
(2015) 04 TP CK 0032
In the Tripura High Court
Case No : Writ Petition (C) No. 13 of 2009

Swapan Kumar Mazumder	Vs	APPELLANT
The State of Tripura and Others		RESPONDENT

Date of Decision : 24-04-2015

Acts Referred:

Constitution of India, 1950 — Article 226

Citation : (2015) 04 TP CK 0032

Hon'ble Judges : S.C. Das, J

Bench : Single Bench

Advocate : S.C. Das, for the Appellant; S. Chakraborty, Addl. G.A., Advocates for the Respondent

Final Decision : Allowed

Judgement

S.C. Das, J.—By filing this writ petition, the petitioner prayed for directing the official respondent Nos. 1, 2, 3 and 4 to consider the case of the petitioner for promotion to the post of Divisional Fire Officer w.e.f. 2nd May, 2001.

2. Heard learned counsel Mr. S.C. Das for the petitioner and learned Addl. G.A., Mr. S. Chakraborty for the respondent Nos. 1 to 4. Respondent No. 5 has chosen to remain absent.

3. Undisputed facts are that the petitioner was appointed in the post of Fireman on 19.04.1973 (Annexure-1 to the writ petition) under the Directorate of Fire Service, Govt. of Tripura. As per the Service Rules, the promotional channels were from the post of Fireman to the post of Sub-Officer and then from the post of Sub-Officer to the post of Station Officer and thereafter from the post of Station Officer to Divisional Fire Officer and so on. The petitioner was promoted to the post of Sub-Officer on 30.08.1977 (Annexure 2 to the writ petition) and thereafter was promoted to the post of Station Officer on 22.09.1995 (Annexure-3 to the writ petition). The Director of Fire Service published a seniority list of the Fireman on 9th December, 1974 (Annexure-4 to the writ

petition) and in that seniority list the name of the petitioner was shown at Sl. No. 69 and the respondent No. 5 was shown at Sl. No. 67 and thereby the respondent No. 5 was placed senior to the petitioner. The seniority position of respondent No. 5 as per seniority list dated 9th December 1974 was challenged by one Milan Kanti Paul and others by filing a Civil Suit No. T.S. 26 of 1977 and the suit was decreed in favour of the plaintiff. The judgment passed in the Title Suit was carried to first appeal as well as to second appeal vide RSA No. 10 of 1984 and by judgment dated 24.06.1996 (Annexure-5 to the writ petition) the Single Bench of the Gauhati High Court upheld the judgment passed by the trial Court. As per the said judgment, a fresh seniority list of Firemen was prepared on 16.11.1996 (Annexure-6 to the writ petition) and in that seniority list, the name of the petitioner was shown at Sl. No. 69 and the name of respondent No. 5 was shown at Sl. No. 72 which means the respondent No. 5 was junior to the petitioner in the post of Fireman from the date of their appointment as a Fireman.

3.1 The petitioner claimed his promotion to the post of Sub-Officer and Station Officer with retrospective effect from the date his junior respondent No. 5 was promoted and since the relief was not granted by the official respondents, he filed Civil Rule No. 510 of 1995 before the Agartala Bench of the then Gauhati High Court and the High Court by judgment dated 01.02.2005 (Annexure-8 to the writ petition) allowed the writ petition and directed the respondents to constitute a DPC to consider afresh whether the petitioner was fit for promotion to the Grade of Sub-Officer w.e.f. the date when the respondent No. 5 was promoted and if so found and promoted, his seniority in the Grade of Sub-Officer as well as Station Officer should be refixed in accordance with the relevant provisions of law applicable to the Officers of both the Grades. Pursuant to that judgment of the High Court, the respondent No. 4 by order dated 21.03.2006 (Annexure-9 to the writ petition) and order dated 05.01.2006 (Annexure-10 to the writ petition) promoted the petitioner showing him as senior in the post of Sub-Officer and Station Officer and a fresh seniority list dated 22.01.2006 of Station Officer was published (Annexure-11 to the writ petition) wherein the petitioner was shown as senior to respondent No. 5.

