

Harendra Ch. Roy Vs. Assam State Electricity Board and anr.

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Court : Guwahati

Decided On : Jun-24-2004

Judge : B.K. Sharma, J.

Acts : [Constitution of India](#) - Articles 14, 16 and 226

Appeal No. : WP(C) No. 7170 of 2001

Appellant : Harendra Ch. Roy

Respondent : Assam State Electricity Board and anr.

Advocate for Def. : N. Sinha, Adv.

Advocate for Pet/Ap. : P.D. Gogoi and L.R. Dutta, Adv.

Disposition : Petition allowed

Judgement :

B.K. Sharma, J.

1. Strange are the ways by which at times employer denies due service benefit/prospect to the employee. The instant case is an example of adoring and adopting such a strange course of action towards deprivation of the benefit of promotion to the petitioner.

2. The petitioner who is presently serving as LDA under the respondents was so appointed way back in 1987. Prior to that he was appointed as Typist in 1979. By an Office order dated 28.2.1995 the petitioner along with others was temporarily promoted as UDA. Such promotion was subject to recommendation of the DPC-III. The promotees were directed to report to their new place of posting within 30 days from the date of issue of the order. It is the case of the petitioner that he was not released from the place of posting by the controlling officer and accordingly could not join the promotional post. In the meantime the prescribed period of 30 days as stipulated in the order of promotion got expired. It will be pertinent to mention here that by the said order of promotion many juniors to the petitioner were also promoted.

3. When the said order of promotion did not materialise for the petitioner he kept on languishing in the post of LDA and eventually by the Annexure IV order dated 17.4.2001, he was once again promoted as UDA under same terms and conditions as that of the earlier order of promotion dated 28.2.1995. As in the earlier occasion, this time also the promotion was subject to recommendation of DPC-III and without prejudice to the claim of the seniors (emphasis supplied).

4. Pursuant to the aforesaid order of promotion dated 17.4.2001, the petitioner joined the promotional post and while was performing his duties as UDA in the office of the Chief Engineer (D), ASEB, an order dated 30.5.2001 was issued canceling the order of promotion in respect of the petitioner. The order reads as follows :

ASSAM STATE ELECTRICITY BOARD

OFFICE ORDER NO. 183 Dated Guwahati, the 30.05.2001.

The provisional promotion of Shri Harendra Ch. Roy, LDA(HOD) Cadre to UDA(HOD) Cadre made vide this office order No. 122 dated 17.4.2001 is hereby cancelled.

Chief Engineer (D)ASEB, Paltanbazar,Guwahati - 781001

Memo No. CE(D)/E/9/Pt.-III/89/320 dated 30.5.2001

5. Being aggrieved, the petitioner preferred an appeal (Annexure-VI) before the competent authority of the department but the same did not yield any result.
6. The respondents have filed an affidavit in opposition. As regards to the plea of the petitioner that he was not released by the controlling officer enabling him to join the promotional post pursuant to the order dated 28.2.1995, the stand of the respondents in the affidavit is that the petitioner did not take steps to get himself released from his original office to join at his new place of posting at Nagaon. A presumption has been drawn that the petitioner possibly did not like the place of posting. It is on that ground the respondents have pleaded in their affidavit that the promotion given to the petitioner by the order dated 28.2.1995 stood automatically cancelled on expiry of 30 days as stipulated in the order itself.
7. Thus, the whole basis of depriving the petitioner of his promotion which he had earned pursuant to the order dated 28.2.1995 is the presumption that the new place of posting was not to the liking of the petitioner and that he did not take steps for his release from the place of posting, as if, it is the petitioner who was to get himself released from his place of posting and not the respondents and for that matter the controlling authority of the petitioner. The stand of the petitioner that he was not released by the controlling officer has not been denied by the respondents in their affidavit.
8. As regards the plea of the petitioner that the temporary promotion granted to him by the order dated 17.4.2001 was cancelled by the impugned order dated 30.5.2001 in gross violence on the principle of natural justice, it is the stand of the respondents that the DPC-III which had considered the petitioner along with others did not recommend the petitioner for promotion on the ground that the petitioner did not carry out the earlier order of promotion dated 28.2.1995. The order of cancellation of promotion of the petitioner was issued as per recommendation of the DPC.
9. The respondents in their affidavit have annexed minutes of the DPC. They have also annexed the guidelines relating to consideration of promotion by the DPC. In the instant case we are concerned with the guidelines relating to DPC-III. As per the guidelines, the DPC is to recommend the names of the candidates for

