

(2011) 02 AHC CK 0357

In the Allahabad High Court

Case No : Civil Miscellaneous Writ Petition No. 53957 of 2007

S.K. Mathur and Others

APPELLANT

Vs

Union of India (UOI) and Others

RESPONDENT

Date of Decision : 24-02-2011

Acts Referred:

Constitution of India, 1950 — Article 12, 16

Citation : (2011) 3 ADJ 829

Hon'ble Judges : Sunil Ambwani, J; Jayashree Tiwari, J

Bench : Division Bench

Final Decision : Dismissed

Judgement

1. We have heard Shri A.N. Tripathi, Senior Advocate assisted by Shri Arvind Kumar Mishra for the Petitioners. Shri Ajai Bhanot appears for the Respondents. Shri Pushpraj Singh appears for Respondent Nos. 5 and 8.

2. The "Nehru Yuva Kendra" was launched as a part of Silver Jubilee celebrations of India in 1972. The scheme was initially implemented by the Ministry of Education. In 1987 "Nehru Yuva Kendra Sangathan", was launched as an autonomous body and was brought under Ministry of Youth Affairs and Sports in 1999. The Sangathan is registered as a Society under the Societies Registration Act in 1987. It is wholly controlled and funded by the Central Government and thus falls within the purview of Article 12 of the Constitution of India, amenable to a writ jurisdiction of the High Court.

3. The Petitioners were appointed as District Youth Coordinators. By this writ petition they have sought for quashing the adhoc promotions of 44 persons on 18.6.1999, on the post of Regional Coordinators recommended by the Departmental Promotion Committee (DPC) dated 9-12th October, 1998 based on seniority list of 1996, which was allegedly substituted/replaced by fresh draft seniority list dated 3.11.2000 on the basis of initial appointment in terms of the recruitment rules dated 5.3.1998. They have also prayed for treating them to be

promoted on the post of Regional Coordinators w.e.f. 18.6.1999 when their juniors were given adhoc promotions and all consequential benefits. The writ petition was amended by the order of the Court dated 25.11.2008, for quashing the Office Order dated 26.8.2008 by which consequent to the sanction of 18 more Zonal Offices in addition to the existing Zonal Offices on 25.8.2008 (to be established in each State capital), the restructuring was made by doubling the existing Deputy Directors, who were relieved by the responsibilities as the Regional Coordinators with the abolition of regional offices and supporting staff was provided to them.

4. The Petitioners have challenged the promotions on the ground that prior to the recruitment rules dated 5.3.1998, the regular service of the existing employees were deemed to be reckoned from the date of their initial appointment. The qualifying service for promotion was to be regular continuous service. The provisional tentative seniority of 1996 was prepared on the basis of the date of joining. The seniority was re-fixed on 9.5.2000, after a large number of objections were received and a draft seniority list was circulated. The final seniority list dated 3.11.2000 was published on the basis of the date of initial appointment. The Departmental Promotion Committee (In short DPC) in the meantime in the year 1998 was illegally constituted. It recommended purely adhoc promotions, which were held so by the Rajasthan High Court in S.B. Civil Writ Petition No. 2496 of 1999, Sukha Ram Bishnoi v. Nehru Yuvak Kendra Sangathan, decided on 02.12.2005. A Sub Committee for review of the promotions made in 1999 was constituted but that on 29.6.2007, three persons from the waiting list prepared by the DPC in 1998, who were under age, were also granted promotions.

5. Shri A.N. Tripathi submits that the recruitment rules dated 5.3.1998 contemplated that the incumbents, who were appointed 5.3.1998, will be treated to be appointed under the recruitment rules of 1998. Their seniority will be reckoned from the date of initial appointment. The DPC could be proposed only after finalisation of the seniority list. The adhoc promotions based on tentative seniority list, were illegally finalised. He submits that apart from the incorrect seniority list relied upon by the DPC, the criteria of selection was also wrongly made. The criteria being seniority-cum-merit, was wrongly interpreted to devise a method in which the merit was taken as the only criteria for promotion. The DPC devised its own method of determining merit completely ignoring the seniority, and thus violating fundamental rights of the Petitioners of equality of opportunity in employment, under Article 16 of the Constitution. Shri Tripathi submits that taking undue advantage of the pendency of the writ petition, the Respondents changed the designation of the Regional Coordinators to that of Deputy Directors/Zonal Directors, and illegally called a High Powered Committee meeting, which was earlier termed as Sub Committee to review the promotions. The alleged High Powered Committee illegally reviewed the wide process of promotion and decided to transfer and post thirteen promotees as Zonal Directors. The entire exercise was in teeth of the declaration of law contained in

