

(2009) 03 GAU CK 0064
In the Gauhati High Court
Case No : Writ Petition (C) No. 2942 of 2006

Biswanath Dasgupta

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

Date of Decision : 09-03-2009

Acts Referred:

Citation : (2009) 4 GLT 827

Hon'ble Judges : P.K. Musahary, J

Bench : Single Bench

Advocate : A. Dasgupta and N. Deka, for the Appellant; D. Baruah, for the Respondent

Judgement

P.K. Musahary, J.—Heard Mr. A. Dasgupta, learned Counsel for the Petitioner and Mr. D. Baruah, learned Standing Counsel, for the Respondent BSNL.

2. The Petitioner initially joined the services of the Indian Posts and Telegraph Department on 14.08.1965 as a Telephone Operator at Bongaigaon Telephone Exchange and was released from the strength of Bongaigaon Exchange on 04.07.2006 by the Junior Engineer (Telegraphs). The Petitioner continued to work under the Assistant Engineer (Trunks), Guwahati, till 1980. Thereafter, the Petitioner made a request to the authorities concerned to transfer him from Guwahati to Bongaigaon and accordingly, he was transferred to Bongaigaon Telephone Exchange on 23.08.1980 under the Department of Telecommunications whereupon his name was struck-off from the strength of the Unit namely C.T.X. Guwahati. Thereafter, he was promoted from the post of Telephone Operator to the post of Senior Grade Telephone Operator on 30.11.1983 and his name appeared at serial No. 102 of the Telephone Operators prepared as on 01.01.1984. With the creation of Bharat Sanchar Nigam Limited (in short, BSNL), the Petitioner became the employee of the BSNL after exercising due option and retired from service as Telecom Operator Assistant (TOMA), Grade-III on 31.03.2002 on attaining the age of superannuation. While the Petitioner was in service, a Biennial Cadre Review Scheme (in short, BCR)

was introduced vide communication dated 13.12.1995 in the service of the Respondents which provides for promotion to 10% post in the next higher Grade solely on seniority basis. Under the aforesaid scheme, the Petitioner was eligible and was within the zone of consideration for promotion to Grade-IV in December, 2001. By a subsequent communication dated 16.06.1997(Annexure-E), the Respondent authorities decided to extend the benefit of pay scale of 10% Biennial Cadre Review (BCR) even to the staff working in the restructured cadre from the date their juniors in the old cadre have been given benefit as per seniority in the basic Grade of the old cadre. As per the draft gradation list for the cadre of TOA(P) as on 31.03.1999 of the Bongaigaon SSA, the Petitioner's name was placed at serial No. 18 and amongst the Grade-III employees, his name was placed at serial No. 14. In spite of clear-cut and categorical instructions contained in the communication dated 16.06.1997, the Respondent authorities deprived the Petitioner of his due promotion and as such, he submitted a representation dated 15.02.2002, before the Telephone District Manager, BSNL, Bongaigaon, to consider his case for promotion to Grade-IV. Without considering his case, one Sri Dashi Ram Kalita, TOA(G), Grade-III, whose case was exactly similar to the Petitioner, was promoted against 10% BCR Grade-IV post but the same has been denied to the Petitioner. The Petitioner then submitted another representation dated 19.03.2004 before the Chief General Manager, Assam Telephone Circle, Guwahati (Respondent No. 3) followed by representations dated 12.04.2005 and 08.06.2005 but to no effect. Then the Petitioner served a Legal Notice dated 27.07.2005 upon the Respondent authorities claiming promotion and other benefits. This time, the Petitioner was informed through his counsel, by the Divisional Engineer (P and A), O/o GMDT, Bongaigaon, vide letter dated 12.09.2005, that since the Petitioner on request, availed transfer, he lost his seniority as per Rule 38 of the P and T Manual Vol.-IV and he is no longer in the basic cadre and as such, he is not entitled to claim promotion under the aforesaid scheme. This communication/letter dated 12.09.2005 (Annexure-R) denying promotion to the Petitioner has been challenged in the present writ petition.