promotion applying the principle of 'seniority-cum-merit'. It is to be seen as to whether such criteria was followed in the case of the petitioner. The minutes of the DPC (Annexure-II to the affidavit in opposition) are quoted below :

PROCEEDING OF DPC-III HELD ON 26.05.2001 IN THE OFFICE CHAMBER OF C.E.(D), ASEB

Departmental promotion committee (DPC-III) meeting held on 26.5.2001 in the office chamber of Chief Engineer (D), ASEB, Guwahati to regularize the promotion case of the LDA's who were' promoted provisionally vide office order No. CE(D)/E(C)/Pt-III/89/142 dated 28.2.1995.

On examination of the records, the Committee reveals that 8 Nos. of LDA's were promoted to the Post of UDA (HOD) Cadre vide above office order. All the LDA's under order of promotion joined in their respective places of posting on promotion except Shri H.C. Roy, LDA. Since Shri Roy did not abide by the order of promotion in time, the DPC-III did not recommend the name of Shri H.C. Roy, LDA for favour of his promotion to the post of UDA(HOD) Cadre. Further, the committee suggested for cancellation of the promotion order passed on 17.4.2001 vide office order No. 122.

The DPC-III recommended the names of all other LDA's as detailed below, who were provisionally promoted vide order dated 28.2.1995 for regularisation.

1. Shri Satya Ram Das
2. Balindra Kumar
3. Tileswar Buragohain
4. Bipulendra Kakati
5. Hemen Ch. Nath
6. Pitambar Talukdar
7. Amulya Haloi

(N.K. Das) (M. Ahmed) (P.P. Medhi)

Chairman, DPC-III Member Convenor Member

10. A bare perusal of the minutes of the DPC-III amply demonstrate the arbitrariness on the part of the members of the DPC. The only ground for not recommending the petitioner for promotion is that he allegedly did not abide by the order of promotion dated 28.2.1995. Further his temporary promotion as UDA by the order dated 17.4.2001 was also suggested to be cancelled on the same very ground.

11. Mr. P.D. Gogoi, learned Counsel appearing for the petitioner submitted that arbitrary exercise of power on the part of the respondents towards deprivation of promotion to the petitioner is writ at large on the face of it. On the other hand, Mr. N. Sinha, learned Standing Counsel, ASEB tried to justify the action on the part of the respondents in not promoting the petitioner and canceling the order of promotion granted in his favour by the order dated 17.4.2001.

12. The first order of promotion dated 28.2.1995 promoting the LDA's as UDA which included the petitioner was subject to the recommendation of DPC-III. Admittedly such promotions were temporary. The stand of the petitioner that he was not released from his place of posting enabling him to join the promotional post in the new place of posting has not been denied or controverted by the respondents in their affidavit, rather it is their stand that the petitioner did not get himself released within the stipulated period of 30 days on expiry of which the order of promotion stood automatically cancelled. Such stand has been taken by the respondents unmindful of their own duty to release the petitioner enabling him to join the promotional post. Had it been the case of issuance of necessary release order in favour of the petitioner and denial on his part to join the promotional post, things would have been different. However, same is not the case in hand. The respondents have drawn a presumption against the petitioner that the place of posting of the petitioner was not to his liking. In such a situation I am constrained to hold that the petitioner was illegally deprived of -his promotion which was issued in his favour by the order dated 28.2.1995

13. The aforesaid order dated 28.2.1995 ordering promotion of the petitioner and others which included many juniors to the petitioner was subject to the recommendations to be made by the DPC. Accepting the representation made by the petitioner, he was once again promoted on temporary basis by the order dated. 17.4.2001 subject to the recommendation of DPC. Thus, both the orders, i.e. 28.2.1995 and 17.4.2001 stipulated the conditions that such promotion of the incumbents were subject to the recommendations of the DPC. The criteria for promotion as reflected in the promotion guidelines is 'seniority-cum-merit'. The case of the petitioner along with others was to considered by the DPC on that basis. However, the DPC did not consider that aspect of the matter and rather rejected the case of the petitioner on the ground that he did not carry out the order dated 28.2.1995 by which he was temporarily promoted. Such a course of action adopted by the DPC is totally arbitrary and does not behove of a body like DPC constituted with responsible officers of the Board.