the judgment of High Court of Rajasthan in Writ Petition No. 2496 of 1999. Shri Tripathi has relied upon the judgments in Sant Ram Sharma Vs. State of Rajasthan and Another, Ajit Singh and Others Vs. The State of Punjab and Others, B.V. Sivaiah and Others etc. Vs. K. Addankl Babu and Others etc., State of Kerala and Others Vs. E.K. Bhaskaran Pillai, Krishan Yadav and another Vs. State of Haryana and others, and Shankarsan Dash Vs. Union of India, , in support of his submission.

6. Shri Ajay Bhanot appearing for Respondents submits that the DPC has strictly followed the due process prescribed in law, and recommended the names for promotion as per recruitment rules approved by the Government of India. The DPC considered all the eligible Group "A" Officers for promotion on the basis of seniority-cum-merit. Only those officers, who were found fit and recommended by the DPC, were promoted. The officers eligible for promotion cannot claim their promotion as a matter of right by virtue of their seniority alone. If they were found unfit by the DPC, the officers junior to them could be recommended for promotion to the higher post.

7. Shri Bhanot submits that the seniority list of Youth Coordinators prepared in 1996, was based on the date of joining as criteria for fixing the seniority. In the year 1998, when the central pay scales were given to the employees of Nehru Youth Kendra Sangathan, by implementing recommendations of the Vth Pay Commission, a direction was issued on 14.5.1998, to modify service rules to make them similar to those of the Central Government employees.

8. The seniority list was modified and was circulated in the year 2000. The promotions, however, were made on the basis of seniority list approved by the competent authority in the DPC held in the year 1998-99. Thereafter a review DPC was constituted, to review the recommendations of DPC held in 1998-99 in which seven more officers whose name could not be initially recommended, were also considered and were given promotions. The names of three officers, who initially joined, but later on were noticed as under age, were also recommended by the 1998-99 DPC. Their promotion orders could not be issued at that time. Three promotional posts were kept vacant till the outcome of the decision of the Ministry of Youth Affairs. Their cases were decided on 29.6.2007, and approved by the Board of Governors in its meeting dated 12.9.2007.

9. Shri Bhanot submits that the Petitioners were also considered in the DPC held in the year 1998-99, for promotion but that the DPC did not recommend the names of the Petitioners for promotion because they failed to fulfill the merit criteria. A Sub Committee under the Chairmanship of the Secretary, Ministry of Youth Affairs and Sports was formed to look into the cases of eligible officers, if any, alleged to have been left out by the DPC in 1998-99. The recommendations of the Sub Committee are awaited.

10. By an Office Order dated 28.10.2009 as per recommendations of the DPC for promoting eligible District Youth Coordinators to the post of Deputy Directors,

the competent authority directed promotions of 27 Youth Coordinators as Deputy Director at zonal office including all the Petitioners, and that all the Petitioners are at present serving as Deputy Directors at Zonal Offices.

11. The Rajasthan High Court in Civil Misc. Writ Petition No. 2496 of 1999 Sukha Ram Bishnoi v. Nehru Yowa Kendra Sangathan and Ors. decided on 2.12.2005, by a short judgment, held that where promotion is according to seniority-cum-merit, the primary consideration is seniority, and the minimum merit required to make the person fit for appointment, only is to be fulfilled; there is no room to adjudge comparative merit by ignoring the seniority altogether and that on the admitted position, the rule was not followed. The Rajasthan High Court thereafter held the adhoc promotion also must strictly follow the rules, and no violation of rules of giving promotion even temporarily is permissible. It was held that the Petitioner's fundamental rights to be offered equal opportunity in the matter of employment was denied. A writ of mandamus was issued to the Respondents for remedying the wrong done to the Petitioner by offering him promotion in case he fulfills the merit criteria without considering comparative merit vis-a-vis other eligible candidates and to promote him to the post of Regional Coordinator with effect from the date any persons junior to him was promoted to the post and on being promoted he will be given all consequential benefits. The Respondents were directed to follow the rules regarding grant of arrears in case of such retrospective promotion.

