
(1994) 12 CAL CK 0020
In the Calcutta High Court
Case No : F.M.A. No. 496 of 1991

State of West Bengal and Others

APPELLANT

Vs

Sri Ashok Roy Chowdhury

RESPONDENT

Date of Decision : 21-12-1994

Acts Referred:

Constitution of India, 1950 — Article 14, 16(1), 162, 166(3), 226

Citation : 99 CWN 375

Hon'ble Judges : Satya Brata Sinha, J; Basudeva Panigrahi, J

Bench : Division Bench

Advocate : A.G. of West Bengal, for the Appellant; Roy, for the Respondent

Final Decision : Dismissed

Judgement

Satya Brata Sinha, J.—This appeal is directed against the judgment and order dated 10th June, 1987 passed by a Learned Single Judge of this Court in C.O. No. 7489(W) of 1986 whereby and where under the Writ application filed by the writ petitioner, respondent No. 1 has been allowed holding that the act of the respondents in promoting respondent No. 4 was not justified by a reason of "conscious non-consideration of the cases including the petitioner" and the impugned promotion of respondent No. 4 was set aside. The fact of the matter lies in a very narrow compass. The petitioner as also the respondent No. 4 were at the relevant time working as Upper Division Clerk in the Public Vehicles Department of the State of West Bengal. Admittedly Sri Timir Baran Dasgupta (hereinafter referred to as Dasgupta) was the senior most amongst the concerned employees. In between Dasgupta and Roy Chowdhury, there were three other employees in order of seniority. The respective position of the parties would appear from a chart which has been referred to by the learned Trial Judge in the judgment under appeal, which is as follows :

Government of West Bengal Office of the Director, Public Vehicles Department, 38, Beltola Road, Calcutta - 700 020.

SI No.

Name

Date of last promotion.

Date of confirmation as U.D.C.

Place of posting.

O.P.R. Remarks of sectional officers.

1

2

3

4

5

6

1.

Shri Timir Baran Dasgupta, UDC

1.1.80

1.1.83

Tax section

good.

2.

Shri Sailendra Nath Bhattacharyya U.D.C.

1.7.80

1.7.83

R.T.A.

He is one of the ablest and most efficient workers of the office. He is dependable.

3.

Shri Subhas Chandra Bose. U.D.C.

1.7.80

1.7.80

General (Accident cell)

O. P. R. attached for persual satisfactory.

4.

Shri Sunil Kumar Mukherjee, U.D.C.

1.7.80

1.7.83

R.T.A. Section

Sri Mukherjee is very sincere, efficient and highly amenable to discipline.

5.

Shri Asoke Kr. Roy Chowdhury

1.7.80

1.7.83

Licence

He officiated as H.C. for considerable period. He is a regular and dependable U.D. Assistant performing heavy load of work with precision and commendable speed. Deserves promotion as H.C. on term.

2. It is stated that Roy Chowdhury was promoted as a Head Clerk on an Ad-hoc basis and he was recommended for promotion to the post of Head Clerk.

3. Das Gupta, however, was promoted to the said post by an order dated 29.1.1986 issued by the Director of Public Vehicles Department, Calcutta.

4. Roy Chowdhury filed a writ application questioning the said order, inter alia on the ground that he having worked as a Head Clerk and being most meritorious candidate, his case should have been considered for promotion. In the writ application, the writ petitioner did not implead that Sri Sailendra Nath Bhattacharyya, Sri Subhas Chandra Bose and Sri Sunil Kumar Mukherjee as party respondents. He, however, impeded one Sri Hiralal Das, respondent No. 5 in the writ application allegedly on the ground that he had earlier been promoted as Head Clerk on merit and not on the basis of seniority.

5. The case of the respondents, on the other hand, was that promotion has been granted to Das Gupta keeping in view of the promotional policy of the State of West Bengal which is seniority-cum-merit. It was stated that Das Gupta admittedly was senior to Roy Chowdhury as would be evident from the gradation list. The said gradation list is contained in annexure "B" to the writ application.

