

(2010) 07 DEL CK 0352

In the Delhi High Court

Case No : Writ Petition (C) No. 424 of 1999

Union of India (UOI)

APPELLANT

Vs

Shri Bhim Sen and Another

RESPONDENT

Date of Decision : 22-07-2010

Acts Referred:

Constitution of India, 1950 — Article 226
Statistical Service Rules, 1961 — Rule 13, 8(1)

Citation : (2010) 07 DEL CK 0352

Hon'ble Judges : Valmiki J Mehta, J; Sanjay Kishan Kaul, J

Bench : Division Bench

Advocate : Sachin Datta and Gayatri Verma, for the Appellant; M.P. Raju and Maria for R 1, for the Respondent

Judgement

Sanjay Kishan Kaul, J.—Respondent No. 1, Shri Bhim Sen, joined the National Sample Survey Organization (for short "NSSO") as Assistant Director in the Data Processing & Survey Design and Research Division on 20.4.1976. This post was outside the Indian Statistical Service (for short "ISS"). The said private respondent proceeded to the Planning Commission, Delhi as Senior Programmer on 31.12.1981 on being selected by the UPSC while retaining his lien on the post of Assistant Director, NSSO. The private respondent opted for appointment in Grade IV of ISS on 16.2.1983 as the process of encadrement in ISS was in progress. The post was ultimately encadred on 13.9.1983. The said private respondent was appointed as a departmental candidate in Grade IV of ISS on 3.7.1985 in pursuance to a recommendation by the UPSC.

2. A Judgment came to be delivered by the Supreme Court in Narender Chadha and Others Vs. Union of India and Others, holding that the ad hoc appointees to Grade IV of ISS be treated as having been appointed to Grade IV on a regular basis in terms of the provisions of Rule 8(1) (a) (ii) of the ISS Rules, 1961 (hereinafter referred to as the said Rules) and be given seniority from the dates of their continuous officiation. In pursuance to this Judgment a revised seniority

list of Grade IV officers of ISS was prepared on 8.5.1986 and in pursuance thereto on 22.5.1986 promotions from Grade IV to Grade III of ISS were also reviewed and fresh orders passed. The private respondent, thus, came to be promoted w.e.f. 6.1.1981 on the basis of reservation in promotion as the private respondent belonged to the Scheduled Caste category. The private respondent further earned his promotion to the post of Junior Administrative Grade on 30.3.1988.

3. The second and a crucial development was that one Shri T.R. Mohanty, a candidate from the General category, filed an OA before the Central Administrative Tribunal (for short "CAT"), Calcutta Bench, being OA No. 336/88 challenging an order dated 24.11.1987 by which eight (8) other SC/ST officers were promoted from Grade IV to Grade III. This application was allowed on 28.11.1988 but the promotion of reserved category officers was not disturbed. It appears that to obviate the consequences, Rule 13 of the said Rules was amended with retrospective effect from 27.11.1972 by a Gazette Notification dated 20.2.1989 so as to make promotions subject to executive instructions. The Union of India also filed a SLP against the order dated 28.11.1988 of the CAT. This appeal came to be decided by the Supreme Court in Union of India (UOI) and Others Vs. Tushar Ranjan Mohanty and Others, The Supreme Court struck down the retrospective operation of the amended Rule 13. We may note that, in the mean time, the private respondent was given the non-functional selection grade w.e.f. 9.9.1992.

4. The effect of the aforesaid litigation was that the out of turn promotion given to Scheduled Caste candidates on the interpretation of existing Rules was held to be illegal by the CAT and the subsequent endeavour to amend the Rule retrospectively did not prove successful in view of the Judgment of the Supreme Court though prospectively there was no difficulty in its application.

5. The result of the aforesaid caused problems for the petitioner/Union of India in fixation of seniority which resulted in a clarification application being filed before the Hon'ble Supreme Court in Union of India v. T.R. Mohanty case (supra). It was stated in the application that the said Rules prior to February, 1989 did not provide for reservation in appointments to promotional posts though there were executive instructions to that effect since 1972 and in view of the Judgment in Narendra Chadha case (supra) it became necessary to redraw the seniority list and to review promotions made till then. The seniority list of level Grade IV of ISS was revised and redrawn. Promotions were also correspondingly revised with retrospective effect and orders were passed on 22.5.1986 implementing the same and further promotions were effected by the order dated 1.9.1987 and 24.11.1987. Narendra Chadha case (supra) protected the officers who may be affected by way of reversions. However, while granting promotions under the order dated 22.5.1986, 1.9.1987 and 24.11.1987 along with two other orders covering the reserved category officers the Government gave effect to the executive instructions of 1972 by giving promotions to the reserved category SC/

ST officers who thereby superseded many general category officers senior to them in Grade IV level. This had resulted in Shri T.R. Mohanty challenging the supersession before the CAT. The supersession of Shri T.R. Mohanty was held to be illegal and he was directed to be placed above eight (8) reserved category officers though promotions given to the 8 reserved category officers were not to be disturbed. It is thereafter that Rule 13 of the said Rules was amended to make it retrospectively applicable but the retrospectivity was not upheld.