14. The temporary promotion of all the incumbents as was given by the aforesaid two orders dated 28.2.1995 and 17.4.2001 were subject to the recommendation of the DPC. The DPC recommended all others except the petitioner on the ground of not abiding the order of promotion dated 28.2.1995. Even if it is held that the petitioner deliberately did not accept the temporary promotion granted to him by the order dated 28.2.1995, same cannot, by no stretch of imagination, disentitle him from consideration of his case for promotion as per the promotion guidelines which is 'seniority-cum-merit'. The DPC did not reject the promotion of the petitioner on any other grounds except the one indicated above. The DPC also granted promotion to others deluding the juniors to the petitioners solely on the ground that they had joined their promotional posts pursuant to the provisional order of promotion dated 28.2.1995. Their such promotions were recommended to be regularised by the DPC leaving aside the case of the petitioner.

15. It is not the case in which the petitioner has been found to be unfit for promotion. In the instant case the transfer guidelines prescribe promotion on the basis of 'seniority-cum-merit'. If that be so, the seniority is to be given due weightage and merely because a person has sufficient merit, he cannot be promoted over and above the persons senior to him, unless he lacks in

qualification or is otherwise found to be unfit. On the face of it, the DPC acted contrary to this principle relating to 'seniority-cum-merit' and instead resorted to a strange procedure towards deprivation of promotion of the petitioner as noticed above. This was wholly without jurisdiction.

16. Every employee has a right to be considered for promotion under Article 16 of the [Constitution of India](#) to a higher post subject to eligibility provided he is within the zone of consideration. But the manner and method applied in the case of the petitioner attracts the principle of 'fairness' of service jurisprudence in the matter of consideration for promotion under Article 16 of the Constitution. The right to be considered for promotion is a fundamental right. It is not the mere consideration for promotion, i.e. consideration must be fair according to the established principles governing the service jurisprudence.

17. It is in this context the Apex Court in the case of AP Aggarwal v. Govt. NCT of Delhi observed :

It is well settled that every State action, in order to survive, must not be susceptible to the vice of arbitrariness which is the crux to Article 14 of the Constitution and basic to the rule of law, the system which governs us.

18. From the aforesaid discussions there, is no manner of doubt that the petitioner has been deprived of his promotion by not treating his case at par with others and his juniors. The DPC recommended the case of others for regularization who were promoted by order dated 28.2.1995 and refused to make such recommendation in favour of the petitioner solely on the ground that he did not abide by the order of promotion dated 28.2.1995 unmindful of the circumstances which led to even forfeiture of such promotion of the petitioner as per the conditions stipulated in the order of promotion. It is in this context the case of the petitioner will have to be considered.

19. Once the action on the part of the respondents is held to be illegal, the consequential order leading to denial of promotion to the petitioner falls to the ground. This flows from the general principle applicable to consequential orders. Once the basis of a proceeding is gone, may be at a later point of time as in the

instant case, another intermediate action taken in the meantime like recommendation of the DPC disallowing the promotion to the petitioner making a discrimination with that of other similarly situated persons would also fall to the ground.

20. For the aforesaid reasons it must be held that so called assessment done by the DPC and its acceptance by the authorities of the ASEB towards deprivation of promotion to the petitioner were illegal and arbitrary and liable to be set aside. The assessment does not answer the test of fair consideration under Article 16 for promotion.