3. The Respondent authorities filed a counter affidavit on 05.04.2007 and the matter was taken-up for hearing on 26.08.2008 and it was posted for further hearing on 24.11.2008. In the meantime, on 18.11.2008, the Petitioner filed a rejoinder to the counter affidavit of the Respondent authorities and when the matter was listed for further hearing on 24.11.2008 and 28.11.2008, the learned standing counsel for Respondent BSNL submitted that he had obtained some relevant instructions and wants to place the same on record by filing additional affidavit. The Respondent authorities, thereafter, filed the said affidavit on 19.01.2009 and the matter was finally heard on 22.01.2009.

4. Mr. Dasgupta, learned Counsel for the Petitioner, referring to the averments made in the rejoinder affidavit, submits that 10% promotion have been provided through a scheme called Biennial Cadre Review (BCR) on completion of 10 years of service for a group of persons who have been placed in a particular

restructured cadre and such promotion should be made only on the basis of seniority or gradation list maintained for these group of persons and the promotion so made should not depend upon the joint gradation list of all Telephone Operators inasmuch as the aforesaid BCR Scheme has been introduced in order to give some relief to Grade-III and IV employees who have been suffering from stagnation to a particular Grade. According to this scheme, submits Mr. Dasgupta, an employee who has completed 26 years of service as on 01.01.1990 would be inducted to this restructured cadre. The Petitioner having admittedly completed 26 years of service as on 01.01.1990, has become eligible for being considered for promotion to the Grade-IV post under the aforesaid scheme. The next submission of Mr. Dasgupta, learned Counsel, is that the Petitioner having been included in the cadre of Biennial Cadre Review (BCR) on his fulfillment of condition laid down in the letter/communication dated 16.06.1997, promotion to Grade-IV under the said Scheme cannot be denied on the ground that the Petitioner on his request, got himself transferred to another Unit and lost his seniority in the new Unit, disentitling him to the benefit under the said Scheme. According to Mr. Dasgupta, the transfer of the Petitioner to the new Unit was no doubt made on his request but it took place prior to his induction to the Biennial Cadre Review (BCR) and as such, it has no bearing on the subsequent promotion to Grade-IV. In support of his submission, he relies on the latest communication vide No. 252-23/99-STN/Pers-III dated 31.05.2007 (Annexure-S to the rejoinder) issued by the Assistant Director General (PERS-III) wherein it is clarified that the basic Grade seniority is the criterion for promotion from BCR Grade-III to BCR Grade-IV and the basic Grade seniority is restructured in a particular gradation list and not to a group of gradation lists. This clearly indicates that for the purpose of promotion from BCR Grade-III to BCR Grade-IV, seniority of BCR Grade-II is the criterion for promotion. The Petitioner sought for transfer from Guwahati to Bongaigaon in the year 1980 while he was serving in Grade-1 and as such, the same cannot be the reason for depriving the Petitioner of the chance of promotion to Grade-IV. Subsequent to his transfer, the Petitioner was included in Grade-II Telephone Operator on completion of 16 years of regular service and thereby, he was included to the Grade-IV Basic Restructured Cadre (BRC). This is the reason why the Petitioner's name found place at serial No. 18 of the draft gradation list for the cadre of TOA as on 31.03.1999 of Bongaigaon SSA (Annexure-H to the petition). The present Grade in the aforesaid draft gradation list was shown as TOA (P)-III and the date of entry in the cadre as on 01.07.1991. For the same reason, according to Mr. Dasgupta, the name of the Petitioner appeared at serial No. 1 of the list of TOA (P)-III for selection of Grade-IV (Annexure-N to the petition) as prepared on 09.07.2004 by the Sub-Divisional Engineer (HRD), O/o GMDT, Bongaigaon.

