

(1982) 12 CAL CK 0023
In the Calcutta High Court
Case No : F. M. A. T. No. 3515 of 1980

Collector of Customs and Others

APPELLANT

Vs

Md. Habibul Haque

RESPONDENT

Date of Decision : 23-12-1982

Acts Referred:

Constitution of India, 1950 — Article 226
Customs Act, 1962 — Section 3, 4

Citation : (1982) 12 CAL CK 0023

Hon'ble Judges : M.M. Dutt, J; M.K. Mukherjee, J

Bench : Division Bench

Advocate : D.K. Sen and S.N. Banerjee, for the Appellant; B.N. Sen, M. Mazumdar, A.K. Sen Gupta, R.N. Mitra and R.N. Das and A.K. Ganguly for Added Respondent, for the Respondent

Final Decision : Allowed

Judgement

M.M. Dutt, J.—In this appeal, the appellants who are the Customs Authorities have challenged the propriety of the decision of a learned Judge of this Court dated November" 21, 1980 whereby the learned Judge made absolute the Rule Nisi that was issued on the application of the respondent, Md. Habibul Haque, under Article 226 of the Constitution of India. The principal question that is involved in this appeal relates to the seniority of the respondent in the post of Preventive Officer, Grade I. On October 1, 1964, the respondent Md. Habibul Haque was appointed a Preventive Officer, Grade II. A disciplinary proceeding was started against the respondent by the service of a charge-sheet on him. In the said disciplinary proceeding, he was dismissed from service by the order of the Assistant Collector of Customs dated September 12, 1969. The respondent moved against the order of dismissal by filing a writ petition in this Court. The order of dismissal was set aside. Thereafter, a fresh charge-sheet was served on him and another disciplinary proceeding was started against him. In that proceeding, the respondent was held guilty of the charges leveled against him and by an order of the Collector of Customs dated August 9, 1973 a major

penalty was imposed upon the respondent by reducing him to a lower stage in the scale of pay of Rs. 150-300/- for a period of one year without cumulative effect. It was directed in the said order that the period of reduction in payment would not operate to postpone his further increment for the above period. All attempts of the respondent to get the said order of punishment set aside failed. It may be stated here that since June 29, 1968, when the disciplinary proceeding was first started against the respondent, till August 8, 1973, the respondent was, under suspension. On August 8, 1974 the respondent was however, promoted to the post of Preventive Officer, Grade I. After the respondent was promoted, he claimed that his seniority in Grade I should be fixed with effect from the date of his appointment to Grade II, that is, October 1, 1964 or at least from June 12, 1966, on which date he was placed under suspension. It was alleged by the respondent that during the period the disciplinary proceeding was continuing or he was under suspension, the Customs Authorities did not consider his case for promotion to Grade 1.

2. At the hearing of the Rule Nisi, the respondent placed reliance on a Circular dated April 25, 1972 issued by the Central Board of Excise & Customs. The respondent also placed reliance on an administrative instruction on Rule 29(2) of the Fundamental Rules which provides as follows:

In cases where the reduction is for a specified period and is not to operate to postpone further increments, the seniority of the Government servant may, unless the terms of the order of punishment provide otherwise, be fixed in the higher service, Grade or post or the higher time-scale at what it would have been but for its reduction.

3. The learned Judge has taken the view that the said Circular dated April 25, 1972 shows that it was the intention of the authorities that on promotion the Preventive Officers would maintain their inter se seniority. Relying upon the said circular and the administrative instruction, the learned Judge has made the Rule Nisi absolute directing the appellants to determine the seniority of the respondent in accordance with law. Further, it has been directed that the inter se seniority of the respondent in Grade I shall be considered on and from the date he joined the service, that is, from October 1, 1964 and the consequential benefits, if any, following the determination of the seniority of the respondent, shall also follow. Being aggrieved by the said judgment of the learned Judge, the instant appeal has been preferred by the Customs Authorities.

4. There are two Grades in the post of Preventive Officer. The vacancies in Grade I are filled by direct recruitment and by promotion from Grade II. The scale of pay of Grade I is higher than that of Grade II. By the Memorandum dated May 5, 1954 of the Ministry of Home Affairs, specific rules have been framed for promotion and recruitment to Grade I and Grade II. Rule 1 of such Rules provides that 33 1/2 % of the posts of Preventive Officer, Grade I, should be filled by direct recruitment and 66-2/3% by promotion. Clause (b) of Rule 1, inter alia, provides that the vacancies in the promotion quota should be filled up

by promotion amongst Preventive Officers, Grade II on the basis of selection and on the recommendations of the Departmental Promotion Committee. It is not in dispute that the vacancies in Grade I are filled up either by direct recruitment or by promotion, as the case may be. Those who are recommended by the Departmental Promotion Committee are only promoted to the posts of Preventive Officer, Grade I. Such recommendations are made on the basis of selection on merit.

