
(2010) 09 SHI CK 0032
In the High Court Of Himachal Pradesh
Case No : C.W.P. (T) No. 4241 of 2008

Sat Narain Sharma

APPELLANT

Vs

State of Himachal Pradesh and Others

RESPONDENT

Date of Decision : 24-09-2010

Acts Referred:

Constitution of India, 1950 — Article 14, 16, 16(1)

Citation : (2010) 3 ShimLC 10

Hon'ble Judges : Rajiv Sharma, J

Bench : Single Bench

Final Decision : Allowed

Judgement

Rajiv Sharma, J.—Petitioner was enrolled by the management of the erstwhile Nahan Foundry Limited as unskilled worker vide office order dated 13.8.1973. He was promoted to the post of Sub-Branch In charge vide office order dated 7.4.1976. The post of Sub-Branch In charge was in feeder category for promotion to the post of Branch In charge. The promotion to the post of Branch In charge was regulated under the Recruitment and Promotion Rules for Non-Technical Staff of Nahan Foundry Limited, duly approved by the Board of Directors. Relevant portion whereof reads thus:

100% promotion from Sub-Branch In charges on the basis of sen-iority-cum-suitability In the case of Sub-Branch In charges in service on the date of issue of recruitment and promotion orders, educational qualifications will be relaxable provided they have 10 years experience as Sub-Branch In charge.

2. Petitioner was over looked for promotion by the employer and the persons junior to him were promoted to the post of Branch In charge on 5.2.1987 and thereafter two more incumbents were promoted to the post of Branch In charge from the post of Sub-Branch In charge on 1.7.1987 and 1.12.1987. Petitioner made representation to the management for considering his case for promotion to the post of Branch In charge. Nahan Foundry Limited was taken over by the

State Government on 1.10.1988. Petitioner became employee of the State. He filed O.A. No. 149/1995 for the redressal of his grievance. The same was directed to be treated itself as a representation to the Secretary (PW). He was directed to consider the case of the Petitioner on merits in accordance with law and decide the same within a period of four months. The same was rejected by the Secretary (PW). Petitioner was informed about the rejection of the same vide Annexures A-8 and A-9 dated 5.10.1996, respectively.

3. Mr. Dilip Sharma has strenuously argued that his client has fundamental right to be considered for promotion to the post of Branch In charge from the feeder category of Sub-Branch In charge. According to him, his client was fully eligible and qualified to be considered for promotion. He also contended that at the time when the Petitioner was over looked for promotion to the post of Branch In charge and the persons junior to him were promoted neither he was under suspension nor any charge-sheet was issued for initiating disciplinary proceedings against him. He lastly contended that no criminal charge was pending against his client.

4. Mr. P.M. Negi has vehemently argued that since recoveries were to be effected from the salary of the Petitioner due to alleged irregularities, his case could not be considered for promotion.

5. I have heard the Learned Counsel for the parties and have perused the pleadings carefully.

6. It is not in dispute that the Petitioner was fully eligible and qualified to be considered for promotion to the post of Branch In charge as per the Recruitment and Promotion Rules framed. The criteria adopted for promotion to the post of Branch In charge from the post of Sub-Branch In charge was seniority-cum-suitability. The fact of the matter is that Petitioner was not considered at all for promotion and the persons junior to him have been promoted on 5.2.1987, 1.7.1987 and 1.12.1987, respectively. The only ground taken by the Respondents in the reply is that since the recoveries were to be effected from the Petitioner, his case could not be considered for promotion. It is settled law by now that at the time of considering an incumbent for promotion what is to be seen whether he is under suspension or disciplinary proceedings have been initiated or any charge has been framed against him in the Criminal Court. In the instant case, neither the Petitioner was under suspension nor any charge-sheet was ever issued to him for initiating disciplinary proceedings nor any criminal case was pending against him. The recoveries can be made by the employer by following due procedure. In the present case, Respondents have failed to draw the attention of the Court that at any point of time any disciplinary proceedings were initiated or even show-cause notice was issued to the Petitioner before effecting recoveries. Petitioner had fundamental right to be considered for promotion. He has been over looked by the Respondents to be considered for promotion to the post of Branch In charge and the persons junior to him have been promoted.

