
(2010) 12 MP CK 0032

In the Madhya Pradesh High Court

Case No : Writ Petition No. 2128 of 2007 (S)

National Fertilizers Ltd. and Another

APPELLANT

Vs

Rajvendra Singh Chauhan and Others

RESPONDENT

Date of Decision : 01-12-2010

Acts Referred:

Constitution of India, 1950 — Article 227

Madhya Pradesh Industrial Relations Act, 1960 — Section 28, 31, 31(3), 61, 62

Citation : (2011) ILR (MP) 1171 : (2011) 1 MPHT 256 : (2011) 1 MPJR 138 :
(2011) 1 MPLJ 461

Hon'ble Judges : S.N Aggarwal, J; Abhay M. Naik, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

Abhay M. Naik, J.

This petition under Article 227 of the Constitution of India has been preferred against the order dated 30th October, 2006 passed by the M.P. Industrial Court Bench at Gwalior in C.A. No. 52/2004.

Respondent No. 1, who was working on the post of Technician Grade I in the services of the Petitioners, submitted an application under Sections 31, 61 and 62 of the Madhya Pradesh Industrial Relations Act, 1960 (for brevity "M.P.I.R. Act) mainly with allegations that Respondents No. 2 and 3 despite being junior to him were promoted as Senior Technician. He prayed that the action on the part of the Petitioners in promoting Respondents No. 2 and 3 on the post of Senior Technician and further inaction on their part in not promoting Respondent No. 1 on the said post may be declared illegal. Consequential prayer has also been made for promotion as well as higher pay grade from the date when Respondents No. 2 and 3 were promoted.

Aforesaid, was opposed mainly on the ground that the application u/s 31 of M.P.I.R. Act, 1960 is not maintainable; secondly, Respondent No. 1 was not

found suitable for promotion by the Departmental Promotion Committee.

Labour Court No. 3, Gwalior vide its order dt. 20th October, 2000, allowed the application and directed the Petitioner to promote Respondent No. 1 from the date prior to the promotion of Respondents No. 2 and 3 and further to pay the difference of pay.

Petitioner preferred Appeal No. 28/MPIR/2001, which was partly allowed vide order dt. 16th May, 2002. Matter was remitted back to the Labour Court with the direction to raise additional issue and to decide it thereafter in accordance with law. Thereafter, the Labour Court No. 3, Gwalior vide order dt. 23-2-2004 again allowed the application of Respondent No. 1 and directed for his promotion prior to the promotion of Respondents No. 2 and 3. Additionally, it was directed that Respondent No. 1 may be paid the difference of salary from the date of promotion.

Aggrieved by the aforesaid, Petitioner submitted C.A. No. 52/2004, which having been dismissed, the present Writ Petition is preferred under Article 227 of the Constitution of India.

Shri Prashant Sharma, learned Counsel for the Petitioners submitted that the application u/s 31(3) of the M.P.I.R. Act submitted by Respondent No. 1 is not maintainable and the same ought to have been dismissed.

Section 31 of M.P.I.R. Act reads as under:

Notice of change. - (1) An employer intending to effect any change in respect of an industrial matter specified in Schedule I shall give notice of such intention in the prescribed form and manner to the representative of employees and to such other persons as may be prescribed.

(2) A representative of employees desiring a change in respect of an industrial matter, which is neither covered by standing orders nor is specified in Schedule II, shall give notice thereof in the prescribed manner to the employers concerned and to such other persons as may be prescribed.

(3) A representative of employees or an employee desiring a change in respect of an industrial matter specified in Schedule II or any other matter arising out of such change may make an application to Labour Court in such manner as may be prescribed.

A perusal of the aforesaid goes to show that Sub-section (1) and (2) obliges an employer and representative of employees respectively to give notice in case if they intend or desire to effect any change in respect of an industrial matter in a situation enumerated therein, whereas, Sub-section (3) enables an employee also desiring a change in respect of an industrial matter specified in Schedule II or any other matter arising out of such change to make an application to Labour Court in such manner as may be prescribed. For the purpose of Sub-section (3), Schedule II becomes significant, which is reproduced below:

SCHEDULE II (Section 31)

The propriety or legality of an order passed or action taken by an employer acting or purporting to act under the standing orders or any rules or regulations governing the conditions of service of the employees.

