

(2011) 05 GUJ CK 0144
In the Gujarat High Court
Case No : Second Appeal No. 70 of 1999

Union of India (UOI) and Another		APPELLANT
	Vs	
Rameshchandra Kantilal Patel		RESPONDENT

Date of Decision : 03-05-2011

Acts Referred:

Constitution of India, 1950 — Article 14, 16

Citation : (2011) 05 GUJ CK 0144

Hon'ble Judges : K. S. Jhaveri, J

Bench : Single Bench

Advocate : Vasavdatta Bhatt, for the Appellant; Anand L. Sharma, for the Respondent

Final Decision : Dismissed

Judgement

K.S. Jhaveri, J.—By way of this appeal, the Appellants have challenged the judgment and decree dated 10.2.1999, passed by the Joint District Judge, Bhavnagar, in Regular Civil Appeal No. 134 of 1996, whereby the learned Appellate Court has reversed the order of the Trial Court and partly allowed the Appeal and directed the Defendants to pay back wages from the due date given in the order of promotion.

2. The short facts of this case are that the original Plaintiff was appointed as Rakshak on 10.01.1969. In the year 1982 the promotion for the post of Senior Rakshak was held. Out of 67 candidates only 7 candidates including Plaintiff were declared as passed and have been on the panel and were accordingly promoted as Senior Rakshak. On 28.03.1984, the Defendant No. 1 issued seniority list, wherein Plaintiff has been shown at Serial No. 36 i.e. above original Defendant No. 3, whose seniority has been shown at serial No. 38. On account of restructuring of cadre effective from 1.4.1993, the post of Senior Rakshak was upgraded to the post of Head Rakshak. The promotion against these posts were granted on the basis of seniority. On 31.7.2004 Defendant No. 2 issued memorandum by virtue of which panel of selected candidates for the post of

Head Rakshak were prepared. The Plaintiff was not on the seniority list and therefore, he made a representation to which a reply was given stating that Plaintiff was overlooked in the matter of promotion on account of his bad service record.

2.1. Therefore, the Plaintiff filed suit for a declaration. Vide order dated 1.4.1983, the learned Civil Judge rejected the suit of the Plaintiff. The Plaintiff therefore, preferred regular Civil Appeal No. 134 of 1996, before the Joint District Judge, Bhanvagar.

2.2. During the pendency of the suit Plaintiff's case was considered by the Defendant authority and Plaintiff was given promotion on the post of head Rakshak with effect from 1.4.1983. Vide order dated 10.2.1999, learned Judge has allowed the appeal of the Plaintiff and directed the original Defendants to pay backwages from the due date given in the order of promotion. Hence, this petition.

3. While considering the case, the Appellate Court has framed the following issues:

1. Whether Plaintiff proves that post of Had Rakshak are to be selected only on the basis of seniority of Sr. Rakshak ?

2. Whether Plaintiff proves that his juniors were promoted overlooking Plaintiff's right illegally by the discrimination by promoting Defendant No. 3 vide order dated 31.7.1984 ?

3. Whether Plaintiff is entitled for the relief of declaration and other consequential relief ?

4. Whether Defendant prove that Plaintiff's record of service is bad and therefore, not selected for the promotion as alleged ?

5. What order and decree ?

4. The Appellate Court after considering the evidence on record and in paragraph Nos. 7, 8 and 9 has held as under:

7. Before arguments were heard by Lower Court, said order was produced by the learned advocate for the Defendants. However, the learned trial Judge proceeded to decide all the issues and came to the conclusion that Plaintiff was not entitled to get promotion as prayed for because his service Record was bad. But, Defendants had not produced any evidence to show that in fact, Plaintiff's service Record was bad. On the contrary, Defendants had considered Plaintiff's case and had corrected their mistake and Plaintiff was given promotion from the due date as prayed for by the Plaintiff in the suit. Therefore, now, all other issues are not required to be decided, but only issue remains to be decided is whether Plaintiff is entitled to get back wages from the due date given in the order dated 15th February, 1996 which is produced at Ex. 37.