5. It appears that sometime in 1969-70, the Government decided to abolish the post of Preventive Officer, Grade II in a phased manner, that is to say, such abolition would be made over time by the promotion of Preventive Officers, Grade II to the posts of Preventive Officer, Grade I on the basis of recommendations of the Departmental Promotion Committee and by stopping further appointments to the posts of Preventive Officer, Grade II. Sub-rule (7) of rule 3 of the said Circular dated April 25, 1972 provides as follows:

Preventive officer Grade II who though found fit for promotion as Preventive Officer Grade I cannot be so promoted because of the pendency of any investigation into their conduct or of any disciplinary proceedings will be promoted under (2) or (3) above, as the case may be, as and when the investigations/proceedings against them are finalised and they are exonerated of the charges against them. On promotion as Preventive Officer Grade I, their seniority in that grade will be fixed in the order of their inter se seniority in the grade of Preventive Officer Grade II In accordance with the general standing instructions of the Government applicable to such class of officers. As their promotion will be in terms of the procedure prescribed in sub-paras (2) or (3) above, as the case may be, the post of Preventive Officer Grade I referred to in these sub-paras equal to the number of such officers will be left unfilled until the investigations/proceedings against them are finalised.

Under sub-rule (8) of rule 3, the Preventive Officers, Grade II who are not found fit for promotion as Preventive Officers, Grade I will continue as Preventive Officers, Grade II until further orders.

6. It is submitted by Mr. Dilip Kumar Sen, learned Counsel appearing on behalf of the appellants that the learned Judge has misinterpreted sub-rule (7) of rule 3 set out above in observing that it was the intention of the authorities that on promotion the Preventive Officers would maintain their inter se seniority. It is submitted that sub-rule (7) does not at all apply to the respondent inasmuch as the respondent was not exonerated from all the charges levelled against him. Indeed, the respondent was found guilty and was penalised by the reduction of his pay to a lower stage of the scale of pay for a period of one year.

7. In our opinion, there is much substance in the above contentions of the learned Counsel. It is true that sub-rule (7) provides that on promotion as Preventive Officers, Grade I, the seniority of the promotees in that Grade will be fixed in the order of their inter se seniority in the Grade of Preventive Officer,

Grade II in accordance with general standing instructions of the Government applicable to such class of officers. But it is clear from sub-rule (7) that the said provision will only apply to the cases of those Preventive Officers, Grade II who are exonerated from all the charges levelled against them. The respondent was, admittedly, not exonerated from the charges levelled against him and, as such, sub-rule (7) is not applicable to him.

8. It is, however, contended by Mr. Bhola Nath Sen, learned Counsel appearing on behalf of the respondent that the posts of Preventive Officer, Grade I and Preventive Officer, Grade II are the one and the same post and, therefore, the inter se seniority of Preventive Officers, Grade II will continue and will be maintained in Grade I on promotion to that Grade. In support of this contention, Mr. Sen has placed reliance upon sections 3 and 4 of the Customs Act, 1962 and the notification issued by the Government creating the post of the Preventive Officer. Counsel submits, although there are two Grades in the post of Preventive Officer, it cannot be treated as two posts for the purpose of seniority and promotion.

9. We are unable to accept the above contentions. It may be that the post is the post of Preventive Officer, but there is nothing in the Act which prevents the Government from sub-dividing the post into two Grades—Grade I and Grade II. As soon as the two Grades are created on different scales of pay, one higher and the other lower, it will be necessary to make provisions for promotion from the lower Grade to the higher Grade which, as stated already, have been made sometime in 1954. Promotions are being made from Grade II to Grade I in accordance with the rules framed by administrative instructions and are being followed ever since. It is a well settled principle of law that when an officer is promoted from a lower rank to a higher rank, his seniority will be counted in the higher rank from the date of his promotion. In other words, he loses his seniority in the lower rank. It may be that Grade I and Grade II constitute the post of Preventive Officer, but for the purpose of promotion and seniority, these two Grades should be treated as two separate posts. If between two Preventive Officers Grade II, one junior and the other senior, the junior gets promotion earlier than the senior, the senior, in our opinion, cannot claim the same seniority as in Grade II over the other after he is promoted to Grade I. If the contention of Mr. Sen is accepted, that will create a deadlock in the administration and there will be great dissatisfaction among the Officers of the Government. Many Preventive Officers, Grade II, some of whom are juniors to the respondent, have been promoted to Grade I long before the respondent's promotion. Their seniority has been fixed from the respective dates of their promotion. If the respondent's seniority in Grade I has to be fixed from the date of his appointment to Grade II in 1964 or from 1966, he will gain an advantage over many of his colleagues even though they were promoted much earlier than the respondent on the basis of the selections by the Departmental Promotion Committee and, in that case, the selections made by the Departmental Promotion Committee will be meaningless.

