
(2011) 08 CAL CK 0004

In the Calcutta High Court

Case No : W.P.S.T. No. 295 of 2010 with W.P.S.T. No. 33 of 2011

Sandip Halder

APPELLANT

Vs

State of West Bengal

RESPONDENT

Date of Decision : 12-08-2011

Acts Referred:

Constitution of India, 1950 — Article 14, 16
West Bengal Determination of Seniority Rules, 1981 — Rule 5(2)
West Bengal Fire Service Recruitment Rules, 1950 — Rule 5

Citation : (2011) 4 CHN 397

Hon'ble Judges : Mrinal Kanti Chaudhuri, J; Ashim Kumar Banerjee, J

Bench : Division Bench

Advocate : Partha Sarathi Sengupta, Dibyendrayan Roy, Munmun Tiwary, Sirsanya Bandopadhyay in WPST 295 of 2010 Subhayu Banerjee in WPST 33 of 2011, for the Appellant; Partha Sarathi Sengupta, Dibyendrayan Roy, Munmun Tiwary, Sirsanya Bandopadhyay in WPST 33 of 2011, Lakshmi Kumar Gupta, Surajit Samanta, Madhumita Roy for the Private Respondents in WPST 295 of 2010, Subhayu Banerjee for the State in WPST 295 of 2010, for the Respondent

Judgement

Ashim Kumar Banerjee, J.

Preface

1. We heard all the counsel with rapt attention. After we concluded the hearing and reserved our judgment our dilemma started. The well-known maxim, "the equity follows the law", if applied in the instant case, we are convinced that it would have a disastrous situation. Would there be a departure to the said well-known maxim by stepping out to grant equitable relief for social good, it would ultimately benefit not only the parties involved in the litigation but also the society at large. We are really at a fix. However, we venture to start writing the script without deciding on the climax. Let the judgment take its own path and let us see what happens at the end. We frankly admit that this is a unique case where even before writing the judgment we could not make up our mind. If someone follows the strict letters of law the result would be obvious. We have to

put our seal of approval on the decision of the Tribunal. As we have already observed, it would have disastrous effect, as Mr. Subhayu Banerjee appearing for the State could impress us on that score. The situation became so complex because of the callousness on the part of the State, at least, in his usual fairness, Mr. Banerjee admitted so. He however left it to the Court for an answer. He also admitted that despite frantic attempt he could not find out any solution. We are faced with a puzzle whose answer is yet to be found out. This is, how we look at the controversy placed before us.

Facts

2. Subject controversy relates to promotion and/or relative seniority amongst the cadres working in State Fire Service. As per the prevalent Service Rules, there was no specific guideline with regard to promotion on year to year basis that created the complex situation resulting in the present controversy. The conflict was between two groups, being one (hereinafter referred to as Direct Recruitment Sub-Officers Group shortly DRSO) who were admittedly senior to the other group enjoying the post of Station Officer through a regular promotional process from the Feeder Post of Sub-Officers whereas the other Group (hereinafter referred to as Promotee Sub-Officers Group, shortly PSO) who were also promotees in the post of Station Officers from the Feeder Post of Sub-Officers. The junior group joined the post of Sub-officers in or about 90s after being promoted from the Feeder Post whereas the other group was recruited in 1980s and became Sub-Officers. In 1980 Rule 5 of the West Bengal Fire Service Recruitment Rules 1950 was challenged in CR. No. 9974 (W) of 1980. On May 3, 1984 this Court declared Rule 5 of the West Bengal Fire Service Recruitment Rules, 1950 as unfair and contrary to the constitutional mandate stipulated in Articles 14 and 16 of the Constitution. The selection made for promotion as per Rule 5 was quashed. State filed an appeal. The Division Bench allowed the appeal vide judgment and order dated December 22, 1988 and set aside the order of the learned single Judge. The petitioners therein filed a SLP before the Apex Court in 1989 being No.3099 of 1989. The Apex Court vide order dated February 12, 1990 passed an interim order to the extent that any promotion made during the pendency of the Appeal would be subject to the final decision in the said matter. The SLP was admitted and the Civil appeal was renumbered as 1137 of 1990. It now appears that on March 31, 1998 the said appeal was dismissed due to non-service of notice of the said appeal for last eight years.