5. Relying on the decision of the Apex Court in *Dwijen Chandra Sarkar and Another Vs. Union of India and Another*, Mr. Dasgupta, learned Counsel for the Petitioner, submits that the benefit under the Biennial Cadre Review (BCR) scheme can be extended to the Petitioner although the Petitioner requested for

transfer and moved to other Unit of the same department inasmuch as the service rendered in the earlier Unit of the said Department could be counted in computing the eligibility period of 26 years of regular service. The learned Counsel further contends that such benefit is to be given to the Petitioner and other similarly situated persons because of the policy envisaged in the aforesaid Scheme which primarily meant for removing frustration amongst the employees due to stagnation at a particular Grade without any scope for promotion to higher Grade. The time-bound promotion like the Biennial Cadre Review (BCR) is not like the regular promotion where seniority-cum-merit or other eligibilities are counted for promotion to the higher post or higher Grade. According to Mr. Dasgupta, learned Counsel, the case of Dwijen Chandra Sarkar (supra) has been followed in the subsequent cases; namely Union of India (UOI) and Another Vs. V.N. Bhat, and Union of India (UOI) and Others Vs. M. Mathivanan,

6. Contradicting the submissions of the learned Counsel for the Petitioner, it is submitted by Mr. D. Baruah, learned standing counsel for Respondent BSNL that the Petitioner admittedly took transfer on request from Kamrup Division to Bongaigaon Division under Rule 38 of the P and T Manual Vol.-IV wherein certain conditions are laid down for such transfer and the official has to sign a written undertaking. In the present case, in compliance to the said conditions namely condition Nos. (v), (vi) and (ix), the Petitioner agreed to forego old claims for confirmation in his new Unit, old claims for subsequent promotion/benefits and that he would rank junior not only to the servicing officials of the cadre in the new Unit but also to all the candidates approved for appointment in the cadre on or before the date of his transfer. As per the aforesaid conditions, his seniority was counted from 24.08.1980 i.e. from the date of his joining at the new Unit (Bongaigaon) on 24.08.1980 and he became juniormost to all the TOA(P) in the gradation list of TOA(P) in the new Division i.e. Bongaigaon Division in TOA(P) Cadre. According to Mr. Baruah, learned standing counsel, one time-bound promotion (in short, OTBP) is normally given to all eligible officials after completion of 16 years of regular service while the Biennial Cadre Review (BCR) promotion is normally given to all eligible officials after completion of 26 years of combined regular service. This OTBP and BCR promotions are one time-bound promotion and are not dependent on seniority. The Petitioner could not be given promotion as he became juniormost under Rule 38 of the said Manual at the new Unit (Bongaigaon) after he joined there on transfer on his request and he is yet to complete 26 years of combined regular service. The promotion of the Petitioner could have been considered only upon completion of 26 years of combined regular service, however, in the meantime, he retired on 31.03.2002 upon attaining age of superannuation. The learned standing counsel also contends that there is no case of discrimination inasmuch as 3 (three) other officials who were senior to the Petitioner namely Abdul Gani Sarkar, Sri Prafulla Nath Sarma and Sri Sudip Kr. Singha, whose names appeared at serial Nos. 68, 67 and 66 respectively in the corrected gradation list of TOA(P) could not be given promotion under the aforesaid Biennial Cadre Review (BCR) Scheme as

they also availed transfer on request under Rule 38 of the P and T Manual Vol.-IV. The learned standing counsel further contends that the name of the Petitioner having been placed at serial No. 69 in the aforesaid corrected gradation list, has become the juniormost official amongst those officials who availed transfer under the aforesaid Rule 38 of the Manual, and as such, the Petitioner cannot make any grievance of discrimination or denial of chance of promotion under the aforesaid scheme, at this stage.

7. As regards the grievance of the Petitioner that one Sri Dashi Ram Kalita, TOA(G), was favoured with promotion under the aforesaid BCR Scheme and the Petitioner was denied of the same, it is submitted that the former was in the BCR Grade-III in the pre-restructured cadre and was the seniormost amongst the officials in the pre-restructured cadre of BCR-III and as such, the Petitioner's case is not similar to that of Sri Kalita. The other 2(two) officials namely Gobinda Ramchiary and Ganesh Chandra Bhuyan, both TOA(P)-III, were placed at serial Nos. 23 and 33 respectively in the gradation list of 11.09.1995 and they were senior to the Petitioner in the basic cadre. The learned standing counsel further submits that the above named persons were also working in the pre-restructured cadre and did not avail transfer under Rule 38 of the aforesaid Manual and as such, they did not lose their seniority like the Petitioner.