6. It was further contended on behalf of the respondents that Das Gupta has also worked as Public Relation Officer for sometime, which post is higher than the part of Head-clerk.

7. As indicated hereinbefore the learned Trial Judge held that the promotion given to Das Gupta was illegal as Roy Chowdhury was the most meritorious

candidate.

8. The learned Advocate General in support of this appeal inter alia, submitted that keeping in view of the policy decision adopted by the State of West Bengal as would appear from the memorandum dated 11th June, 1980, it would be evident that the seniority-cum-merit was the criteria for grant of promotion and in view of the fact that Das Gupta was not unfit for being granted promotion; no illegality can be said to have been committed by the State in promoting him to the post of Head Clerk.

9. Mr. Roy appearing on behalf of Das Gupta adopted the submission of learned Advocate General. He further pointed out that both Upper Division Clerk and the Head Clerk have been placed in Grade "C". According to the learned Counsel the post of Head Clerk is not a selection post. The learned Counsel further submitted that although the writ petitioner might have a better performance report but keeping in view of the fact that Dasgupta's performance was also satisfactory, no illegality has been committed by this concerned respondent in granting promotion to Dasgupta. It was submitted that the legality of the policy adopted by the State of West Bengal has not been questioned and thus the writ petition was not maintainable.

10. My attention was further drawn to a statement of the promotional policy dated 5th August, 1981 issued by the Finance Department, State of West Bengal.

11. The learned counsel, therefore, submitted that as the post of Head Clerk was not a selection post, promotion could be given also on seniority cum-merit basis.

12. Reliance in this connection has been placed upon in the case of Sant Ram Sharma Vs. State of Rajasthan and Another,

13. It was further submitted that the executive policy of the State cannot be subject matter of challenge in a proceedings under Article 226 of the Constitution of India.

14. Reliance in this connection has been placed upon in the case of State of Andhra Pradesh and Another Vs. V. Sadanandam and Others,

15. The learned Counsel appearing on behalf of the Writ petitioner/respondent however did not make endeavor to support the judgment under appeal in reasoning adopted by the learned trial Judge.

16. The learned Counsel for the writ petitioner/respondent has raised two contentions in this appeal. Firstly our attention was drawn to the Circular Letter dated 1.12.72 whereby the State Government directed that in the matter of promotion the merit-cum-seniority should be followed. According to the learned Counsel in view of the aforementioned circular which still holds the field, State Government cannot grant promotion on the basis of the seniority alone relying on or on the basis of the circular letter dated 6.5.1978. It was pointed out that the Circular letter dated 20th May, 1980 having been issued pursuant to the

earlier Circular letter dated 28.3.78 which has been struck down by the Division Bench of this Court in the case of Biplab Bhusan Mazumdar vs. State of West Bengal reported in 1982 (1) C.L.J., 77, the said Circular Letter should not also be followed.

17. The learned Counsel contended that in this view of the matter, the circular letter dated 20.5.1980 referred to by the learned Counsel for the appellant will also have no application in the facts and circumstances of this case, inasmuch as the afore-mentioned circular letter dated 1.12.72 is still in force.

18. The learned Counsel for the respondent submitted that the appellants had not controverted the statements made in paragraph 8 of the writ petition. It was further submitted that Hiralal Das who was impleaded as respondent no. 5 in the writ application was also promoted on the basis of merits and thus the writ petitioner should not have been discriminated.

19. There cannot be any doubt that if the Promotion Policy of State is seniority-cum-merits; seniority will prevail subject to the condition that the employee shall not be found unfit to hold this higher post.

20. In the case of D.P. Singh alias Dina Nath Prasad Singh and Others Vs. Ranchi Kshetriya Gramin Bank and Others I, having relied upon several Supreme Court decisions held as follows :

In State of Orissa Vs. Durga Charan Das, upon which reliance has been placed by Mr. P.K. Sinha, the post was a selection post and the Supreme Court while considering the provisions of Rule 6 framed u/s 23(2) of the Government of India (Construction of Orissa) Order, 1936 held :

As we have already indicated, promotion to a selection post depends upon several relevant factors the number of vacancies in the posts of Registrars is one factor, the number of persons eligible for the said promotions is another factor: and the seniority of the said competitors along with their past record and their merits as judged by the Public Service Commission, is yet another factor.