3.2 It is also an admitted position that a post of Divisional Fire Officer was created at Ambassa, Dhalai District on 02.05.2001 (Annexure-13 to the writ petition) but the post was not filled up and it was ultimately lapsed. According to the respondents (para 13 of the counter affidavit) the post of Divisional Fire Officer, Ambassa, Dhalai was again created by departmental notification dated 02.09.2008 which was created earlier and was lapsed.

3.3 As per the recruitment rules for the post of Divisional Fire Officer (Annexure-12 to the writ petition), the post was classified as a Class-II gazetted and a selection post and the method of recruitment was by promotion failing which by deputation and failing both by direct recruitment. For promotion from the post of Station Officer one must have at least 6(six) years of service in the Grade of Station Officer. The petitioner contended that he was promoted to the

post of Station Officer in the year 1995 and therefore he completed 6(six) years of required service in the feeder post of Station Officer and was eligible for promotion to the post of Divisional Fire Officer (for short DFO) and though the post was lying vacant and DPC also recommended the promotion of the petitioner in the post of DFO but the official respondents having a bias against the petitioner and being biased in favour of the respondent No. 5 did not promote the petitioner to the post of DFO. Respondent No. 5 with a view to stall the promotion of the petitioner to the post of DFO filed a writ petition No. WP(C) 279 of 2006 but no stay order was granted and it was ordered by the High Court in the Civil Rule that any promotion to the post of DFO shall be subject to ultimate outcome of the writ case. Thereafter the issue of promotion was not effectively taken up though there was opinion of the Law Department that the promotion may be given to the post of DFO subject to ultimate decision of the WP(C) No. 279 of 2006. The petitioner was deprived from his due promotion though he was eligible for promotion from the year 2001 and there was vacant post for such promotion. The petitioner alleged bias for not convening DPC meeting while eligible officers were available and the petitioner contended that the DPC meeting was not convened for the purpose of keeping the post vacant till the date of his retirement on 31.10.2008. He was given extension for 3 months from 31.10.2008 and he made representation for promotion on 24.09.2007 (Annexure-24 to the rejoinder affidavit) and also issued demand notice dated 24.11.2008 (Annexure-21 to the writ petition) while he was in the extension service but his promotion was not considered and he was deprived of the promotion to which he was legitimately entitled.

4. The respondents contended that from the year 2001 till 2008 no one was promoted to the post of DFO from the post of Station Officer and therefore, there was no question of depriving the petitioner from his legitimate right. It is also contended by the respondents that after the judgment dated 24.06.1996 in RSA 10 of 1984, the seniority list of Fireman was prepared afresh but the promotion to the post of Station Officer was given to the petitioner and respondent No. 5 prior to that judgment and the position that the petitioner was senior to respondent No. 5 both at the stage of Sub-Officer and Station Officer was settled after judgment dated 01.02.2005 in Civil Rule No. 510 of 1995. Therefore, the petitioner could not be promoted to the post of DFO during pendency of CR 510 of 1995 and subsequent writ petition of respondent No. 5 i.e. WP(C) 279 of 2006. The DPC for promotion to the post of DFO was held on 24.12.2008 when the petitioner already retired from service and by filing an additional counter affidavit the official respondents brought on record the DPC minutes dated 24.12.2008 (Annexure R/2 to the additional counter affidavit) and the respondents contended that the case of the petitioner was also considered by the DPC but did not recommend the name of the petitioner since he was already retired on 31.10.2008.

5. The following questions fell for consideration of this Court:--

"I. Whether there was a vacant post of DFO for promotion in the year 2001 and whether the petitioner was eligible for promotion at that point of time?

II. Whether the promotion to a superior post can be considered after retirement of the person who was entitled to be promoted before retirement in the existing vacant post?"