12. It is submitted that in view of the aforesaid judgment, Petitioners represented to review their case. The legal opinion was sought by the Sangathan. The Petitioners rely upon the legal opinion in which it was stated that the seniority list must have been finalised, after giving opportunity of objections, before utilising the same for promotions. The number of officers to be considered required three times the number of vacancies. In the year 1998, DPC the number of vacancies were 41. The zone of consideration was, therefore, to be limited to 123. In violation of these norms those, who did not fall within the zone of consideration, were also promoted. The rules of reservation were not followed inasmuch as for general category candidates the zone of consideration as in the case of non-availability of SC/ST candidates could not be enlarged. A list of 23 underage officers was considered for promotions and that the promotions granted on adhoc basis were finalised. The pre-DPC screening was not made, and in the review DPC a comprehensive year-wise exercise as per Rule 6.4.1 of the Guidelines was not followed.

13. In B.V. Sivaiah's case (supra) the Supreme Court observed in paras 14, 17 and 18 as follows:

14. Para 7 (c) of the Second Schedule to the Rules does not in our opinion, lend support to the contention that the criterion of seniority-cum-merit envisaged by the Rule making authority involves assessment of comparative merit for the purpose of promotion. The word "selection" has been used in the sense of selecting an officer for promotion on the basis of the criterion of seniority-cum-

merit. The requirement that such selection shall be made on the basis of interview and assessment of performance reports for the preceding three years is consistent with the criterion of seniority-cum-merit as explained in the State of Kerala and Another Vs. N.M. Thomas and Others, that "given the necessary merit requisite for efficiency of administration" the senior though the less meritorious shall have priority. The said mode enables an assessment to be made about the minimum necessary merit requisite for efficiency of administration and it cannot be construed as importing assessment of comparative merit of the officers eligible for promotion.

17. On behalf of the promoted officers it was urged that for the purpose of promotion on the basis of seniority-cum-merit, seniority means the length of service and that among officers who were appointed on the same date and have the same length of service seniority can have no bearing and promotion has to be made on a comparative assessment of merit of such officers. We are unable to agree. While applying the principle of seniority-cum-merit for the purpose of promotion what is required to be considered is inter se seniority of the employees who are eligible for consideration. Such seniority is normally determined on the basis of length of service, but as between employees appointed on the same date and having the same length of service, it is generally determined on the basis of placement in the select list for appointment. Such determination of seniority confers certain rights and the principle of seniority-cum-merit gives effect to the such rights flowing from seniority. It cannot, therefore, be said that in the matter of promotion on the basis of seniority-cum-merit seniority has no role where the employees eligible for promotion were appointed on the same date and have the same length of service.

18. We thus arrive at the conclusion that the criterion of "seniority-cum-merit" in the matter of promotion postulates that given the minimum necessary merit requisite for efficiency of administration the senior, even though less meritorious, shall have priority and a comparative assessment of merit is not required to be made. For assessing the minimum necessary merit the competent authority can lay down the minimum standard that is required and also prescribe the mode of assessment of merit of the employee who is eligible for consideration for promotion. Such assessment can be made by assigning marks on the basis of appraisal of performance on the basis of service record and interview and prescribing the minimum marks which would entitle a person to be promoted on the basis of seniority-cum-merit.

14. The assessment of minimum necessary merit for efficiency of administration, thus cannot be construed as importing assessment of comparative merit of the officers eligible for promotion. The assessment can be made by assigning marks on the basis of appraisal or performance of service record and interview, and prescribing minimum marks, which would entitle a person to be promoted on the basis of seniority-cum-merit.