8. Having gone through the pleadings and submissions made by the learned Counsel for the parties, I find that the factual aspects of the matter with regard to the appointment, transfer and formulation of the scheme in question, are not in dispute. While the Petitioner has been pleading that the benefit under the aforesaid BCR Scheme be provided to him as he attained the eligibility after rendering the prescribed service period/experience, no matter whether he was transferred from one Unit to another on his own request or otherwise, the Respondent authorities, however, on the other hand, putting much emphasis on the provision of Rule 38 of the aforesaid Manual, refused to provide benefit under the said scheme to the writ-Petitioner.

9. The Respondent authorities adopted procedure for promotion to Grade-IV (scale of Rs. 2000-3200/ -) against the scheme vide letter No. 22-6/94-TE-II dated 13.12.1995 (Annexure-D to the petition) which is quoted herein below:

Government of India Ministry of Telecommunications Department of Telecom Sanchar Bhavan, New Delhi-1. No. 22-6/94-TE-II Dated: 13.12.1995

To,

All Heads of Telecom Circles/ Metro Districts, Artce. Regions/ Project Circles and All Other Heads of Administrative Units.

Sub: Procedure for Promotion to Grade-IV (Scale of Rs. 2000-3200) against 10% posts in the BCR Scheme.

Your kind reference is invited to the instructions contained in this Office Letters No. 27-4/87-TE-II dated 07.01.1994 and 13.02.1994 and Letter No. 27-11/94-

TE-II dated 30.08.1994 which stipulate promotions to Grade-IV in the scale of Rs. 2000-3200/ - (against 10% posts in the BCR) as per the seniority position in Grade-III. The said procedure had been challenged by certain officials before the CAT Principal Bench, New Delhi by filing OA No. 1455/91.

The Hon"ble CAT vide its judgment dated 07.07.1992 directed that the promotions to 10% posts in the scale of Rs. 2000-3200/ - would have to be based on seniority in the basic cadres subject to fulfillment of other conditions of the BCR viz. those who are regular employees as on 01.01.1990 and had completed 26 years of service in the basic Grade (including higher Grades). The DOT filed an SLP against the said judgment and the Hon"ble Supreme Court vide their order dated 09.09.1993 upheld the judgment of CAT Principal Bench, New Delhi. Similar applications had also been filed before other CAT Benches in the country and in those cases as well, the judgments in line with the judgment of Principal Bench, New Delhi, had been given. Review of the existing procedure of promotion to Grade-IV (now designated as Chief Section Supervisor) under the BCR Scheme has been under consideration in view of the judgment of Principal Bench, New Delhi, upheld by the Supreme Court. It has now been decided in supersession of earlier instructions that promotion to the said Grade-IV may be given from amongst officials in Grade-III on the basis of their seniority in the basic Grade. The promotions would be subject to fitness determined by the DPC as usual.

The cases of promotion to the said Grade-IV in the scale of Rs. 2000-3200/ - against 10% posts under the BCR Scheme may be reviewed and the same may be regulated accordingly restricting the number of officials thus promoted strictly to 10% of the posts placed in Grade-III (Scale of Rs. 1600-2660/ -) as provided in the BCR scheme.

Sd/ - (B.S. Berma) Director (TE)

10. Thereafter, vide subsequent letter No. 27-4/87-TE-II(Pt) dated 16.06.1997 (Annexure-E to the petition), the Respondent authorities prescribed the eligibility conditions of Staff working in the restructured cadre to Grade-IV (10% BCR), as under:

Government of India Ministry of Telecommunications Department of Telecom Sanchar Bhavan, New Delhi-1. No. 27-4/87-TE-II (Pt) Dated: 16.06.1997

To,

All Heads of Telecom Circles/Metro Districts, Maintenance Regions/Project Circle and All Heads of other Administrative Offices.

Sub: Eligibility of the staff working in Restructured Cadre to Grade-IV (10% BCR) of the basic cadre.

I am directed to refer to this Office Letter No. 27-4/87-TE-II(Pt) dated 22.10.1993 under which permission was granted to allow BCR of the basic Grade

to the officials who have moved to the restructure cadre and opted for OTBT of the basic cadre. At that time, it was clarified that such officials will have no claim for 10% posts in the pay scale of Rs. 2000-3200 in the basic Grade.