21. In view of the above, the impugned order dated 17.4.2001 stands set aside and quashed. The petitioner shall be deemed to be promoted as UDA w.e.f. 28.2.1995 the date on which his juniors were so promoted and consequently regularised. It is made clear that the petitioner will not be entitled to any back wages. However, he will be entitled to notional benefits of pay fixation taking his promotion to be effective from the date on which his juniors were so promoted by the order dated 28.2.1995 and subsequently regularized by the DPC. He will also be entitled to get back his seniority on that basis.

22. The above course of action has been adopted not as a general rule, but having regard to the facts and circumstances and also the manner and method in which the petitioner has been treated by the respondents. In this connection I may gainfully refer to the observation made by the Apex Court in the case of *Badri Nath v. Govt. of Tamil Nadu and Ors.* as reported in : AIR 2000 SC3243 :

88. We may, however, point out that it is not as if there are not exceptions to this general principle. The occasions where the court issued a writ of certiorari and quashed an Order and had also issued a mandamus at the same time to the State or public authority could be very rare but we might emphasise that the power of this Court to mould the relief in the interests of justice in extraordinary cases cannot be doubted. In *Comptroller & Auditor General of India v. K.S. Jagannathan* such a power on the part of this Court was accepted by a three-Judge Bench. Madon, J. referred to the observations of Subba Rao, J. (as he then was) in *Dwarka Nath v. JTO* wherein the learned Judge explained that our Constitution

designedly used wide language in Article 226 to enable the Courts to 'reach justice wherever found necessary' and 'to mould the reliefs to meet peculiar and complicated requirements of this country'. Justice Madon also referred to *Rochester Corporation v. R.R. v. Revising Barrister for the Borough of Hartley Padfield v. Minister of Agriculture Fisheries and Food* and to passage from Halsbury's Laws of England, 411 Edn. Vol. 1, p. 59. Finally Madon. J. observed : (SCC pp. 692-93, para 20) :

20. There is thus no doubt that the High Courts in India exercising their jurisdiction under Article 226 have the power to issue a writ of mandamus or a writ in the nature of mandamus or to pass orders and give necessary directions where the Government or a public authority has failed to exercise or has wrongly exercised the discretion conferred upon it by a statute or a rule or a policy decision of the Government or has exercised such discretion mala fide or on irrelevant considerations or by ignoring the relevant considerations and materials or in such a manner as to frustrate the object of conferring such discretion or the policy for implementing which such discretion has been conferred. In all such cases and in any other fit and proper case a High Court can, in the exercise of its jurisdiction under Article 226, issue a writ of mandamus or a writ in the nature of mandamus or pass orders and give directions to compel the performance in a proper and lawful manner of the discretion conferred upon the Government or a public authority, and in a proper case, in order to prevent injustice resulting to the parties concerned, the court may itself pass an order or give directions which the Government or the public authority should have passed or given had it properly and lawfully exercised its discretion, (emphasis supplied).

We emphasise the words underlined in the above passage to the effect that the Court may in some rare situations itself pass an order or give directions which the Government or the public authority should have passed or given had it properly and lawfully exercised its discretion. The same view was expressed by another three-Judge Bench in *B.C. Chaturvedi v. Union of India* even regarding disciplinary cases. Verma, J. (as he then was) observed (as SCC p. 762, para 18) as follows :

The High Court/Tribunal, while exercising the power of judicial review, cannot normally substitute its own conclusion on penalty and impose some other penalty. If the punishment imposed by the disciplinary authority or the appellant authority shocks the conscience of the High Court/Tribunal, it would appropriately mould the relief, either directing the disciplinary/appellate authority to reconsider the penalty imposed, or to shorten the litigation, it may itself, in exceptional and rare cases, impose appropriate punishment with cogent reasons in support thereof.

The underlined works reiterate the powers of this Court in rare and exceptional cases.

23. For the foregoing reasons and discussions, the writ petition stands allowed. The impugned order dated 30.5.2001 stands set aside and quashed. The petitioner shall be deemed to be promoted as UDA pursuant to the order dated 28.2.1995. However, he will not be entitled to get back wages except notional fixation of pay, seniority and other service benefits.

24. The writ petition stands allowed. No cost.

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