21. The Supreme Court, therefore, held :

The very concept of selection involves the consideration of seniority coupled with merit, which is generally described as the seniority-cum-merit.

This decision, therefore, has no application in the facts of this case.

22. In State of Mysore and Another Vs. Syed Mahmood and Others, the Supreme Court held :

Where the promotion is based on seniority-cum-merit, the officer cannot claim promotion as a matter of right by virtue of his seniority alone. If he is found unfit to discharge the duties of the higher post, he may be passed over and an officer junior to him may be promoted.

23. In State of Mysore & Anr. v. P.N. Manjudiah & Anr. reported in 1969 NSC 38,

the Supreme Court was considering a case of deputation and held :

So long as the service of the employee in the new Department is satisfactory and he is obtaining the increments and promotions in that Department, it stands to reason that the satisfactory service and the manner of its discharge in the post he actually fills should be deemed to be rendered in the parent Department.

24. The Supreme Court, however, following the decision of Syed Mahmood's case (supra) held that the High Court should not have issued a writ of mandamus to promote the officer with retrospective effect stating :

The correct procedure for the High Court was to issue a writ to the State Government compelling it to perform its duty and to consider whether having regard to his seniority and fitness the 1st respondent should have been promoted on the relevant date and so what consequential benefits should be allowed to him.

25. The decision of the Supreme Court in Syed Mahmood's case (supra) as also in P.M. Manjundiah's case (supra) were followed by it in State of Mysore Vs. C.R. Sheshadri and Others, wherein it was held :

On the other hand if seniority-cum-merit is the rule as the Supreme Court decisions cited before us promotion is problematical. In the absence of positive proof of the relevant service rule, it is hazardous to assume that by efflux of time the petitioner would have spiraled up to Deputy Secretary ship. How could we speculate in retrospect what the rule was and whether the petitioner would have been selected on merit and on the strength of such dubious hypothesis director active promotion and back pay.

The Supreme Court also observed :

Nothing has been suggested against the petitioner in his career to disentitle him to promotion and we have no doubt Government will give him his need. However, if the criterion for promotion is one of seniority-cum-merit, comparative merit may have to be assessed if length of service is equal or an outstanding junior is available for promotion.

(Underling is mine for emphasis).

26. This aspect of the matter was again considered by the Supreme Court in State of Kerala and Another Vs. N.M. Thomas and Others, wherein it was held :

The principle of equality is applicable to employment at all stages and in all respects, namely, initial recruitment, promotion, retirement, payment of pension and gratuity. With regard to promotion, the normal principles are either merit cum-seniority or seniority-cum-merit. Seniority-cum-merit means that given the minimum necessary merit requisite for efficiency of administration, the senior though the less meritorious shall have priority. This will not violate Articles 14, 16(1) and (2). A rule which provides that given the necessary requisite merit, a member of the backward class shall get priority to ensure adequate

representation will not similarly violate Article 14 of Articles 16(1) and (2). A rule which provides that given the necessary requisite merit, a member of the backward class shall get priority to ensure adequate representation will not similarly violate Article 14 or Article 16(1) and (2). The relevant touch-stone of validity adequate representation for the -unrepresented backward community or goes beyond it

(Underlining is mine for emphasis)

27. In *Md. Usman and Others Vs. State of Andhra Pradesh and Others*, the Supreme Court while considering this validity of rule 5 of Andhra Pradesh Registration Sub-division Service Rules held :

In other words, that selection made on the basis of seniority cum-merit the seniors among the clerks were selected subject to suitability.

28. The post of Head-clerk in view of the policy decision of the State is not a selection post.

29. It may be true that the performance of the writ petitioner was better than the respondent no. 4 and the same by itself was not the decisive factor. Seniority in terms of the service rules was to get precedence over merit. The Respondent no. 4 was not unfit for promotion. His service records were satisfactory. He had also officiated as a Public Relations Officer.