7. Mr. P.M. Negi has also argued that Managing Director of Respondent No. 3 had issued memorandum dated 4.3.1987 whereby he had issued instructions that incumbents who will deposit the money, will be considered for promotion and one Sh. Surender Singh was promoted. Consideration of the Petitioner for promotion to the higher post was not dependent on the memorandum issued on 4.3.1987. In case any recoveries were to be effected the Respondents were required to follow the procedure prescribed under the law. Petitioner's right of consideration for promotion has been denied by the Respondents without any authority of law. In view of this, order Annexure A-9 dated 5.10.1996 is not sustainable in the eyes of law.

8. Their Lordships of the Hon'ble Supreme Court in *Ajit Singh and Others Vs. The State of Punjab and Others*, have held that the word "employment" being wider, there is no dispute that it takes within its fold, the aspect of promotions to posts above the stage of initial level of recruitment. Their Lordships have further held that if a person satisfies the eligibility and zone criteria but is not considered for promotion, then there will be a clear infraction of his fundamental right to be "considered" for promotion, which is his personal right. Their Lordships have further held that where seniority-cum-suitability rule applies, promotion of eligible candidates must be made in accordance with seniority fixed at basic level and where merit-cum-seniority rule applies, promotion has to be made of the senior at the basic level if found meritorious in comparison with others. Their Lordships have held as under:

22. Article 14 and Article 16(1) are closely connected. They deal with individual rights of the person. Article 14 demands that the "State shall not deny to any person equality before the law or the equal protection of the laws". Article 16(1) issues a positive command that

there shall be equality of opportunity for all citizens in the matters relating to employment or appointment to any office under the State". It has been held repeatedly by this Court that Sub-clause (1) of Article 16 is a facet of Article 14 and that it takes its roots from Article 14. The said sub-clause particularizes the generality in Article 14 and identifies, in a constitutional sense, "equality opportunity" in matters of employment and appointment to any office under the State. The word "employment" being wider, there is no dispute that it takes within its fold, the aspect of promotions to posts above the stage of initial level of recruitment. Article 16(1) provides to every employee otherwise eligible for promotion or who comes within the zone of consideration, a fundamental right to be "considered" for promotion. Equal opportunity here means the right to be "considered" for promotion. If a person satisfies the eligibility and zone criteria but is not considered for promotion, then there will be a clear infraction of his fundamental right to be "considered" for promotion, which is his personal right.

Promotion" based on equal opportunity and "seniority" attached to such promotion are facets of fundamental right under Article 16(1).

23. Where promotional avenues are available, seniority becomes closely interlinked with promotion provided such a promotion is made after complying with the principle of equal opportunity stated in Article 16(1). For example, if the promotion is by rule of "seniority-cum- suitability", the eligible seniors at the basic level as per seniority fixed at that level and who are within the zone of consideration must be first considered for promotion and be promoted if found suitable. In the promoted category they would have to count their seniority from the date of such promotion because they get promotion through a process of equal opportunity. Similarly, if the promotion from the basic level is by selection or merit or any rule involving consideration of merit, the senior who is eligible at the basic level has to be considered and if found meritorious in comparison with others, he will have to be promoted first. If he is not found so meritorious, the next in order of seniority is to be considered and if found eligible and more meritorious than the first person in the seniority list, he should be promoted. In either case, the person who is first promoted will normally count his seniority from the date of such promotion. (There are minor modifications in various services in the matter of counting of seniority of such promotees but in all cases the senior most person at the basic level is to be considered first and then the others in the line of seniority). That is how right to be considered for promotion and the "seniority" attached to such promotion become important facets of the fundamental right guaranteed in Article 16(1).

9. Accordingly; in view of the observations made hereinabove, the petition is allowed. Annexure A-9 dated 5.10.1996 is quashed and set aside. Respondents are directed to consider the case of the Petitioner for promotion to the post of Branch In charge from the date his juniors were promoted with all the consequential benefits. Needful be done within a period of two months after the production of certified copy of this judgment by the Petitioner. No costs.