Adequacy and equality of materials and equipment supplied to the employees.

Health, safety and welfare of employees (including water, dining sheds, rest sheds, latrines, urinals, creches, restaurants and such other amenities).

Matters relating to trade union organisation, membership and levies.

Construction and interpretation of awards, agreements and settlements.

Employment including -

(i) reinstatement and recruitment;

(ii) unemployment of persons previously employed in the industry concerned.

Payment of compensation for closure, lay-off and retrenchment.

Assignment of work and transfer of employees within the undertaking.

Shri Prashant Sharma, learned Counsel appearing for the Petitioner contended that Respondent No. 1 in his application submitted before the Labour Court did not seek the relief of quashment of the order of promotion of Respondents No. 2 and 3. In the absence of such prayer, it has been submitted that the application u/s 31 of M.P.I.R. Act was and is liable to be rejected. It has been further contended by the learned Counsel that the question of promotion is not covered by any of the items contained in Schedule II, therefore also the application was and is liable to be rejected.

After considering the submissions in the light of Section 31(3) of M.P.I.R. Act and Schedule II as well, we are of the opinion that the contentions raised on behalf of the Petitioner are not liable to be accepted. Sub-Section 3 of Section 31 (supra) clearly enables an employee desiring a change in respect of an industrial matter specified in Schedule II or any other matter arising out of such change to make an application to Labour Court in such manner as may be prescribed. Item No. 1 of schedule (supra) read with Sub-section (3) of Section 31 of M.P.I.R. Act, enables an employee to make application not only to challenge the propriety or legality of an order but also enables him to dispute the proprietary or legality of an action taken by his employer acting or purporting to act under the standing orders or any rules or regulations governing the conditions of service of the employees. Case of Respondent No. 1 is that he was entitled to the next higher pay scale after completion of five years of service. It was completed in the month of February 1993, however, the higher pay scale was not given to him. According to him, he was victimized due to his participation in the union activities. Though the allegations levelled against the employer (i.e. the Petitioner) were denied, Respondents No. 2 and 3 despite being juniors to Respondent No. 1 were given

higher pay scale. Labour Court after recording the evidence found Respondent No. 1 to be entitled to higher pay scale from the date prior to promotion of Respondents No. 2 and 3. This order was set aside in an appeal on 16-5-2002 and the case was remanded to the Labour Court for deciding it afresh after framing fresh issues. The Labour Court again vide its order dt. 23-2-2004 held that Respondent No. 1 was entitled to promotion prior to Respondents No. 2 and 3. It is the action of the Petitioner of promoting Respondents No. 2 and 3 prior to Respondent No. 1, which was challenged before the Labour Court. Similarly, inaction on its part in not promoting Respondent No. 1 is also under challenge. Both the challenges are permissible at the instance of an employee under Item No. 1 of Schedule II. This being so, contentions of the Petitioner in this respect are hereby repelled and the application submitted by Respondent No. 1 before the Labour Court is found maintainable.

Further contention of Petitioner's learned Counsel is that there ought not to have been a direction for promotion. Instead, a direction for consideration for promotion ought to have been issued. Countering the aforesaid, Shri Ravi Jain, learned Counsel for Respondent No. 1 placing reliance on 1982 SCC (L & S) 42 Workmen v. Williamson Magor and Co. Ltd. and Anr. submitted that direction for promotion is justified in the peculiar facts and circumstances of the present case.

In the aforesaid decision, Hon"ble Apex Court has observed:

Even if promotion may not be a condition of service in a private company and promotion may be the function of the management, it may be recognised that there may be occasions where the Tribunal may have to cancel the promotions made by the management where it is felt that persons superseded have been so superseded on account of legal mala fide or victimisation. Although in spite of the allegations of mala fide, the Union has not been able to prove factual mala fide, in this case malice in law and effectual victimisation are obvious due to the fact that unjustified promotions of some junior persons were made superseding, without any reason or necessity, the cases of a large number of senior persons.

