

(2013) 11 GAU CK 0006
In the Gauhati High Court
Case No : Writ Petition (C) No. 5055 of 2006

Niroda Gogoi

APPELLANT

Vs

Dibrugarh University and Others

RESPONDENT

Date of Decision : 27-11-2013

Acts Referred:

Citation : (2013) 5 GLT 716

Hon'ble Judges : T. Vaiphei, J

Bench : Single Bench

Advocate : P.J. Saikia, Mr. B. Chetia and Mr. J.C. Borah, for the Appellant; K. Agarwal, R.J. Baruah and Ms. D. Kakati, for the Respondent

Final Decision : Partly Allowed

Judgement

T. Vaiphei, J.—Whether the petitioner is entitled to monetary benefits with retrospective promotion to the post of Computer when her case could not be considered by respondent-University on the date the post fell vacant without any valid justification, is the moot point in this writ petition. The case of the petitioner is that she was appointed as draftsman in the Planning & Construction (P & C) Branch of the Dibrugarh University on 2.5.1984. The post of Computer is the next promotional post for Draftsman, which became vacant on 31.12.1996. The qualification for the post of Computer (P&C) is Diploma holder or Certificate holder with a minimum of 6 years experience of working in the particular line. The petitioner was admittedly eligible for promotion to the post of Computer as on 31.12.1996. In fact, according to the petitioner, she was verbally entrusted with the additional duty and responsibility for the post of Computer. The petitioner, therefore, applied for promotion to this post as early as 21.1.1997 when she filed an application to the Registrar of the University (respondent 2). After inordinate delay, the respondents held the selection process for promotion to the post of Computer on 8.2.1999, but no promotion order was issued even after they continued to utilize her service in this post. Ultimately, on 5.3.2003, the respondent No. 2 allowed the petitioner to officiate in this post but without

retrospective effect w.e.f. 1.1.1997. Nor was she granted charge allowance from 1.1.1997 to 5.3.2003. The petitioner was also denied of her annual increment from 1.3.2004 or the scale of promotion since 2001. On the basis of the repeated representations made by her, the Vice-Chancellor of the University finally constituted a two-man Committee to enquire into her case. After long delay, the respondent No. 2 by his letter dated 28.4.2006 informed her that the Executive Committee in its 275th meeting rejected her case on the basis of the report of the Enquiry Committee. Aggrieved by this, she is now approaching this Court in this writ petition.

2. In resisting the writ petition, the respondents in their affidavit-in-opposition deny that the petitioner was ever either verbally or in writing requested to discharge the duties of the post of Computer in addition to her duties as Draftsman. The answering respondents do admit that the petitioner was called for interview before the Selection Committee on 8.2.1999 for the post of Computer, but then the sitting of the Selection Committee had to be postponed on that day. The case of the respondents is that the selection for the post of Computer was being made through the Selection Committee with an external expert from the Public Works Department, which was strongly opposed by the Dibrugarh University Employees' Association, which demanded that the post of Computer be filled up by promotion on the basis of seniority. According to the answering respondents, one Mrs. Niroda Das, having the requisite qualification was working as Draftsman in the Department of Applied Geology since 1979 and the demand of the Association was to promote her to the post of Computer. This resulted in postponement of the meeting of the Selection Committee scheduled for 8.2.1999 for considering the promotion of the petitioner the post of Computer. They deny that the petitioner had appeared before the Selection Committee on 8.2.1999. As the sitting of the Selection Committee was not held on 8.2.1999, the question of issuing the order of promotion for the petitioner does not arise. The answering respondents also point out that though the petitioner claimed to have submitted various representations, the materials on record show that the University had her received on the representation dated 8.7.1999 and 28.9.2000. The answering respondents also deny that the service book and original personal file of the petitioner where recommendation had been made by the University Engineer for her promotion to the post of Computer were missing from the Establishment Branch of Dibrugarh University or that the same resulted in not considering her various representations. The respondents point out that the petitioner, who was serving as Draftsman, was allowed to officiate on promotion as Computer for a period of three months vide the order dated 5.3.2003 and was attached to the Planning and Construction Branch of Dibrugarh University. The petitioner was given scale promotion by the order dated 29.1.2008 and was allowed to draw her annual increment w.e.f. the day of raising her basic pay on 1.3.2008. Earlier, the petitioner was granted annual increment w.e.f. 1.3.2004 to 1.3.2006 in the pay scale of Rs. 3760-9400 vide the order dated 24.10.2006 Another order was issued on 13.3.2007 granting annual