3. The State however did not conduct any promotional process since 1990. In fact, the entire promotional process was stalled from 1984 because of the protracted litigation. Although, there was no specific restraint made by the Apex Court the State did not venture to carry out the promotional process during the said period. The order of dismissal of the Apex Court appeal was also not in the knowledge of the State for a considerable period, as a result the promotional process was stalled for two decades. Whenever the exigency arose the State granted ad hoc promotions. Those were never confirmed. In 1994 to 1996 PSO

joined as Sub-Officers. The next promotional post was the post of Station Officer. Regular promotion to the said post would require clearing of an examination conducted by PSC for confirmation to the post of Sub-Officers. PSO (two of them) cleared out the said examinations between the period of May 10, 1999 and November 1999 (others cleared on March 15, 1999). The Government vide Notification dated January 25, 1999 started regular promotional process for the post of Station Officers. It was rather an attempt to regularize the ad hoc appointees who got ad hoc promotions from the post of Sub-Officers to Station Officers. The Director, West Bengal Fire Service vide Memo dated January 25/February 26, 1999 asked the concerned eligible candidates to appear at the departmental test followed by interview for promotion on regular basis. In the mean time the result of the PSC examination held on different dates as referred to above, was published on March 15, 1999 when the PSO being respondent No.6 to 10 were successful and were confirmed in the post of Sub-Officers except two, as stated above. Accordingly, both the groups participated in the departmental examination held on August 29, 2000 and were all qualified for promotion to the next higher post being the post of Station Officer. On September 13, 2000 the authority published a merit list on the basis of the said departmental examination. On the next day the promotions were given to both the groups. Pertinent to note, PSOs secured better merit in the said examination than that of DRSOs. However, both the groups were happy after being promoted on regular basis as Station Officers. Disputes arose after about six years when a gradation list was published placing DRSOs much above the PSOs, although, they fared well in the examination and as such were senior to the other group. Objections poured in. Being aggrieved, PSO filed application before the Tribunal being O.A. No.2736 of 2007. During pendency of the said application the authorities revised the gradation list and published the same giving effect from May 28, 2007 being revised final gradation list. On a close look to the said list it would appear that the position of the PSOs became worse in the final gradation list.

4. The Tribunal passed an interim order staying the effect of the original gradation list dated November 7, 2006. PSOs also challenged the final gradation list by filing a supplementary application. The Tribunal finally heard the matter and disposed of the same vide judgment and order dated April 19, 2010 appearing at pages 143-155(F) of the paper book. By the said order the Tribunal quashed both the gradation lists being list dated November 7, 2006 and May 28, 2007. The Tribunal asked the authority to prepare a final gradation list in terms of Rule 5(2) of the West Bengal Determination of Seniority Rules, 1981. Pertinent to note, in terms of Rule 5(2) in case of a single process of selection the relative seniority would be determined in order of merit. Following such analogy the Tribunal held that merit would prevail since both the groups were considered in a single selection process in the post of Station Officers. Being aggrieved, the DRSO filed the instant application before us which was heard by us on the above mentioned dates.

Issues Raised by the Petitioners

5. Mr. Partha Sarathi Sengupta, learned Senior Counsel appearing for the petitioners raised the following issues :-

- i) The DRSOs came in the post of Sub-Officers in early part of 1980s. Hence, they were entitled to be considered for promotion in the next higher post of Station Officer after becoming eligible for the same. The State however failed to consider them contemporaneously.
- ii) PSOs joined the post of Sub-Officer in 1994-96, much after the other group was borne in the cadre. Hence, they could not be treated at par.
- iii) The Apex Court did not pass any order of restraint upon the State to conduct a promotional process. The State was negligent enough by not holding regular promotional process for decades for which DRSOs should not suffer.
- iv) Assuming but not admitting that the State was entitled to hold a single selection process considering both the groups, PSOs were not entitled to participate in such process as PSOs were not borne in the cadre on the day when the notification was issued for holding the single selection process not being confirmed in the post of Sub-Officers after clearing Public Service Commission Examination.
- v) The Tribunal erred in applying the analogy of Rule 5(2) that could not be made applicable in the instant case in view of the fact that both the groups could not be treated at par for the reasons stated in clauses (i) and (iv) above.

6. Mr. Dibyendra Narayan Roy, learned Counsel also appearing for DRSOs raised the following additional issues :-

- i) As per the notification the eligible candidates were to apply within ten days from the date of such notification. AH the PSOs were not qualified for the post within the stipulated period and as such could not be considered in a single promotional process.
- ii) When the promotions were given in 2000 DRSOs did not feel aggrieved as no gradation list was published at that time. They were also not aggrieved earlier as ad hoc promotions were given from time to time. They were happy when the gradation list was published. Right to sue accrued only when gradation list was sought to be disturbed by the other group. Hence they felt aggrieved and approached the Tribunal for being added as party respondents therein.