30. It is, therefore, difficult to comprehend as to how the decision of the State can be termed "arbitrary" or for unauthorized purpose.

31. The State of West Bengal issued a Memorandum dated 1st December, 1972 whereby and where under the principles to be followed in the matter of promotion have been laid down. It has been stated in clause (a) of paragraph 1 of the said Circular that a Government servant should be selected for promotion on grounds of merit and suitability in all respects and not of seniority. Sub paragraph (2) of the said Circular states the guidelines in determining the merits.

The said paragraph (2) of the said Circular reads thus :

It is considered necessary to indicate some guidelines in determining merit. The following factors should therefore be taken into consideration in deciding merit:

(a) The annual confidential report of the competent officer in the prescribed form should be given due weight in considering cases of promotion taking into account reports relating to paragraphs (b) and (c) below.

(b) Satisfactory work based on periodical reports which in case of certain-categories would involve report on maintenance of case records, diaries, etc. and on out-put of work according to the approved norm.

(c) The conduct of Government servants who resort to cease work and/or indulge in acts of indiscipline like slogan shouting, holding meetings, etc. within office premises during the prescribed office hours and/or resort to or in any way abet

strike for any period in violation of the provisions in rule 3(C) of West Bengal Service Rules, Part 1 and Rule 27 of West Bengal Government Servants' Conduct Rules.

By Order dated 6th May, 1978, paragraph 2(C) was directed to be deleted in the following terms :

Due to operation of Finance Department Memo No. 5009-F dated 21.5.74 and Para 2(c) of Government Order No. 7119-F dated 1.12.72, a large number of Govt. employees could not get their promotion to higher posts (including appointment to higher posts while having no lien on the lower feeder posts) and appointment to New/Intermediate Selection Grade posts as also the benefit of confirmation either in the basic posts or in the posts to which they were earlier promoted or appointed. In all these respects, these employees happened to be superseded by their junior colleagues. Finance Department Memo No. 5009 F dated 21.5.74 has since been withdrawn and Para 2(c) of Government "Order No. 7119-F dated 1.12.72 also deleted. A question has been under consideration of the Government for quite some time past as to the appropriate action to be taken for redressed of the grievances of the employees already deprived of the benefits of promotions and appointments to higher posts and Selection Grades as well as confirmation by virtue of operation of the Finance Department Memo, and the Govt. Order referred to.

Various directions were given in paragraph 2(1)(c) and paragraph 2(II)(c) which read thus :

2(I)(c). The seniority of the employees thus promoted or appointed substantively to the supernumerary posts should be reckoned with effect from the date on which the last of the employees as in (a) above was confirmed in the cadre concerned.

2(II)(c). The promotion or appointment to higher grades of services and posts as referred to in II(b) above should take retrospective effect from the dates on which the employees II(a) above were originally promoted or appointed. To give retrospective effect in this manner, an appropriate number of supernumerary posts should be created on a temporary basis for the specific period from the date on which a particular post was originally filled up till the date of cancellation as in II(a) above. In the cases of the persons who may be re-promoted after reversion on the strength of this order, no supernumerary posts will require to be created.

(d) Where the super session of senior colleagues was made in consultation with the P.S.C. action indicated as in II(b). above should be taken in consultation with the P.S.C.

(e). After cancellation of earlier orders officiating promotion or appointment as in II(a) above, an employee having lien on the lower feeder post will come over to his substantive post and an employee having no such lien will be appointed to

the post which he held prior to holding of the post in respect of which the appointment has been cancelled. The pay of an employee having no lien on any post will be fixed in relaxation of normal rules on his appointment to the lower post which he was holding before appointment to the higher post in the same manner in which his pay would have been fixed had he had lien on the lower post.

32. The employees who were earlier promoted to the post of Head Clerks and who became junior to the employees who were later on promoted pursuant to the aforementioned circular filed a writ petition before this Court and the matter was ultimately decided by the Division Bench of this Court in the case of Biplab Bhusan Mazumdar v. State of West Bengal reported in 1982(1) CLJ, 77 : 1982 Lab. I.C. 563.