10. Next, it has been urged by Mr. Bhola Nath Sen for the respondent that the decision of the Government to abolish Grade II by promotion of Preventive Officers from Grade II to Grade I and stopping further recruitment to Grade II was really upgrading of Grade II to Grade I. Counsel submits that such upgradation can be made in a phased manner over time by placing Preventive Officers, Grade II to Grade I. It is contended that such upgradation is not tantamount to promotion and, as such, the inter, se seniority of Preventive Officers, Grade II will be maintained in Grade I. Much reliance has been placed on behalf of the respondent by his learned Counsel on the decision of the Kerala High Court in *N.G. Prabhu and another v. Chief Justice and another*, 1973 (2) S. L. R. 251. Our attention has also been drawn to the said Circular dated April 25, 1972 where in some places the word "upgradation" has been used. In *N. G. Prabhu's* case (*supra*), the Kerala High Court observed as follows:

Promotion is, of course, appointment, to a different post carrying a higher scale of pay in the service. If, to better the conditions of service of the incumbents in posts in the same category the scale of pay of all the posts in the category is raised, the incumbents would naturally get the higher scale of pay. But in such a case it may not be proper to characterise the event as promotion to higher posts though a benefit of a higher scale of pay is obtained by all concerned. In other words, if the upgradation relates to all the posts in a category naturally, there is no sense in calling it a promotion of all the persons in that category. That is because there is no question of appointment from one post to another. Parties continue to hold same posts but get a higher scale of pay. It may be that it is not all the posts in a particular category that are so upgraded, but only a part of it. Normally, the benefit of such upgradation would go to the seniors in the category. They would automatically get a higher scale of pay. That is because though their posts continue in the same category a higher scale of pay is fixed for those posts. It is appropriate then to say that the seniors have been nominated to the Higher Grade which has been so created by upgradation. This phenomena does not differ from the case where all the posts are upgraded and, it appears to us that those who get the higher grade cannot be said to have been "promoted" because here again there is no question of appointment from one post to another. They continue to hold the same post, but because of seniority in the same post they are given a higher scale of pay. When a person is nominated to the higher scale of pay from time to time based on seniority it may perhaps loosely be termed as a promotion. But it appears to us that it is different from promotion as we envisage it normally.

11. We do not find any reason to differ from the proposition of law that is contained in the above observation of the Kerala High Court. But that observation, in our opinion, does not apply to the facts and circumstances of the instant case. It is true that the Government decided to abolish Grade II in the posts of Preventive Officer by gradual promotion from Grade II to Grade I and stopping further recruitment to Grade II. Such promotion will be given on the basis of selection on merit by the Departmental Promotion Committee and not on

the basis of seniority. It is manifestly clear from the said Circular dated April 25, 1972 that if a Preventive Officer Grade II is not found fit for promotion to Grade I, he will remain in Grade II. Thus it is apparent that it is not a case of upgradation of all the posts of Preventive Officer Grade II or a part of it on the basis of seniority. Merely because the Government decided to abolish Grade II, that does not mean that Grade II is upgraded to Grade I. What is important is how the abolition of Grade II is to be effected. If the abolition had been decided to be made by upgrading Grade II to Grade I, it would surely not be a case of promotion, but upgradation, simpliciter and, accordingly, the inter se seniority would be maintained. But if the upgradation takes place by gradual promotion from Grade II to Grade I on the basis of selection on merit and not on seniority such upgradation will really be a case of promotion and the question of seniority will be counted from the date of such promotion. When there is upgradation to a higher grade from a lower grade without any selection on merit, it will be a case of upgradation simpliciter and the inter se seniority in the lower grade will be maintained in the higher grade. But where, as in the instant case, upgradation from a lower grade to a higher grade is made on the basis of selection on merit that will be a case of promotion and not upgradation. The word "upgradation" has been loosely used in the said Circular dated April 25, 1972. It is, however, clear the Government contemplated promotion of Preventive Officers, Grade II to Grade I on the basis of selection to be made by the Departmental Promotion are, therefore, unable to accept the contention of the respondent that there was an upgradation of the post of Preventive Officer, Grade II to Grade I and so the inter se seniority of Preventive Officers, Grade II, in the Grade will be maintained in Grade I.