6. The difficulty was mentioned in para 15 of the application as under:

15. All the promotions given to SC/ST category officers by the said orders dated 22.5.1986, 1.9.1987 and 24.11.1987 (Annexures 2, 3 & 4) and 2 other orders mentioned above are, as held by the Hon"ble Supreme Court, invalid. If, however, none of these promotions invalidly made are to be disturbed and the general category officers have to be placed above and senior to the reserved category officers in the respective positions now being occupied by them, the structure of the entire cadre will drastically change. Huge number of posts will have to be created at the higher levels.

(a) Annexure 8 is a statement listing reserved category candidates now in Grade III. As explained in the statement if their positions are not to be disturbed and general category officers senior to them are promoted and placed above them, a total number of 423 additional posts will have to be created in Grade III.

(b) Similarly, Annexure 9 is a statement listing reserved category candidates now in the Junior Administrative Grade. As explained in the statement if their positions are not to be disturbed and general category officers senior to them are promoted and placed above them, a total number of 300 additional posts will have to be created in the Junior Administrative Grade.

(c) Similarly, Annexure 10 is a statement listing reserved category candidates now in the Non Functional Selection Grade. As explained in the statement if their positions are not to be disturbed and general category officers senior to them are promoted and placed above them, a total number of 124 additional posts will have to be created in the Non Functional Selection Grade.

It may be clarified that many of the incumbents, particularly in Grade III, have since retired but the above posts would have to be created to give them monetary benefits. However, as on 1.3.95 about 40 additional posts in the Non Functional Selection Grade and about 49 in the Junior Administrative Grade are required to be created to accommodate incumbents. There will be no officers in Grade III unless filled up by large scale promotions and even then 89 posts in Grade III (or Grade IV) will have to be kept in abeyance. All this will create imbalance in the cadre and will also cause severe operational problems till such time the excess over the sanctioned strength in JAG and NFSG is adjusted against the cadre posts.

7. The aforesaid application was disposed of by the Supreme Court in Union of

India and Ors. v. T.R. Mohanty and Ors., 1995 Supp. (3) SCC 591. The operative portion is reflected in para 6 which reads as under:

6. After hearing the learned Counsel for the parties, we are of the view that the Judgment of this Court upholding the Judgment of the Tribunal has to be implemented. Appreciating the difficulties highlighted by the Union of India in this application, we are of the view that the Union of India should make all efforts to protect the promotions of Scheduled Caste candidates, if possible. We are further of the view that if in the implementation of the directions given by this Court, it becomes necessary to revert the Scheduled Caste candidates from the higher posts to which they have been promoted under the existing rules (unamended) or under the amended rules, that may be done and we modify the Tribunal's Judgment to that extent. We, however, make it clear that any financial benefits given to the Scheduled Caste candidates while working in the higher posts, shall not be withdrawn and be protected as personal to them. We further make it clear that Mr. Mohanty shall be entitled to the relief keeping in view his position in seniority so far as the general category candidates are concerned. If in the process he is reverted to the lower post no recovery shall be effected from him in respect of money already paid to him.

8. The net result of the aforesaid was that in view of the difficulty expressed by the Union of India requiring large number of posts to be created, reversion of SC officers from higher posts to which they had been promoted under existing Rules unamended or under the amended Rules was permitted though all efforts to protect the promotions of such SC officers was to be made, if possible. The financial benefit to the said SC category officers, however, was not to be withdrawn and was to be protected.

9. The petitioner/Union of India thereafter passed an Office Order dated 4.1.1996 noticing all the aforesaid facts and issuing a revised promotion order.

10. The private respondent submitted a representation dated 11.4.1996 for refixation of seniority. The private respondent stated in the representation that he would not have opted for ISS Grade III and would have continued in the Planning Commission if he had known that this fate would befall him. The redrawing of seniority list, according to the private respondent, deprived him of the benefits of Senior Programmer which post he got through UPSC direct recruitment. However, this representation did not find favour as per Office Memorandum dated 2.9.1996.

11. It is at this stage that the private respondent filed an OA before the CAT, Principal Bench, New Delhi seeking to set aside and quash the order dated 4.1.1996 to the extent it effected promotion of the private respondent. The OA was contested by the petitioner herein but the CAT in terms of the impugned order dated 27.10.1998 found in favour of the private respondent. The only issue which was urged for consideration and decided is as set out in para 13 of the impugned order, i.e. whether the principles of natural justice were violated while

issuing the order dated 4.1.1996. The CAT was of the view that fair hearing ought to have been granted to the private respondent giving him an opportunity to present his case before issuing the order dated 4.1.1996. The Union of India challenged this order by filing the present writ petition under Article 226 of the Constitution of India and the operation of the impugned Judgment was stayed vide order dated 28.10.1999. The interim order continued and the private respondent has retired in the mean time. Thus, the only relief which would arise in case the petition is to be dismissed is the monetary consequences. It may be noticed that insofar as monetary benefits received by the private respondent while working on the promoted post are concerned the same are already protected by the order of the Supreme Court in the clarification application. Thus, the only question would be that if the private respondent had continued to work on the promoted post (which he actually did not) he would have been entitled to certain emoluments and whether those emoluments should be granted to him even though he has not worked on that post on account of the fact that the order dated 4.1.1996 was issued in violation of principles of natural justice.

