the foregoing paragraph, that chances of promotion do not constitute a condition of service. In that view of the matter, it is inevitable to hold, that the High Court erred in recording its eventual determination on the basis of the fact that the promulgation of the TA Rules, 2003 and STA Rules, 2003 was discriminatory and arbitrary with regard to the fixation of the inter se seniority, since the same seriously prejudiced the chances of promotion of the erstwhile members of the ministerial cadre, namely, those members of the original ministerial cadre, who had not opted for appointment/absorption into the cadre of Data Entry Operators, with reference to and in comparison with, those members of the original ministerial cadre who had opted for appointment/absorption into the cadre of Data Entry Operators.

24. As a proposition of law it is imperative for us to record that chances of promotion do not constitute conditions of service, and as such, mere alteration of chances of promotion, would not per se call for judicial interference. The above general proposition would not be applicable, in case the chances of promotion are altered arbitrarily, or on the basis of considerations which are shown to be perverse or mala fide."

As has stated by the respondents that the post of Director has been made Ex. Cadre post, the petitioner or any other person has not been debarred from seeking appointment to the said post of Director now to be filled up by the Jharkhand Public Service Commission on the indent made by the department.

9. In the facts of the petitioner's case, it is also noticed that since the petitioner has been implicated in CBI case and sanction for prosecution has been granted by the respondent Government on 05.12.2014, respondents have removed him from the post of Officiating Director, Mines by Notification dated 04.03.2015 by posting another person in such capacity. However, that notification is not under challenge by the petitioner. Judgments relied upon by the petitioner in the case of J. Shreenivasa Rao (Supra) and Nirmal Chandra Bhattacharjee (Supra) do not help the petitioner's case. In the case of J. Shreenivasa Rao (Supra), it has been found that there was time stipulated in the rules for preparation of panel. In such manner, there was statutory interdict upon the employer to do so which was not followed in the said case. In the case of Nirmal Chandra Bhattacharjee (Supra), it is found that there was restructuring order which provided that the vacancy existing on a particular date should be filled up according to the procedure which was in vogue before 01.08.1983. These relevant material facts and operation of any such rules are found lacking in the petitioner's case. In the judgment relied upon by the petitioner in the case of Mahesh Narain (Supra), the question involved therein was whether unamended 1987 rules or amended 1987/1990 rules were applicable to the respondent-employee. The State of U.P. had contested the claim of employees on the ground that the experience of the respondent would be counted not from the date when the amended 1987/1990 Rules were published in the gazette but from the date when the amended 1987/1990 Rules were under preparation in view of which they did not possess the requisite experience of five years on the post of Scientific Officer. This contention of the State of U.P. was outrightly rejected by the Hon'ble Supreme Court holding that the Rules cannot be held to be made effective from the date of their preparation, but will attain legal sanctity and can be enforced only when they are made effective. The date on which they are made effective would obviously be the date when Rules are published in the Gazette Notification. Reliance of the petitioner on the said judgment, therefore, is of no aid to his case.

10. In sum and substance, since the amendment to the Rules of 2011 has been given effect to on 10.11.2014 and no challenge to that has either been thrown in the present writ application, any exercise to fill up the post of Director, Mines would be governed, as per the rules which are in vogue. The contention of the

petitioner to the effect that the post of Director, Mines cannot be continued in officiating or ad-hoc capacity, however has some substance, though petitioner himself was the beneficiary of such officiating arrangement for more than 7 years. In that respect, it is expected that the respondent State would take steps with due promptitude to ensure that the post of Director is filled up in accordance with law within a time frame. However, so far as the main prayer of the petitioner is concerned, in the factual background noticed and reasons recorded hereinabove, this Court does not find any merit in the writ petition. However, the writ petition is disposed of with the aforesaid observations.