6. Learned counsel Mr. Das appearing for the petitioner has candidly submitted that the petitioner was senior to respondent No. 5 from the very inception of his appointment in the year 1973 in the post of Fireman but a wrong seniority list of the post for Fireman was prepared and respondent No. 5 was promoted to the post of Sub Officer and Station Officer showing him as senior to the petitioner. Admittedly after judgment of RSA 10 of 1984 dated 24.06.1996 the seniority list of Fireman was prepared afresh as per judgment (Annexure-6 to the writ petition) i.e. seniority list dated 16.11.1996 and in that seniority list, the petitioner was shown at Sl. No. 69 and the respondent No. 5 was shown at Sl. No. 72. So, it was settled by the seniority list dated 16.11.1996 (Annexure-6 to the writ petition) that the petitioner was senior to respondent No. 5 in the post of Fireman and therefore he was entitled to be promoted to the post of Sub Officer and Station Officer with retrospective effect along with his junior showing him as senior but that relief was not initially granted and after the petitioner filed Civil Rule No. 510/95 and the writ petition was allowed by judgment dated 01.02.2005 (Annexure-8 to the writ petition), the petitioner was promoted with retrospective effect from the date his junior the respondent No. 5 was promoted both in the post of Sub-Officer and Station Officer and therefore, the seniority position of the petitioner was retained all along as senior to respondent No. 5. In the judgment dated 01.02.2005 of Civil Rule No. 520/95 (Annexure-8 to the writ petition) the learned Single Judge of the High Court clearly indicated element of bias against the petitioner and in favour of the respondent No. 5 on the part of the official respondents and that bias attitude of the respondents continued even after passing of order dated 01.02.2005 by the High Court. It is submitted by Mr. Das, learned counsel for the petitioner that the petitioner and respondent No. 5 were together sent for training course in National Fire Service College, Nagpur and the petitioner cleared it in the first attempt but the respondent No. 5 failed. The petitioner was due to be promoted to the post of Station Officer after such examination of National Fire Service College but it was kept pending till respondent No. 5 cleared his course in the succeeding year. It is also contended by Mr. Das, learned counsel that the post of DFO created in the year 2001 was lying vacant and the petitioner was entitled to be considered for promotion to the vacant post but the official respondents being biased towards the respondent No. 5 did not consider the promotion of the petitioner and did not constitute DPC from 2001 till the petitioner was superannuated even after his representation.

7. Learned Addl. G.A. Mr. Chakraborty has argued that when the petitioner become due to be considered for promotion to the post of DFO, respondent No. 5 filed WP(C) 279/06 and by an order dated 11.11.2008, the High Court directed

that the promotion to the post of DFO shall be subject to ultimate decision of that writ petition and during that period no one was promoted to the post of DFO from the post of Station Officer and therefore question of depriving the petitioner from his legitimate due does not arise. He has also contended that the post of DFO, Ambassa which was created in the year 2001 was lapsed because the post was not filled up within the stipulated time and that post was again created on 02.09.2008 and thereafter DPC was held on 31.10.2008 and by that time the petitioner already retired and so there was no question of any deprivation of the petitioner.

8. I have very meticulously gone through the writ petition, rejoinder affidavit, counter affidavit filed by respondent Nos. 1 to 4 and additional counter affidavit filed by respondent Nos. 1 to 4 and carefully considered the documents filed by both side and the submission of learned counsel of both side. I am in agreement with the submission of learned counsel Mr. Das that the High Court while deciding Civil Rule No. 510/95 has observed the element of bias on the part of the official respondents against the petitioner and in favour of respondent No. 5. That judgment was not challenged by the official respondents in any superior forum and it stands good. The direction given in that judgment has been complied with and the petitioner was given promotion with retrospective effect from the date his junior the respondent No. 5 was promoted to the post of Sub-Officer and Station Officer. It is an admitted position that a post of DFO was created in the year 2001. It is also an admitted position that by the year 2001, the petitioner completed 6(six) years of service in the Grade of Station Officer and therefore, he was eligible for consideration of promotion to the post of DFO. It is quite evident that though the respondent No. 5 filed WP(C) No. 279/06 to stall promotion to the petitioner to the post of DFO but the High Court granted no stay order and it was simply ordered that any promotion to the post of DFO shall be subject to ultimate decision of the writ petition but the official respondents did not initiate any proposal for filling up the vacant post of DFO and no DPC was held before retirement of the petitioner. It is, therefore, evident that though there was a vacant post of DFO in the year 2001 and though the petitioner was eligible for promotion to the post of DFO at that relevant point of time, the respondents did not initiate any proposal for promotion and thereby the petitioner was deprived from his legitimate right of being considered for promotion to the post of DFO.