12. Learned Counsel for the petitioner canvassed before us that principles of natural justice cannot be put in a straight-jacket formula and the said principles should not apply where at least no prejudice is shown. Learned Counsel has drawn our attention to the observations made in the impugned Judgment itself in para 15 to the following effect:

15. From the nature of the case, it would appear that a fair hearing, if allowed, would have made no difference.

13. Learned Counsel, thus, submitted that while noticing that what was perceived as a fair hearing would have made no difference yet the OA has been allowed on the ground of violation of principles of natural justice. Learned Counsel relied upon the Judgment in Everest Advertising Pvt. Ltd. Vs. State, Govt. of NCT of Delhi and Others, Learned Counsel also sought to support his plea on the ground that the reversion order was neither in the nature of a punishment nor stigmatic as they were the consequence of the legal position propounded by the Supreme Court and in this behalf relied upon National Aviation Company of India Ltd. Vs. S.M.K. Khan, Learned Counsel also referred to a recent Judgment of the Supreme Court in Rupa Rani Rakshit and Ors. v. Jharkhand Gramin Bank and Ors. (2010) 1 SCC 345 holding that wrong promotions continuing for even about ten (10) years do not create equities in favour of the persons promoted wrongly. It was submitted that in the present case it is the Supreme Court which has laid down law as to why promotions were wrong and despite this, at least, the monetary benefits were protected.

14. Learned Counsel for respondent No. 1, on the other hand, sought to support the impugned Judgment that the promotions given as per OM dated 27.11.1972 could not be called into question because the OM was not struck down and the setting aside of the retrospectivity of Rule 13 of the said Rules could not affect

the promotion granted to respondent No. 1. The aspect of respondent No. 1 having opted for Grade III service in ISS post on the then existing position was also emphasized. The Judgment in Union of India v. T.R. Mohanty case (supra) had not directed any reversion to be necessarily made.

15. We have given a thought to the rival contentions to appreciate the peculiar position which has emerged albeit in pursuance to the Supreme Court directions. The promotions made in pursuance to the OA and the consequent placing of Shri T.R. Mohanty below the reserved category candidates was struck down by the CAT. The endeavour of the Government to get over this aspect where promotions were being made in pursuance to an administrative order by amending Rule 13 of the said Rules retrospectively also did not succeed before the Supreme Court as the said Rule was held to have only prospective effect. The result of this was that the seniority list had to be redrawn but if persons promoted were not to be demoted, a large number of posts had to be created. This difficulty was expressed by the Union of India in the clarification application in para 15 which has been extracted hereinbefore. It is at that stage that the Supreme Court passed an order on this clarification application permitting the Union of India to make consequent demotions on redrawing the seniority list if it was not possible to do so otherwise. The monetary benefits were, however, still protected.

16. The fact that it was not otherwise possible is quite apparent from the clarification application itself as the alternative was to create a large number of posts for which the Union of India was not willing and that is what gave rise to the application for clarification. Thus, the order impugned before the CAT by private respondent No. 1 dated 4.1.1996 was issued in pursuance to the clarification obtained from the Supreme Court. In such a scenario unless the redrawing of seniority was contrary to the Supreme Court Judgment, there was nothing really to be said.

17. Be that as it may the undisputed fact is that the private respondent did make a representation against the Office Order dated 4.1.1996 on 11.4.1996 which was examined but was rejected on 2.9.1996. The private respondent, thus, did have the opportunity to represent against the redrawing of seniority and the demotion as a consequence of the Supreme Court order. The representation of the private respondent was examined but was found to be without merit.

18. We are, thus, of the considered view that it can hardly be said that there was lack of adequate opportunity to the private respondent and the only ground on which the OA has been allowed is that the principles of natural justice have been violated. The chance to make a representation subsequently to the Office Order dated 4.1.1996, in our considered view, is sufficient opportunity to represent in the given facts of the case as no hard and fast rule can be laid in this behalf. The CAT has, in fact, granted relief while noticing that even if any prior representation opportunity was granted it would have been a futile one and this part we have extracted above. There would, thus, be no purpose in having a futile exercise being carried out. This is, of course, being observed even though,

in our considered view, opportunity was, in fact, granted by consideration of the representation of the private respondent to the Office Order dated 4.1.1996.

19. Lastly, we may observe that the monetary benefits given to respondent No. 1 during the period of his service in the promoted post were protected by the order passed by the Supreme Court on the clarification application of the petitioner. The private respondent has not worked on the promoted post for the remaining period for which he is claiming monetary benefit. The private respondent has retired and thus, there is no question of actual promotion or any other benefit to respondent No. 1 in the given facts of the case.

20. We, thus, set aside the impugned order dated 27.10.1998 of the CAT and make the rule absolute leaving the parties to bear their own costs.