increment for the year 2007 in the pay scale of Rs. 3760-9400/-. In this order, it was made clear that the date of effect of annual increment was deferred to 3.3.2007 due to grant of earned leave for four days w.e.f. 27.2.2007 to 2.3.2007. The answering respondents further aver that a three man Committee was set up to examine the grievances of the petitioner concerning her claim to charge allowance and promotion. The report of the Committee was examined by the Executive Council of the University, which after considering the suggestions made by the Committee, came to the conclusion that the question of appointing the petitioner to the post of Computer with retrospective effect did not arise and that the petitioner is also not entitled to any special charge allowance for the period commencing from 1.1.1997 to 4.3.2003. These are the main thrust of the stance taken by the respondent-University.

3. After hearing Mr. P.J. Saikia, the learned counsel for the petitioner, and Mr. K. Agarwal, the counsel for the University, it becomes clear that the claim of the petitioner for special charge allowance from 1.1.1997 to 4.3.2003 has no legs to stand on inasmuch as no substantial evidence could be produced by her to show that she had actually discharged the additional duty of Computer. The only evidence she has is in the form of the Office Order dated 11.4.1996 issued by the University Engineer, Dibrugarh University allowing her, with the approval of the Registrar, to work at site in addition to her existing duties and attached with one Mrs. Depali Phukan, Asst. Engineer (Civil). Now, what is to be noted is that the University Engineer has no authority to engage the petitioner for such work. As the respondents have denied approving such engagement, in the absence of any order in writing by the Registrar to that effect, such office order cannot be acted upon to hold that she is entitled to charge allowance. Coming now to the question as to whether the petitioner is entitled to retrospective promotion with monetary benefits, the submission of the learned counsel for the petitioner is that the petitioner was admittedly eligible, and, in fact, the only eligible candidate, for promotion to the post of Computer and as the only eligible candidate, she ought to have been promoted on 31.12.1996, when the post fell vacant. He contends that as she had been denied of such promotion till 5.3.2003 without any valid reason, the granting of promotion to the petitioner with retrospective promotion with monetary benefits i.e. with effect from 31.12.1996 or, at any rate, with effect from 8.2.1999 when she was called for interview and the same was cancelled, is highly warranted. The learned counsel submits that the cancellation of the interview on the ground that a demand was made by the Dibrugarh University Employees' Association for promoting Mrs. Niroda Das, who was not eligible for the post, cannot be a relevant consideration for postponing the selection process. After all, this resulted in denying timely promotion to the petitioner. As she has been denied of timely promotion, concludes the learned counsel for the petitioner, she is certainly entitled to retrospective promotion with full monetary benefits to compensate her for infringing her fundamental right to be considered for said promotion in time.

4. Per contra, Mr. K. Agarwal, while defending the respondent-University,

contends that the petitioner has no fundamental right to promotion, and all she had was the right to be considered for promotion, and cannot insist that she should be promoted from the date the post of Computer fell vacant or when the interview was postponed. Referring extensively to the affidavit-in-opposition, additional affidavits and the file produced by him, he submits that there was no intentional delay in concluding the selection process, and it was due to the demand made by the Dibrugarh University Employees Association for promoting another contender for the post that the meeting for the interview had to be postponed: such postponement was due to circumstances beyond the control of the respondent-University, for which they could not be faulted with. He further argues that there is no law which mandates that a post is to be filled immediately after vacancy occurs. True, contends the learned counsel, the post fell vacant on 31.12.1996, but there are many formalities to be fulfilled before proceeding to fill up the vacancy. Reminding this Court about the settled position of law that promotion comes into effect only on the date of promotion and not on the date of occurrence of vacancy, the learned counsel for the respondents strenuously urges this Court to dismiss the writ petition with cost.