9. Let us now decide Issue No. II. By filing additional counter affidavit, the official respondents brought on record the DPC minutes dated 24.12.2008 which is marked as Annexure-R/2 and it shows that a DPC was constituted by the Government for considering promotion to the post of DFO and four names were taken into account for consideration of which the name of the petitioner was at Sl. No. 1. The DPC discarded the name of the petitioner observing -

"Shri Swapan Kumar Majumder who is at Sl. No. 1 of the seniority list was not considered by the DPC as he had retired on 31.10.2008 and is presently serving

on three months extension of service w.e.f. 01.11.2008 to 31.01.2009."

It is an admitted position that the petitioner retired from service on 31.10.2008. It is also an admitted position that from the year 2001 till 24th December, 2008 there was no DPC convened by the respondents to consider promotion to the post of DFO though there was eligible candidate and there was vacant post. It is the case of the petitioner that at the instance of respondent No. 5, the official respondents did not initiate DPC for promotion to the post of DFO only with a view to deprive the petitioner from promotion and for that purpose the respondent No. 5 instituted WP(C) No. 279/06 but failed to obtain any stay order from the Court and even thereafter the petitioner was not promoted and the post was lying vacant. Still the official respondents did not convene DPC meeting for promotion to the post of DFO during the period petitioner was in service. Immediately after the retirement of the petitioner, the respondent No. 5 withdrew the WP(C) No. 279/06 and a copy of order dated 11.11.2008 passed in that writ petition has been annexed as Annexure-16 to the writ petition which shows that respondent No. 5 withdrew the writ petition immediately after retirement date of the petitioner and it is quite evident that after retirement of the petitioner, the official respondents initiated the proposal for promotion to the post of DFO.

10. Learned counsel Mr. Das has submitted that DPC convened by the respondents on 24.12.2008 was bound to consider the case of the petitioner as per the revised DPC guidelines of the State Govt. but the DPC did not follow the guidelines and discarded the case of the petitioner simply observing that he already retired from service. He has referred to paragraph 2.4.1 at page 7 of the revised DPC guidelines of the State Govt. which is not disputed by the respondents and that DPC guidelines reads as follows:--

"2.4.1 Preparation of yearwise panels by DPC where they have not met for a number of years.

Where for reasons beyond control, the DPC could not be held in an year(s), even though the vacancies arose during that year (or years), the first DPC that meets thereafter should follow the following procedure:

(i) Determine the actual number of regular vacancies that arose in each of the previous year(s) immediately preceding and the actual number of regular vacancies proposed to be filled in the current year separately.

(ii) Consider in respect of each of the years those officers only who would be within the field of choice with reference to the vacancies of each year starting with the earliest year onwards.

(iii) Prepare a "Select List" by placing the select list of the earlier year above the one for the next year and so on."

11. It is contended by learned counsel Mr. Das that since there was a vacant post in the year 2001 and the petitioner was eligible for consideration for promotion

to the post of DFO which was lying vacant, his name ought to be considered by the DPC as an eligible candidate at that relevant point of time as per the DPC guidelines and discarding the candidature of the petitioner for promotion was altogether wrong and illegal.

12. Learned G.A. has submitted that DPC guideline is simply a guideline to be followed by the DPC and it has no force of law, therefore, non consideration of that guideline cannot create any right in favour of the petitioner.