33. The Division Bench of this Court held that the Circular letter dated 28.3.78 had no retrospective effect.

34. The Division Bench held that the writ petitioners therein were reported only on the ground that they had superseded their juniors. It observed the peculiar feature of the case that the petitioners were reverted to their substantive posts not on any of the usual grounds but on the basis of the rules subsequently framed by this circular letter dated 28.3.1978.

35. The bench, thereafter considered as to whether the said circular letter dated 28.3.1978 can be given retrospective effect. The said question was answered in the negative.

36. It was held that by executive instructions, rules framed under proviso to Article 309 of the Constitution of India cannot be varied or modified.

37. None of the aforementioned questions is relevant in this application.

38. In Biplab Bhusan Mazumdar's case the 1980 or the 1981 circulars were not considered having not been brought to the notice of the bench.

39. It is not the case of the writ petitioner that the circular letter dated 1.12.72 was issued under the rule making power of the State i.e. in terms of proviso to Article 309 of the Constitution of India. The said circular was in fact issued by the Finance Department. Audit Branch of the State. The said circular letter even does not satisfy the requirements of Article 162 of the Constitution of India. It is not even authenticated in terms of Article 166(3) of the Constitution.

40. The Finance Department, therefore, could itself vary the said circulars and lay down the new statement of policy. When a new policy is adopted, the same shall override the earlier and in the event there exists any conflict between the two, the doctrine of implied repeal will be attracted.

41. For the reasons aforesaid the submission of the learned counsel for the writ petitioner respondent no. 1 cannot be accepted.

42. It is now well known that this Court while exercising its power of judicial

review is only concerned with the decision making process. It is not concerned with the merit of decision impugned before it.

43. The learned trial Judge himself stated the law thus :

While considering the action of the respondents in overlooking the cases of the other candidates for the post of Head Clerk including the petitioner this Court reaffirms that the judicial review, of the administrative discretion based on abuse of power is merited. In the case of Secretary of State for the Environment vs. Nottinghamshire County Council and Secretary of State for the Environment vs. City of Bradford Metropolitan Council reported in (1986) LRC (Const) 762 held that judicial review is a great weapon in the hands of the judges, but the Judges must observe the constitutional limits set by our parliamentary system upon their exercise of this beneficial power. The action of the respondent in overlooking the cases of the candidates including the petitioner, in my view, is infected with illegality, rationality and impropriety which is the recent classical analysis of Lord Diplock in Council of Civil Service Union vs. Minister for Civil Services (1985) IRC (Const) 948 at 1026. In this connection, a reference may be made to the judgment in Patriotic Frontjapu vs. Minister of Justice. Legal and Parliamentary Affairs 1986 IRC (Const) 672 at page 690.

44. Despite saying so the learned Judge considered the merits of the respective candidates which he could not do. The learned Judge also committed a grave error is not dismissing the writ petition on the ground that all the affected employees were not impleaded as parties. In this case the policy decision was not in issue. The contention of the writ petitioner that although he was junior, he should have been promoted on merits superseding his juniors. All employees whom he sought to supersede were thus necessary parties.

45. It is now well known that the power of judicial review can be exercised, inter alia, on the grounds of illegality, irrationality and procedural impropriety.

46. None of the aforesaid grounds is available in this case to interfere with an administrative action of the State.

47. It was also not the case of the writ petitioner that the order of promotion issued in favour of Dasgupta was vitiated on account of malafide on the part of the concerned authorities, nor was it his case that the said order was passed for unauthorised purpose.

48. For the reasons aforementioned the judgment and order passed by the learned trial judge cannot be sustained. In the result, this appeal is allowed, the judgment and order passed by the learned trial judge is set aside and the writ petition filed by the Respondent No. 1 is dismissed.

However, there will be no order as to costs.

Basudeva Panigrahi, J.

Writ Petition dismissed.

I agree.