5. It is true that the post of Computer became vacant on 31.12.1996. In ideal situation, though this is also the prescribed procedure, selection process for filling up such vacancy by promotion ought to have been started well in advance before the incumbent retires from service on superannuation. But then, it is a notorious fact that such an ideal is hardly attainable for some inexplicable reasons. The admitted position of the parties is that the promotion process for the post of Computer was ready on 8.2.1999, a fact easily demonstrated by the calling of the petitioner for interview. The other undisputed facts are that the petitioner on the date for interview for the post was the only eligible candidate as she had the requisite Certificate and more than 14 years of working experience in the particular line, namely, in the P & C Branch vide the note dated 5.11.1999 of the Vice-Chancellor. Clause 8(ii) of Dibrugarh Employees' Service Conditions Ordinance, 2000 mandates that every appointment by promotion shall be by selection on the basis of merit and efficiency due regard being paid to seniority and satisfactory service record. However, the selection process came to be stalled only on the ground that there was strong objection raised by the Dibrugarh University Employees Association, who wanted the post to be filled up on promotion on seniority basis. It may be noted here that if the post were to be filled on promotion on seniority basis, one lady i.e. Niroda Bala Das, another Draftsman, had an edge over the petitioner. But, according to the Vice-Chancellor, this lady belonged to Applied Geology and Petroleum Technology which is academically biased and had no working experience in the P & C Branch, which is construction biased. What stands out from the above is that the selection process for promotion to the post of Computer was halted by an extraneous consideration and under the pressure of outside forces, which could not have influenced the respondent-University in halting the promotion process of the petitioner. The right of the petitioner for consideration to the post of

Computer had thus been unnecessarily and unduly delayed by the prevarication and indecision of the respondent-authorities. The respondent-University cannot be held to ransom by the employees association. The Vice-Chancellor in his note dated 5.11.1999 had clearly acknowledged that the petitioner, being a certificate holder and having more than 14 years of working experience on the particular line of Construction activities, qualified for promotion to the post of Computer whereas the said Niroda Das working as Draftsman in the Applied Geology Department was not having altogether different nature of duties and was academically biased and not construction biased. Had the case of the petitioner for promotion to the post of Computer been considered by the Selection Committee on 8.2.1999 by taking into account her eligibility and her position, she could have been promoted soon after 8.2.1999. In this context, the following observations of the Apex Court in Union of India (UOI) and Another Vs. Hemraj Singh Chauhan and Others, are instructive:

36. It is an accepted legal position that the right of eligible employee to be considered for promotion is virtually a part of their fundamental right guaranteed under Article 16 of the Constitution. The guarantee of a fair consideration in matters of promotion under Article 16 flows from guarantee of equality under Article 14 of the Constitution.

37. In *The Manager, Government Branch Press and Another Vs. D.B. Belliappa*, , a three-Judge Bench of this Court in relation to service dispute, may be in a different context, held that the essence of guarantee epitomised under Articles 14 and 16 is "fairness founded on reason" (see SCC, p. 486, para. 24).

38. It is, therefore, clear that legitimate expectations of the respondents of being considered for promotion has been defeated by the acts of the Government and if not of the Central Government, certainly the unreasonable inaction on the part of the Government of State of Uttar Pradesh stood in the way of the respondent's chances of promotion from being fairly considered when it is due for such consideration and delay has made them ineligible for such consideration. Now the question which is weighing on the conscience of this Court is how to fairly resolve this controversy.

6. In my judgment, the petitioner has wrongly denied of the promotion legitimately due to her in 1996 or, at any rate, in 1999. As she has been arbitrarily and without any justification denied of promotion in time, the question is whether she is entitled to retrospective promotion. Normally, the settled position of law is that the promotion comes into effect from the date of promotion and not from the date of occurrence of vacancy and at the most, notional promotion can be given without monetary benefits on the principle of no work, no pay. The Apex Court in *State of Kerala and Others Vs. E.K. Bhaskaran Pillai*, after reviewing various decisions concerning payment of retrospective benefit on promotional post held in the following manner:

4. Learned counsel for the State has submitted that grant of retrospective benefit

on promotional post cannot be given to the incumbent when he has not worked on the said post. Therefore, he is not entitled to any benefit on the promotional post from 15.6.1972. In support thereof, the learned counsel invited our attention to the decisions of this Court in *Paluru Ramkrishnaiah and Others Vs. Union of India (UOI)* and *Another, Virender Kumar, General Manager, Northern Railways, New Delhi Vs. Avinash Chandra Chadha and others, State of Haryana and Others Vs. O.P. Gupta, etc., , A.K. Soumini Vs. State Bank of Travancore and Another, and Union of India (UOI) and Another Vs. Tarsem Lal and Others, .* As against this, the learned counsel for the respondent has invited our attention to the decisions given by this Court in *Union of India Vs. K.V. Jankiraman, etc. etc., , State of Andhra Pradesh Vs. K.V.L. Narasimha Rao and Others, , Vasant Rao Roman Vs. Union of India (UOI) through the Central Railway, Bombay and Others, : Vasant Rao Roman Vs. Union of India (UOI) through the Central Railway, Bombay and Others, and State of U.P. Vs. Vinod Kumar Srivastava (2006) 9 SCC 621 : 2006 SCC (L & S) 1940*, We have considered the decisions cited on behalf of both the sides. So far as the situation with regard to monetary benefits with retrospective promotion is concerned, that depends upon case to case. There are various aspects which have to be considered. Sometimes in a case of departmental enquiry or in criminal cases it depends on the authorities to grant full back wages or 50% of back wages looking to the nature of the delinquency involved in the matter or in criminal cases where the incumbent has been acquitted by giving benefit of doubt or full acquittal. Sometimes in the matter when the person is superseded and he has challenged the same before Court or tribunal and he succeeds in that and direction is given for reconsideration of his case from the date the persons junior to him were appointed, in that case the Court may grant sometimes full benefits with retrospective effect and sometimes it may not. Particularly when the administration has wrongly denied his due then in that case he should be given full benefits including monetary benefit subject to there being any change in law or some other supervening factors. However, it is very difficult to set down any hard and fast rule. The principle of "no work no pay" cannot be accepted as a rule of thumb. There are exceptions where Courts have granted monetary benefits also.

7. From the paragraph extracted in the foregoing, it becomes clear that there is no rule of thumb that retrospective benefit on promotional post is to be invariably rejected on the principle of no work, no pay. In *E.K. Bhaskaran Pillai case (supra)*, the petitioner therein was wrongly denied of promotion, but belatedly filed the writ petition only on 15.6.1972 whereas he did not claim arrears of salary although he was promoted with retrospective effect i.e. 15.9.1962. Therefore, the arrears of salary were directed to be paid only with effect from 15.6.1972 where he filed the writ petition. In *Gopi Chand Vishnoi Vs. State of U.P. & Anr., (2006) 9 SCC 694*, where promotion of the appellant was refused in 1985 on the sole ground of existence of certain adverse entries in his service records and where his adverse entries got expunged in 1989 and was

promoted w.e.f. 1989, it was held that adverse entries having been expunged, his promotion must be treated to have been wrongly refused in 1985 and, therefore, he was entitled to promotion w.e.f. 1985 when his juniors were granted promotion and also consequential benefits. It was held therein that as the appellant had already superannuated, his post-retiral benefits shall be recalculated and arrears of amount of pension should be paid to him. In the instant case also, the petitioner was, for long, denied of the promotion to the post of Computer for long though the same was legitimately due to her in terms of the service rule but was wrongly denied for no fault of her there was absolutely no justification for halting the selection process being held on 8.2.1999. If the respondent authorities arbitrarily and illegally delayed the promotion of the petitioner, they cannot later on deny arrears of salaries for the period of delay. To hold it otherwise will be most unfair and iniquitous. However, it cannot be overlooked that the petitioner filed the writ petition only in 2006: she was given officiating promotion w.e.f. 5.3.2003. The petitioner herself is partly guilty of laches. Consequently, she cannot be given all the arrears of salary with effect from 8.2.1999. For the reasons stated in the foregoing, this writ petition is partly allowed. The respondent-University is directed to promote the petitioner to the post of Computer with retrospective effect i.e. from 8.7.1999 when the respondent-University received her representation for the first time and pay her all the back wages for the post of Computer as calculated from 8.7.1999 to 5.3.2003. The directions shall be complied with within a period of the three months from the date of receipt of a copy of this judgment. No costs.