13. It is an admitted position that the petitioner was due to be considered for promotion in the year 2001 and there was a vacant post of DFO but the respondents did not convene any DPC before his retirement. While the State Govt. had a guideline to be followed by the DPC, it was supposed to be strictly followed by all DPC while considering promotion of any officer of the Government. It is apparently clear that DPC did not follow the above guideline. No doubt it has got no force of law but since State Govt. has formulated this DPC guideline, it cannot be ignored by the DPC and DPC cannot promote its own thoughts and ideas in place of the guideline formulated by the State Govt. Non consideration of the case of the petitioner by the DPC dated 28.12.2008 was therefore a clear violation of the DPC guideline and therefore, the rejection of the candidature of the petitioner outright from consideration of promotion was not justified.

14. Mr. Das, learned counsel for the petitioner has also argued that there are instances of promotion after retirement given by the State Govt. and the petitioner brought on record two cases and annexed the documents which are marked as Annexure-18 to Annexure 20. It shows that one Utpal Debbarma was promoted to TPS Grade-I after his retirement. Another Pradyut Narayan Ghosh was promoted in the post of Office Superintendent from the post of Head Clerk after his retirement. The respondents could not come out with any satisfactory response in their counter affidavit and the petitioner therefore cannot be discriminated. He has also referred a decision of the Agartala Bench of the then Gauhati High Court in WP(C) No. 60/09, the case of Shri Gopal Chandra Roy v. the State of Tripura and Ors. and submitted that in that writ petition the promotion of a retired employee was considered to the post of Revenue Inspector and the Writ Court directed the State Govt. to give promotional benefits with retrospective effect.

15. In their counter affidavit the respondents contended that Utpal Debbarma was a member of the police service and the Police Service Rules is not applicable to the Tripura Fire Service Department and therefore, the case of Utpal Debbarma cannot be an instance. Similarly in the case of Pradyut Narayan Ghosh, the stand of the respondents is that he was due to be promoted and his promotion was given before his actual retirement. The documents which are annexed by the writ petitioner as Annexure 18, 19 and 20 supporting the contention of the petitioner and the respondents could not discard it. Annexure 18 clearly shows that Sri Utpal Debbarma a TPS Grade-II was given promotion to

TPS Grade-I after his retirement. The respondents could not show any provision under the Tripura Police Service Rules to give promotion after retirement and therefore, it is evident that the State-respondents though in another department has considered promotion of a TPS Grade-II officer to the Grade of TPS Grade-I after his retirement. In Annexure 20, Memo dated 25.07.2005 shows that Pradyut Narayan Ghosh a Head Clerk of ICAT Department of the Govt. of Tripura was due to be retired on 31.10.2005 and Memo dated 25.01.2006 of Annexure 20 shows that he was given promotion to the post of Office Superintendent and it means that after his retirement on 31.10.2005 he was given promotion by Memo dated 25.01.2006. These two instances show that there were cases where the State Govt. given promotion after retirement of a Govt. servant. If the State Govt. considered such promotion though in another department after retirement similar treatment why cannot be given to the petitioner of this case, has no answer of the State respondents.

16. In the case of Gopal Chandra Roy (*supra*), the petitioner who was holding the post of Tehsildar was due to be promoted to the post of Revenue Inspector but the promotion was not given during his service life and in that case the learned single Judge of the then Gauhati High Court, Agartala Bench referring to the cases of Dev Dutt Vs. Union of India (UOI) and Others, (2008) 117 FLR 1024 : (2008) 7 JT 463 : (2008) 7 SCALE 403 : (2008) 8 SCC 725 : (2008) 2 SCC(L&S) 771 : (2008) 3 SLJ 244 and the case of Smt. Sudha Shrivastava Vs. Comptroller and Auditor General of India, AIR 1996 SC 571 : (1995) 9 JT 358 : (1995) 6 SCALE 449 : (1996) 1 SCC 63 : (1995) 4 SCR 797 Supp : (1997) AIRSCW 2117 : (1997) 4 Supreme 571 held that the petitioner was entitled to be considered for promotion. The Court in paragraphs 11 and 12 of the judgment held thus--

"11. Having regard to the above decisions of the Supreme Court in Sudha Shrivastava and Dev Dutt, I am of the opinion that notwithstanding the retirement of the writ petitioner from service, this court can give appropriate direction for fresh consideration of the petitioner's case by the D.P.C., for promotion to the post of revenue inspector. This view is taken since it is seen from the D.P.C. records that the case of the petitioner was not considered by the D.P.C., and no other reasons are forthcoming for not recommend the case of the petitioner for promotion to the post of revenue inspector.