Issues Raised By The Respondents

7. Mr. Lakshmi Kumar Gupta, learned Senior Counsel appearing for PSOs raised the following issues: -

- i) PSOs had cleared Public Service Commission Examination to qualify before the departmental promotional examination was held. Hence, there could be no irregularity on that score.

ii) As per Rule 5(2), in a single recruit process merit would prevail while determining inter se seniority. Hence, the Tribunal was right in directing the authority to follow the said Rule.

iii) The DRSOs participated in the selection process. They were much below the PSOs in the merit list. They did not challenge the merit list or the result published by the authority. Hence, the belated objection would be of no consequence.

iv) The authority published the gradation list ignoring the merit. A final gradation list further down graded the meritorious candidates and the Tribunal was right in quashing both the lists.

v) In case the DRSOs felt aggrieved for non-holding of the promotional process year to year they could have approached the Tribunal compelling the State to hold such process. Once they accepted such position and the ad hoc promotions and participated in a single promotional process they were not entitled to raise a belated plea that their seniority would be governed as per their position in the Feeder Post and not in terms of Rule 5(2).

vi) The notification for single recruitment process was published on February 26, 1999. All PSOs cleared out the Public Service Commission Examination in early 1999 whereas the examination for the promotional process were held on May 15, August 28 and August 29, 2008 i.e. much after all the candidates cleared Public Service Commission Examination and got confirmed in the Post of Sub - Officers. Hence, the plea raised by DRSOs on that count could not hold good.

vii) In absence of any appropriate Rule it was not incumbent upon the State to conduct promotional process on year to year basis. In any event since the DRSOs did not raise such issue contemporaneously, belated attempt on that score would not be valid.

Issues Raised By The State

8. Mr. Subhayu Banerjee, learned Counsel appearing for the State took the following pleas :-

i) It was a mistake on the part of the State not holding regular promotional process on periodical basis. This happened due to misconstruing the order of the Apex Court resulting in a complex situation that arose subsequently,

ii) Seniority should be given due regard. The State was supposed to conduct the promotional process on regular basis. It could not do so. Hence, the subsequent process in 1999-2000 could not be said to be a single process that would make Rule 5(2) applicable. Tribunal erred in appreciating so.

iii) When there was conflict between law and equity the Court should grant equitable relief, particularly sitting in writ jurisdiction, stretching the law to the permissible extent to end the crisis.

iv) Upholding of the order of the Tribunal, would create a disastrous situation as it would, in course of time, make the seniors sub-ordinate to the juniors as the next promotional process was based on seniority and the PSOs would automatically get such promotion to the exclusion of the DRSOs making them sub-ordinate to them.

Cases Cited

- i) Reserve Bank of India Vs. N.C. Paliwal and Others,
- ii) A. Janardhana Vs. Union of India (UOI) and Others,
- iii) H.V. Pardasani and Others Vs. Union of India (UOI) and Others,
- iv) Vinod Kumar Sangal v. Union of India (UOI) and Ors., (1995) 4 SCC 246
- v) U.P. Co-operative Cane Union Federation Ltd. Vs. Commissioner of Income Tax,
- vi) Baidyanath Jena and Another Vs. Union of India and Others,
- vii) S.P. Badrinath Vs. Govt. of A.P. and Others etc. etc.,
- viii) Vijay Singh Charak Vs. Union of India (UOI) and Others,
- ix) M.P. Palanisamy and Others Vs. A. Krishnan and Others,
- x) 2011 Lab.I.C. 20 (State of Uttar Pradesh & Anr. vs. Santosh Kumar Mishra & Anr.)
- xi) Pawan Pratap Singh and Others Vs. Reevan Singh and Others,

Our View

Before we go into the controversy, let us first discuss the cases cited at the Bar.

9. The decision in the case of H. V. Pardasani & Ors. (supra) and Baidyanath Jena (supra) were cited to support the contention that the promotional rules should be strictly followed and no departure could be made therefore. In the case of H. V. Pardasani and Ors., the Apex Court observed that in absence of any special provision regarding determination of seniority length of continuous service in any particular grade would be the basis of determining seniority in such grade. However, if a rule prescribes a method of fixation of inter se seniority, such rule would prevail. Identical view was expressed in the case of Baidyanath Jena (supra). The Apex Court in the earlier case of Reserve Bank of India (supra) also observed in the same way. The Apex Court therein held that it would be open to the State to lay down any rule which it thinks appropriate for determining seniority in service. The Court is not competent to strike down such rule on the ground that it needs another rule which would have served better. It could only be done when the said rule was arbitrary or irrational or results in "inequality of opportunity amongst the employees belonging to the same class."