8. The learned advocate for the Appellant Mr. Xavier contended before me that there is no evidence on record to show that there was any mistake or misconduct on the part of Plaintiff. Plaintiff has given deposition on oath and he has clearly stated that no adverse remarks was communicated to him. On the contrary, he was given promotion on selection post in the year 1983 and, thereafter, according to policy of up-gradation of post 67 persons were promoted on the post of Head Rakshak and there was no reason for not giving promotion to present Plaintiff and said mistake is corrected by the Department during the pendency of the suit, therefore, Plaintiff is entitled to get back wages according to settled rules. In support of his arguments, the learned advocate for the Appellant has relied upon decision reported in (1997) 36 ATC 225, D.L. Desphande v. Divisional Railway Manager and Anr. Wherein it has been observed as under:

in the treatise of service law "Service under the state" by Justice M. Rama Jois of the Karnataka High Court at page 1987 edition under the option "Denial of arrears" referring to a decided case, the following principle has been restated:

Where according to service rules, the pay of an official is fixed with effect from a particular date any condition imposed by the Government in the order fixing the pay which disentitles the official from drawing the arrears of pay from that date is illegal.

4. the last portion of the above circular states that even if a civil servant was denied promotion at proper time; he was not entitled to arrears of salary on the ground that he did not shoulder the duties and responsibilities on the higher post. In my view, the denial of arrears of salary to the Petitioner cannot be supported. The Petitioner had a right to be considered for promotion on the dates when it was due in view of the right to equality guaranteed under Article 14 of the constitution and right to equal opportunity in matters relating to employment guaranteed under Clause (1) of Article 16 of the Constitution of India. The said valuable rights guaranteed by the constitution cannot be denied in the first instance and thereby deny the civil servant the opportunity to render service in the higher post and subsequently make it a ground to justify the arrears of salary even after according retrospective promotion, at some point of time later. The giving effect to the circular as against the Petitioner, having regard to the facts and circumstances of the case, would amount to the violation of the fundamental rights guaranteed to the Petitioner under Article 14 read with Clause (1) of the Article of the Constitution.

7. According, we declare that the last sentence of para 228 of IREM, Viz., "No arrears on this account shall be payable as he did not actually shoulder the duties and responsibilities of the higher posts" no more exists. We cannot part with this order without expressing our concern or the persistent attitude of the Railways in ignoring the judgments of the Karnata High Court and that of the Emakulam Bench which have made it amply clear that the provision which disentitles an employee to get consequential monetary benefits in the case of

notional promotions has been held to be invalid and arbitrary. When the circular that existed prior to incorporating the same as para 228(1) in IREM could not have been depended upon in view of the High Court judgment, an ingenious way of circumventing the judgment seems to have been adopted by incorporating it as para 228(I). It is hoped that the Railway Board and the department shall at least henceforward restrain from adopting such a course to avoid unpleasant consequences.

The learned advocate for the Appellant has also relied upon decision given by the Central Administrative Tribunal, Ahmedabad Bench, Ahmedabad in M.A. 772/1996 in C.A. 92 /95 in C.A. 253/90. The same principle is laid down in the aforesaid decision. Looking to the principle laid down in the aforesaid decision it is quite clear that when Plaintiff is denied promotion on account of any mistake committed by the Department Plaintiff is entitled for back wages.

9. The learned advocate for the Respondents Mr. D.K. Vyas relied upon decision reported in 1974 SC 460 wherein it has been observed that when promotion is required to be given on seniority-cum-merit basis the promotion is not the matter of right, court can only issue directions to Government and cannot substitute its own order for that of Government. There is no dispute regarding said principle. But, so far facts of the present case are concerned, the promotion from due date is already given by Defendants, therefore, there is no question of considering the point whether Plaintiff is entitled to get promotion or not. The only question is required to be decided is whether looking to the facts and circumstances of the case, Plaintiff is entitled to get back wages. Defendants have not produced any material or evidence on record to show that there was any misconduct on the part of the Plaintiff, and therefore, he was not given promotion. On the contrary, looking to the facts that Plaintiff is given promotion during the pendency of the suit from due date it can be said that there was error or mistake on the part of Department and the Department has corrected said mistake. Therefore, looking to the principle laid down in the decision cited by the learned advocate for the Appellant, the Appellant is entitled to get back wages. Hence, I come to the conclusion that the judgment and Decree passed by the learned Trial Judge is quite illegal and required to be set aside and Plaintiff's suit should be decreed....

5. In the present case promotion from the due date was already given and therefore there is no question about his eligibility. Once he is eligible to be appointed, he is entitled to get backwages. There is nothing on record to show that there was any misconduct on the part of the Plaintiff, therefore, he was not given promotion.

6. In any case no substantial question is involved in this appeal. The appeal is, therefore, dismissed. No order as to costs.