12. Fundamental Rule 29(1) provides that if a Government servant is reduced as a measure of penalty to a lower stage in his time-scale, the authority ordering such reduction shall state the period for which it shall be effective and whether on restoration, the period of reduction shall operate to postpone future increments and, if so, to what extent. Sub-rule (2) of Fundamental Rule 29 deals with a case where a Government servant is reduced as a measure of penalty to a lower service, grade or post or to a lower time-scale. The respondent was reduced as a measure of penalty to a lower stage in his time-scale and not to a lower time-scale and, therefore, sub-rule (2) of Fundamental Rule 29 will have no application. The administrative instruction which has been relied on by the learned Judge as quoted above (wrongly stated in the judgment as Fundamental Rule 29) relates to sub-rule (2) of Fundamental Rule 29 and not to sub-rule (1) thereof. Although there is no such administrative instruction in respect of sub-rule (1) of Rule 29, in our opinion, there is no reason why a Government servant, who has been reduced as a measure of penalty to a lower stage in his time-scale and whose period of reduction has been directed not to operate to postpone his future increments, will not get the benefit of the said administrative instruction. Subject, however, to this that such Government servant is found fit for promotion to the higher service, grade, or post.

13. It is the case of the respondent that his case for promotion to Grade I was not considered by the Departmental Promotion Committee during the period he was under suspension and accordingly, it is submitted on his behalf that he should be promoted with retrospective effect from June 29, 1968 when he was placed under suspension. It has, however, been averred in paragraph 14 of the affidavit-in-opposition of the appellants that the respondent's case for appointment to the post of Preventive Officer, Grade I was considered by the Departmental Promotion Committee while the respondent was under suspension and the disciplinary proceedings were pending against him. But as the respondent was not found fit for promotion to the post of Preventive Officer, Grade I by the Departmental Promotion Committee during the respondent's period of suspension, he cannot claim promotion to Grade I with effect from any date earlier than August 9, 1974 when he was found fit by the Departmental Promotion Committee and promoted to the post of Preventive Officer, Grade I.

14. The respondent was put under suspension on June 29, 1968 and he was dismissed from service on September 12, 1969 by the order of the Assistant Collector of Customs. The order of dismissal of the respondent was set aside by a learned single Judge of this Court by his order dated April 27, 1971 passed in the Rule Nisi being C. R. No. 3826 (w) of 1970 issued on the writ petition of the respondent. The said order of the learned Judge was upheld in appeal preferred by the Customs Authorities, the present appellants before us, by the order of the Appeal Court dated March 29, 1972. So long as the order of dismissal was subsisting for the period from September 12, 1969 up to March 29, 1972, the order of the trial Court dated April 27, 1971 having been stayed by the Appeal Court pending the disposal of the appeal, the respondent's case was not considered for promotion by the Departmental Promotion Committee as it could not be. It appears from the records produced before us by the learned Counsel of the appellants that after the order of dismissal was set aside by the learned Judge in the said Rule Nisi and ultimately upheld by the Appeal Court by its order dated March 29, 1972, the respondent's case for promotion was considered by the Departmental Promotion Committee on June, 21, 1973, and it was found that the respondent was not fit for promotion. Again, the respondent's case for promotion was considered by the Departmental Promotion Committee on August 3, 1974 and this time the respondent was found fit for promotion to the post of Preventive Officer, Grade I with effect from August 9, 1974. So the respondent is not entitled to claim that he should be promoted with effect from any date earlier than the date he was found fit for promotion by the Departmental Promotion Committee, that is, August 3, 1974. The Departmental Promotion Committee has, however, recommended that the respondent should be promoted with effect from August 9, 1974. In our opinion, for whatever may be its worth, the respondent's promotion should have been with effect from August 3, 1974 when he was found fit for promotion. In view of the above discussion, we do not think that the learned Judge was right in directing that the inter se seniority of the respondent in Grade I to be considered on and from the date he was appointed

to the post of Preventive Officer, Grade II, that is, from October 1, 1964. The learned Judge had overlooked that the respondent is not entitled to the benefit of sub-rule (7) of rule 3 of the said Circular dated April 25, 1972 inasmuch as the respondent was not fully exonerated from the charges made against him. Further, the learned Judge also did not take into his consideration that the respondent was not found fit for promotion by the Departmental Promotion Committee on June 21, 1973. In the circumstances, we set aside the judgment of the learned Judge and allow this appeal, subject to this that the respondent's promotion to the post of Preventive Officer, Grade I, shall be with effect from August 3, 1974 with all consequential benefits including his seniority from that date.

15. In view of the facts and circumstances of the case, there will, however, be no order for costs.

16. As prayed for by the learned Advocate for the respondents, let the operation of this order remain stayed for a period of three weeks after the Christmas Vacation.

Monoj Kumar Mukherjee, J.

I agree.