10. The decisions in the case of Union of India & Ors. vs. N. R. Banerjee & Ors.

(supra), Vinod Kumar Sangal (supra) and Vijay Singh Charak (supra) were cited on the issue of backlog. Paragraphs 5 and 6 in the case of N. R. Banerjee (supra), the Apex Court observed the DPC should be convened at regular annual intervals to draw panels which could be utilized for giving promotions against the vacancies occurring during the course of a year. In the case of Vinod Kumar Sangal (supra), identical view was taken by the Apex Court. However, Mr. Gupta distinguished these three cases by saying that the Apex Court therein considered a situation where the rules specifically provided for holding DPC on regular intervals. According to him, the Apex Court did not want to make such observation, rather did not make such observation in a case where there was no such rule prevalent. Similar view was taken by the Apex Court in the latest decision in the case of State of U. P. & Anr. vs. Santosh Kumar Mishra & Anr. (supra). Here year to year theory was discontinued subsequently. In paragraph 32, the Apex Court observed that on account of a deliberate decision by the State, private respondents were left out of the zone of consideration. The decision taken by the State at that time to accommodate the diploma holders in batches against their respective years can no doubt be discontinued at a later stage, but not to the disadvantage all those who had been deprived of an opportunity of being appointed by virtue of the same rules.

11. In the case of A. Janardhana (supra), the Apex Court considered a similar situation and observed that when someone was working and gathering experience in the post, a fresh recruit from the market comes and joins them at par much after the past recruits were borne in service, would have demoralizing effect on service. The Apex Court appreciated the situation and observed, "if this has not a demoralizing effect on service we fail to see what other iniquitous approach would be more damaging." The Apex Court observed that the direct recruit should not be permitted by any principle of seniority to score a march over a promotee as it would be arbitrary and violative of Articles 14 and 16 of the Constitution of India.

12. If we take a sum total of the precedents as discussed above, we would find that if the strict letters of law are followed, the Tribunal order must be upheld as it would mean the survival of the fittest. We, however, wish to look at the problem from a different angle. DRSO group was borne in the cadre of Sub-Officers before PSO. Hence, they were admittedly senior to PSO. It is true that the rules do not specifically mandate DPC to sit on year to year basis. However, such was the healthy rule of practice in case of promotion and/or recruitment. In case the State conducted the process on year to year basis DRSO would have got opportunity to compete for the post and such competition would have been restricted to themselves till PSO joined them in later part of 1990s. The State admittedly misconstrued the order of the Apex Court which did not impose any restraint on the State to conduct the promotional process. The subject litigation as we gather from the pleadings was a challenge to Rule 5 of the West Bengal Fire Service Recruitment Rules, 1950. This was challenged by a group of fire operators who were aspiring for promotion in the post of Sub Officers. In any

event, the State adopted a peculiar mode of promotion giving ad hoc promotions for decades without regularizing them by holding a regular recruitment process. If someone is to be blamed, it must be the State and not its employees belonging to either group. The State created the situation and made it so complex and then tries in vain to wriggle out of the situation and ultimately leaves it to the Court for a solution. We fully agree that if the order of the Tribunal is upheld today in course of time the seniors would become subordinate to the juniors which is not expected in an emergency service like fire service where the employees must not suffer from frustration. We, sitting in equitable jurisdiction, must oversee such circumstance, otherwise we would be failing in our duty to do substantive justice which is not only beneficial for the State and its employees but also good for the public at large who are the ultimate beneficiaries of the service rendered by both the groups at the time of disaster. We are prompted to say so looking at the observation made by the Apex Court in *A. Janardhana (supra)*. It is true that under Rule 5(2), single selection process would fix interse seniority in accordance with the merit. However, if we have a close look to the circular dated January 25, 2009/February 26, 2009 and on a combined reading of both the circulars, we would find that this was nothing but a one time process to regularize all ad hoc appointees who were promoted on ad hoc basis on different dates. It would be difficult to describe such process as a single recruitment process. It was rather a process initiated by the State to regularize their irregularity. Hence, it would not be proper to apply Rule 5 (2) while determining interse seniority.

13. The applications, thus, succeed. The order of the Tribunal impugned hereby is set aside.

14. We find that only 5 (five) persons approached the Tribunal challenging the gradation list. The State committed a mistake, the State would find out ways and means to accommodate those five in the next promotion which would be strictly on the basis of seniority, if required by creating supernumerary post. However, such promotion must not disturb the gradation list that was prepared finally by the State applying the logic of seniority. We are told that provisional list contained mistakes. However, while preparing the final gradation list, the position became worse. Hence, before giving effect to the final gradation list, the State would also verify each case to minimize the errors and then proceed for the next promotional process in the next promotional post. Such regular process of promotion must not be disturbed by the State while accommodating the five PSO who approached the Tribunal.

15. The dispute started in the year 2007 when five (5) applicants approached the Tribunal challenging the gradation list. The others neither joined them nor made any independent approach up till date, although four years have passed in between. Hence, the special privilege given by this order to those five (5) must not be extended to others, although being similarly circumstanced. We purposely make it clear as it would have another complex situation disturbing the regular

process of promotion.

16. The W.P.S.T. No.295 of 2010 and W.P.S.T. No.33 of 2011 are disposed of without, however, any order as to costs.

17. Urgent photostat copy will be given to the parties, if applied for.

Dr. Mrinal Kanti Chaudhuri, J.

18. I agree.