

Devendra Nath Rai Vs. Union of India (Uoi) and anr.

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Court : Guwahati

Decided On : Dec-20-2007

Judge : H. Barua, J.

Appellant : Devendra Nath Rai

Respondent : Union of India (Uoi) and anr.

Advocate for Pet/Ap. : Shri. Bhuyan

Judgement :

H. Barua, J.

1. By this writ petition under Article 226 of the Constitution of India, the writ petitioner has challenged the legality and correctness of communication bearing No. E. 35014/2001/Pers. 11/1710 dated 23.8.2001 (Annexure-H) issued from the office of the Director General, Central Industrial Security Force and also seeks direction from this Court to issue notional promotion to him in any date prior to 29.6.1991 for maintenance of his seniority in the grade.

2. The case of the writ petitioner may be summerised as under:

(i) The writ petitioner joined the service in the Central Industrial Security Force on 23.10.1974 as Sub Inspector (Executive) one of the four branches of the said service. After successful completion of seven years of service in the rank, the writ

petitioner was promoted to the rank of Inspector (Executive) with effect from 1.4.12.1981 vide office Order dated 21.12.1981 (Annexure-A). After such promotion the promotee is to undergo a probation for a period of two years and in that calculation the writ petitioner was to complete his probation period on 13.12.1993. While the writ petitioner was serving at Roukela in Roukela Steel Plant, on 23.12.1983 while on duty, some miscreants sneaked into the premises of Roukela Steel Plant, a protected area and in the said incident, one of the miscreants died. A criminal case was registered for the death of the said miscreant and the writ petitioner was falsely implicated and he was put in custody till 23.9.1983 and placed under suspension with effect from 2.9.1983. However, the order of suspension was revoked with effect from 3.8.1984.

(ii) After detailed investigation of the criminal case by the police, the investigating agency failed to show complicity of the writ petitioner and therefore, the criminal proceedings against him were dropped. But the Departmental was sanguine to initiate a departmental proceeding against the writ petitioner under Rule 34 of the Rules (CISF Rules) 1969 alleging mis-conduct vide charge-memo dated 7.6.1984. However, the petitioner was fully exonerated from the charges vide office order dated 6.11.1987.

(iii) Due to suspension from 2.9.1983 to 3.4.1984, the period of probation of the writ petitioner was extended by one and half year up to 13.6.1985. The writ petitioner was regularized thereafter vide order dated 11.1.1988 (Annexure-C) and the period of suspension was treated as on duty with all benefits entitled to including pay and allowances.

(iv) The writ petitioner was confirmed in the rank of Inspector on 14.6.1985 after the expiry of the period of probation of one and half year. Because of extension of probationary period of one and half year, the writ petitioner's seniority in the rank of Inspector (Executive) was effected. However, the anomaly which arose in the seniority list of the Inspectors subsequently corrected and the writ petitioner was placed at Serial No. 258 (A) vide revised seniority list of Inspectors (Annexure-D). Normally, promotion to the rank of Assistant Commandant of the writ petitioner was due in the year 1991 but the writ petitioner was promoted to the rank of

Assistant Commandant on regular basis with effect from 21.12.1994, which had been conveyed vide communication dated 21.3.1995 (Annexure-E).

(v) Unfortunately, some of the Inspectors, who were senior and junior to him but promoted subsequently of the writ petitioner were also given notional promotion from the dates shown against their names. Shri M.K. Warman and Shri Ramesh Mishra were both seniors to the writ petitioner while other Inspectors at Serial (iii) to (viii) as stated in paragraph 16 of the writ petition were all juniors to the writ petitioner.

(vi) On 25.10.1999 a notification was issued by the respondent authority where twenty four officers in the rank of Assistant Commandant were given the benefits of the notional promotion to the said rank with retrospective effect. Of course, with a clarification that these officers would not be entitled to for arrear pay and allowances etc. Surprisingly, in the said notification the name of the writ petitioner did not find place despite his regular promotion on 21.12.1994. In the said notification not only his two seniors named above were given the benefits of notional promotion but also to some of his juniors.