It has also been observed in para 12:

12. Mr. Pai, learned Counsel appearing for the management, made two submissions before us. Firstly, he submitted that unlike in public sector undertakings, promotion is not a condition of service in a private company. We are unable to accept the submission of Mr. Pai in toto. If there is no scope of any promotion or upgradation or increase in salary in a private undertaking, the submission of the learned Counsel may be justified but if there are grades and scopes of upgradation/promotion and there are different scales of pay for different grades in a private undertaking, and, in fact, promotion is given or upgradation is made, there should be no arbitrary or unjust and unreasonable upgradation or promotion of persons superseding the claims of persons who may be equally or even more, suitable. The second submission of Mr. Pai is that although there were no norms, the promotions of the persons in question were

not arbitrary and that the findings of the Tribunal in this regard were incorrect. He led us through the material evidence of the witnesses examined. We are unable to agree with learned Counsel and do not find any reason to differ from the findings of the learned Tribunal that the promotions of the 15 persons were arbitrary and unjustified. Mr. Pai also submitted that unless victimisation was proved by the Union, the management's action should not be disturbed. The word "victimisation" has not been defined in the statute. The term was considered by this Court in the case of *Bharat Bank Ltd. v. Employees*. This Court observed, "It (victimisation) is an ordinary English word which means that a certain person has become a victim, in other words, that he has been unjustly dealt with". A submission was made on behalf of the management in that case that "victimisation" had acquired a special meaning in industrial disputes and connoted a person who became the victim of the employer's wrath by reason of his trade union activities and that the word could not relate to a person who was merely unjustly dismissed. This submission, however, was not considered by the Court. When, however, the word "victimisation" can be interpreted in two different ways, the interpretation which is in favour of the labour should be accepted as they are the poorer section of the people compared to the management.

Hon'ble Apex Court in the case of *The Distt. Registrar, Palghat and Ors. v. M.B. Koyakutty and Ors.* 1979 SCC (L & S) 126 has observed:

30. The last point for consideration is, whether it was proper for the High Court to issue a positive direction requiring the Appellant to promote the Respondent to the Upper Division and thereafter to determine his rank in the cadre of Upper Division Clerks. Ordinarily, the Court does not issue a direction in such positive terms; but the peculiar feature of this case is that it has been disputed that Koyakutty Respondent satisfies the two-fold criterion for promotion laid down in the statutory Rule 28(b)(ii). Indeed, the District Registrar, Palghat, who was impleaded as Respondent 3 in the writ petition, expressly admitted in paragraph 8 of his counter-affidavit filed before the High Court, "that the seniority of service is the basis of promotion from the ranks of Lower Division Clerks to the ranks of Upper Division Clerks provided they are fully qualified by passing the departmental tests for the purpose". It was never the case of the Registrar that Koyakutty was not otherwise fit for promotion. Indeed, even in the grounds of appeal to this Court, incorporated in the Special Leave Petition, it is not alleged that Koyakutty did not satisfy the criterion of seniority-cum-fitness prescribed by Rule 28(b)(ii). The position taken by the Appellant, throughout was that this rule should be deemed to have been "supplemented" by the impugned government notification. It is not correct that the impugned notification merely "supplements" or fills up a gap in the statutory rules. It tends to supersede or super-impose by an Executive fiat on the statutory rules something inconsistent with the same. Since the existence of both the criteria viz., seniority and fitness for promotion to the Upper Division prescribed, by the statutory Rule 28(b)(ii), in the case of Koyakutty was not disputed, the High Court was justified in issuing the direction

it did.

On perusal, it is found that the learned Industrial Court in para 8 has clearly observed that the Petitioners have not examined any witness to prove unsuitability of the applicant for promotion. Despite remand, no evidence was produced by them to justify supersession of Respondent No. 1. It is further found on perusal that the lower Court framed additional issue on 28-10-2002 and granted opportunity to the Petitioners to adduce evidence. Despite this, it was expressed on behalf of the Petitioners on 14-1-2003 that they did not wish to lead evidence. Thus, in the present case, the Petitioners have failed to adduce relevant evidence to establish unsuitability of Respondent No. 1 despite a plea to this effect having been raised. Thus, we do not find any material on record to find any infirmity in the impugned order.

On perusal of the entire material on record in the light of law governing the situation, we hold that the victimization of Respondent No. 1 was made by promoting Respondents No. 2 and 3 prior to Respondent No. 1 and in order to impart justice, direction for promotion could have been legally given, which alone would subserve the purpose of law.

Resultantly, there being no force in the writ petition, the same is hereby dismissed summarily, however, with no order as to costs.