2. The question of allowing 10% BCR (Grade IV) of the basic Grade to such officials has been under consideration of the Government for quite some time. The basis for such consideration has been that the staff in the Restructured Cadre should not be at a disadvantage compared to their counter part in the basic Grade.

3. The matter has been examined and I am directed to say that it has now been decided to allow 10% BCR scale of Rs. 2000-3200/- (Grade -IV) also to the staff working in the Restructured from the date their juniors in the old cadre have been given this benefit as per seniority in the basic Grade of the old cadre.

4. This issues with the concurrence of Finance Advice vide U.G. No. 1518/FA-1/97 dated 12.06.2007.

Sd/- Director (TE)

11. In both the aforesaid letters, the applicability of Rule 38 of the P and T Manual Vol.-IV has been mentioned debarring the employees, like the Petitioner, who have been transferred to other Unit on request as having lost their seniority in the earlier Unit and be placed at the bottom of the seniority list in the new Unit. Even accepting for a moment that the employees, like the Petitioner, who have lost their seniority and placed at the bottom of the seniority list in the new Unit, can they be deprived of the benefit of the BCR Scheme? For consideration of this aspect, it would be necessary to appreciate the difference between time-bound promotion and the regular promotion. The scheme in question is admittedly adopted as a measure of ensuring time-bound promotion taking into consideration that there are large number of employees in the Department who are not likely to get promotion in the near future because of their comparatively low position in the seniority of staff in a particular Grade and it was felt necessary to give promotion to those employees to the next higher Grade/post to remove possible bickering and frustration. Such time-bound promotion does not necessarily mean that it would affect the seniority of those persons who are senior to the persons as per the general gradation list. It rather means that such a time-bound promotion does not affect the normal seniority of the higher-ups. The law of time-bound promotion has been settled by the Supreme Court in Dwijen Chandra Sarkar's case (supra). In that case, the Appellants were appointed as LDCs in the Department of Rehabilitation, Government of India, on 18.11.1970 and 05.02.1965 respectively. Subsequently, the Appellant No. 1 was transferred on 07.12.1976, to P and T Department in the public interest as Personal Assistant while the Appellant No. 2 was also transferred on 13.12.1976 to the same Department in the public interest. The time-bound promotion scheme was introduced on 17.12.1983 to be effective from 30.11.1983. The said Appellants on being refused by the authorities to grant time-bound promotion

under the aforesaid BCR Scheme, approached the Central Administrative Tribunal (C.A.T.), Calcutta Bench, but their petition was dismissed by the said Tribunal, which led them to approach the High Court which held that services rendered by the Appellants with the former department cannot be counted and therefore, they are not entitled to time-bound promotion unless they complete 16 years in the transferee department namely the P and T Department. This led the Appellants in the case to approach the Apex Court. Allowing their appeal, the Apex Court held that the Appellants would be entitled to the higher Grade from the date they completed 16 years of service computing the same by taking into account their past services in the earlier department i.e. the Rehabilitation Department alongwith the services rendered in the P and T Department. It was also held that they would be so entitled so long as they remain in the post of Assistants and till their normal promotion to a higher post according to the Rules.

12. In the M. Mathivanan's case (supra), the Respondent employee was selected for recruitment to the cadre of Postal Assistant on 28.12.1981 and was appointed on daily wage basis and he, thereafter, underwent necessary training and was placed in reserve training pool and was posted to work in different post offices. In August 1983, he volunteered for enrollment in the Army Postal Services and his request was accepted and accordingly, he was appointed as Postal Assistant w.e.f. 27.08.1983. By a Memorandum dated 17.12.1983, the Respondent Department formulated time-bound promotion scheme which came into effect from 30.11.1983. The Respondent employee in the year 1999 made an application claiming benefit under time-bound promotion scheme as he had completed 16 years of service counting from the date of his service as Postal Assistant. The Respondent authorities denied his claim and informed him that his case for time-bound promotion would be considered only from 2007. The Central Administrative Tribunal (C.A.T.), Madras, on being approached by the Respondent employee, allowed his application holding that his service ought to have been considered from 30.09.1983 and since he had already completed 16 years of service in 1999, he was entitled to the benefit of time-bound promotion scheme. The Respondent Union of India being dissatisfied and aggrieved with the Tribunal's order, preferred an Appeal before the High Court of Judicature at Madras, which upheld the Tribunal's judgment and Order. Ultimately, the Union of India approached the Apex Court against the judgments of Tribunal as well as the High Court. The Apex Court held that since the Respondent employee had completed 16 years of service in the year 1999, he would be entitled to the benefit of time-bound promotion scheme and the action of the Respondent authorities in not granting the said benefit was illegal and contrary to law. The case of M. Mathivanan (supra), in my considered view, covers the case of the present writ-Petitioner inasmuch as in both the aforementioned cases, the employees were posted/transferred on their request. The case of the present Petitioner is on a better footing considering the fact that in Mathivanan's case (supra), the Respondent employee was posted in a different department while the writ-Petitioner in the present case has been transferred only from one Unit to