15. The DPC was convened in the year 1998. The candidates selected by the DPC

could not be granted promotion in the year 1999. The instant writ petition was filed on 29.10.2007, seven years after the promotions were made. In the meantime a review DPC has been held. We thus find substance in the preliminary objections taken by the Respondents that the reliefs claimed in instant writ petition are barred by delay and laches which have not been adequately explained in the writ petition.

16. In the supplementary counter affidavit of Shri Rishi Pal Singh, Deputy Director, Nehru Yuva Kendra Sangathan, Lucknow, it is stated that a number of candidates, who were promoted, were junior to the Petitioners in the seniority list. Some of the candidates promoted in pursuance of the DPC of the year 1998 (10/12.10.1998) have either retired or died. All of them were not impleaded in the writ petition, and thus we also find substance in the objections that the writ petition is liable to be dismissed on the ground of non-joinder of necessary parties. The impleadment of some of the Respondents as Respondents No. 3 to 8 in the writ petition, and the others from 9 to 18 on 3.3.2009, seeks to bring them on record ten years after their promotion.

17. The first provisional seniority list of Youth Coordinators was published on 11.6.1996 inviting objections from all the persons, who were affected by the provisional seniority list. The objections were required to be submitted by 15.7.1996. The list was duly circulated. A number of objections were submitted including the objections of Shri Sanjay Kumar Singh-Petitioner No. 4. In these objections we do not find any of the grounds, which have been taken in the writ petition. He simply submitted that his date of joining has been incorrectly mentioned in the seniority list. The objections were upheld and necessary corrections were made. No other persons objected to the seniority list. In the DPC held in the year 1998 and consequential promotions on the basis of seniority list dated 3.11.1996, the Petitioners were also considered. The DPC proceedings were conducted and regulated by the DPC guidelines issued by the Government of India on 10.4.1989. These guidelines include the stages of inviting objections, and the assessment of the suitability of candidates by the DPC. While merit has to be recognised and re-warded, para 6.1.3 of the Guidelines provided that the advancement in an officer's career should not be regarded as matter of course, but should be earned by dint of hard work, good conduct and result oriented performance as reflected in the annual confidential reports. The promotions are to be based on strict and rigorous selection process.

18. Para 6.1.4 of the guidelines provide that while "Average" may not be taken as adverse remark in respect of an officer, at the same time, it cannot be regarded as complimentary to the officer, as "Average" performance should be regarded as routine and undistinguished. It is only the performance that is above average and is really noteworthy which should entitle an officer to recognition and suitable rewards in the matter of promotion. It is further provided in para 6.1.5 that the DPC should not be guided merely by the over all grading, if any, that may be recorded in the confidential reports but should make its own

assessment on the basis of the entries in the confidential reports. In para 18 of the supplementary counter affidavit, it is stated that the bench mark for promotion devised and adopted by the DPC was the grading "Good". The DPC assessment of "Very Good" was to be considered as the bench mark of "Good". The candidates who were assessed by the DPC as "Very Good" were in fact in the bench mark of "Good". The grading "Good" was the criteria/bench mark for selection. The Petitioners acquiesced to the process of selection and the procedures adopted by the DPC.

19. The method followed by the DPC was in accordance with the then prevailing guidelines issued by the Government of India on 10.4.1989. The Petitioners were considered but were not selected. They kept quiet for eight years before filing the writ petition. They were also considered by the review DPC in the year 2000, by which time the seniority list was re-drawn and based on the basis of the date of appointment. They were again not found fit for promotion.

20. In the aforesaid circumstances, we do not find that the Respondents authorities committed any error of law in either relying upon the tentative seniority list for promotion or in violating the guidelines for promotion. The Petitioners did not challenge the promotions of which the review DPC was also held and considered them in the year 2000. The filing of the writ petition after seven years on 29.10.2007, without explaining the delay and impleading necessary parties, relying upon only upon a decision of the Rajasthan High Court, does not entitle them to the reliefs, claimed by them.

21. The writ petition is dismissed.