12. Accordingly it is directed that the respondents would have the claim of the petitioner for promotion be considered by an appropriate promotion committee, for promotion to the post of revenue inspector on the basis of the service records as on 1998 when the D.P.C. failed to consider the case of the petitioner.

If on such consideration the D.P.C. recommends the case of the petitioner for promotion, he shall be granted appropriate notional promotion and consequential higher notional pay, for the purpose of considering higher retirement benefits for the petitioner.

However since the petitioner has not rendered any service in the higher post, I

am of the opinion that there may not be any justification for giving direction for payment of arrear pay to the petitioner, if his case for promotion is favourably recommended with retrospective effect from the year 1999, when his juniors were promoted.

The appropriate exercise for fresh consideration of the case of the petitioner is to be concluded by the respondents within a period of 3 months from the date of receipt of a copy of this Court's order. Petitioner would make appropriate communication in this regard."

17. The case of the petitioner is almost similar to that of the case of Gopal Chandra Roy (supra). I have also gone through the judgment of the Apex Court in the case of Dev Dutt(supra) and the case of Sudha Shrivastava (supra). The ratio of those decisions may fairly be applied in the case of the petitioner of the present case. The petitioner was eligible for consideration of promotion in the year 2001. There was a vacant post of DFO at that relevant point of time. No doubt that promotion is not a right but consideration of promotion is a right, well settled. The petitioner had a legitimate right to be considered for promotion during his service life from the year 2001 till his date of retirement on 31.10.2008 and even thereafter. Admittedly no effort was taken for promotion from the year 2001 till the date of superannuation of the petitioner and the DPC was held on 24.12.2008 and at that time, the petitioner's name was also listed in Sl. No. 1 for consideration of promotion but the DPC has discarded his name only on the ground that he already retired and such exclusion of the name of petitioner was contrary to the DPC guideline. No doubt a person cannot be considered for promotion after his retirement even while he is in extension of service he cannot be considered for promotion. It is brought on record that the petitioner made representation for consideration of his promotion while he was in service. The case of the petitioner is different since he was eligible for promotion while in service and there was vacant post for consideration of promotion. So his case cannot be discarded simply on the ground that DPC could not be held at that time and since DPC held after his retirement therefore his case cannot be considered for promotion. Since there was vacant post and the petitioner was eligible for consideration but the respondents deliberately did not convene DPC meeting for consideration of the promotion of the petitioner even after representation, I am of considered opinion that a valuable right of the petitioner to be considered for promotion has been violated by the official respondents and thereby the petitioner has been deprived from his legitimate due. This Court while exercising jurisdiction under Article 226 of the Constitution of India is to see the justice is rendered to a person according to law. Where ever injustice is caused, this Court has inherent jurisdiction to remedy the injustice and to do justice to the affected person. The legitimate right of the petitioner to be considered for promotion was denied by the official respondents during the time when he was in service and immediately after his retirement as it appears, the DPC was constituted and the name of the petitioner was discarded from consideration by the DPC in total disobedience to the guidelines formulated by

the State Govt. Therefore, I think it is a fit case to give appropriate direction to the respondents to constitute a special DPC to consider the case of the petitioner.

18. Accordingly, it is hereby ordered that the official respondents should constitute a special DPC within 3(three) months from today to consider the case of the petitioner for promotion to the post of DFO with retrospective effect when he was entitled to be promoted and the post was lying vacant for promotion and thereafter, the DPC shall made appropriate recommendation and the respondents are directed to give, in case of such recommendation, appropriate notional promotion and consequential all service benefits to the petitioner. The petitioner cannot claim the pay of higher post in case the DPC considered his promotion and he shall not be entitled to any arrear pay but shall be entitled to only the retiral benefits with retrospective effect.

19. The writ petition accordingly stands allowed and disposed of.