another Unit of the same Department on his request and as such, I do not find any reason why the ratio in the aforesaid case rendered by the Apex Court would not be applicable to the present case. In this aspect, it may be appropriate to quote paragraph-17 of the judgment and Order passed in the aforesaid Mathivanan's case (supra), as under:

17. It is no doubt true as observed by the High Court that Dwijen Chandra Sarkar was not an identical case, inasmuch as in that case, the Appellants were transferred "in public interest", whereas in the instant case, the transfer was volunteered by the Respondent employee for enrollment in Army. That, however, in our opinion, does not make difference since to us, the language of para-1 of the Scheme is clear, unambiguous and leaves no room for doubt. That aspect was also considered in Dwijen Chandra Sarkar. But, in any case, even that point is also finally concluded by another decision of this Court in Union of India v. V.N. Bhatt in which the employee was initially appointed in the Ministry of Defence and voluntarily transferred himself to the office of the Post Master General. The question which came up for consideration was as to whether he would be entitled to get benefit of the Scheme. Relying on Dwijen Chandra Sarkar, this Court held that the employee would be entitled to the benefit of the Scheme on completion of sixteen years of service.

13. In order to make the position further clear, it may be appropriate to extract and quote relevant portion from paragraph-4 of the judgment and Order in the aforesaid V.N. Bhatt's case (supra) as under:

4. The well-settled principle of law that even in the case where the transfer has been allowed on request, the employee concerned merely loses his seniority, but the same by itself would not lead to a conclusion that he should be deprived of the other benefits including his experience and eligibility for promotion. In terms of the Schemes aforementioned, promotion is to be granted for avoiding stagnation only within the said parties. The said Schemes have been framed because they are beneficial ones and are thus required to be implemented. The Scheme merely perused that any person having rendered 16/26 years of service without obtaining any promotion could be entitled to the benefit therefor. It is, therefore, not a case where promotion to the higher post is to be made only on the basis of seniority.

14. Having considered the present case in the light of the settled position of law, as annunciated by the Apex Court in the above cited cases, I come to a conclusion that the Respondent authorities misdirected themselves in applying the provision of law under Rule 38 of P and T Manual Vol.-IV and took a wrong decision to the effect that an employee who requested and got transferred to other Unit of the same Department and on being placed at the bottom of the seniority list in the new Unit, is not entitled to get the benefit of BCR Scheme without considering the meaning, purport and purpose of providing the time-bound promotion under the aforesaid scheme. The action of the Respondent authorities in denying the time-bound promotion under the aforesaid BCR

scheme to the writ-Petitioner has no nexus with the purpose sought to be achieved under the aforesaid Scheme and as such, the impugned action of the Respondent authorities is not sustainable under the law. This being the position, the impugned communication dated 12.09.2005 issued under No. QD-144/02-03/128 (Annexure-R to the petition) to the writ-Petitioner through his counsel communicating denial of the benefit under the BCR Scheme is liable to be quashed and accordingly, the same is hereby quashed and set aside. The Respondent authorities are hereby directed to consider the Petitioner's case alongwith other eligible candidates/employees, if any, in the light of the law settled by the Apex Court as highlighted in the aforementioned cases, and also in the light of the discussions made in this judgment and settle his claim within a period of 3 (three) months from the date of receipt of a certified copy of this order from the Petitioner.

15. With the above observations and directions, this writ petition stands disposed of. There shall be no order as to cost.