(vii) It is contended by the writ petitioner that by the said notification dated 25.10.1999 serious prejudice has been caused to him denying the benefit of notional promotion with retrospective effect. The writ petitioner made several representations with the appropriate authority, but his representations were not taken care of by the authority rather they informed him vide order dated 23.8.2001 (Annexure-H) stating inter alia that though he was considered for promotion to the rank of Assistant Commandant in the years 1988, 1990, 1991, 1992 and 1993, he could not be promoted as such due to insufficient number of vacancies plus poor grading in comparison to his juniors, who superseded to him.

(viii) It is also contended by the writ petitioner that the grounds taken by the respondents for not promoting him were all baseless hollow and untenable. It is further contended by him that the officers in the rank of Inspector, who were promoted subsequently in other words after him to the rank of Assistant Commandant were all given the benefit of notional promotion with retrospective effect for the purpose of maintenance of seniority. The writ petitioner, therefore,

being junior to Shri M.K. Warman and Shri Ramesh Mishra in the rank of Inspector and senior to others, who were given the benefit of notional promotion, the writ petitioner is also entitled for such benefits with retrospective effect, from the date prior to 29.6.1991 since he was promoted to the rank of Assistant Commandant on 21.12.1994.

3. The respondents filed affidavit-in-op-position. Their case as it appears from the affidavit-in-opposition is that since the writ petitioner carried adverse remarks in his ACRs and since his juniors stood in better grade in comparison to the writ petitioner, the assessment in the DPC meetings in conformity with the law laid down by the Government of India in case of promotion, the officers junior to him were promoted accordingly and offered notional benefit with retrospective effect as per Rules.

4. The further case of the respondents is that no prejudice has been caused to the writ petitioner as alleged. The notional promotion, which had given effect to the officers was offered according to the norms and Rules and the action that had resorted to by the respondents cannot be branded arbitrary, unreasonable, irrational and discriminatory. The action of the respondents is also not violative of Articles 14 and 16 of the Constitution of India.

5. We have heard Mr. Ujall Bhuyan, learned Counsel for and on behalf of the petitioner and also heard Mr. R. Sarma, learned Central Government Counsel for and on behalf of the respondents.

6. During the course of argument, Shri Bhuyan, learned Counsel for the petitioner very precisely submitted that the action on the part of the respondent in giving the benefit of notional promotion to the officers junior to the writ petitioner (promoted subsequently) is arbitrary and discriminatory and violative of Articles 14 and 16 of the Constitution. It is a fact that the writ petitioner was to get his promotion to the rank of Assistant Commandant in the year 1991.

7. But since his probation period had been extended for another one and half year, his promotion was not accordingly considered. However, the writ petitioner was found suitable for promotion to the rank of Assistant Commandant in the year 1994

i.e. on 21.12.1994 and accordingly promoted. The claim of the respondents that the writ petitioner earned adverse remarks in his ACRs and since the officers juniors to him earned better gradings in comparison to the writ petitioner is totally unacceptable and without any basis.

8. In this context, Shri Bhuyan led us through the date of promotion of Shri M.K. Warman and Shri Ramesh Mishra, who were admittedly senior to him in the rank of Inspector were promoted subsequently to the rank of Assistant Commandant, which goes to show that their gradings were not better than the grading earned by the writ petitioner. Both the officers were promoted to the rank of Assistant Commandant on 26.6.1999 and 15.6.1999 while the writ petitioner was promoted on 21.12.1994. Thus claim of the respondents that the writ petitioner did not earn good gradings for consideration of the DPC is hollow and unacceptable.

9. But the respondents even in spite of giving promotion at a later date in comparison to the writ petitioner of these two officers, benefit of notional promotion was offered to both of them from 29.6.1991 and 11.12.1992. Shri Bhuyan in the face of these facts submitted that the omission on the part of the respondents by not giving the benefit of notional promotion to the writ petitioner is arbitrary, unreasonable, discriminatory.

10. Shri Bhuyan relying on a decision in the case between S.K. Saha v. Prem Prokash Agarwal and Ors. reported in : (1994)ILLJ577SC submitted that the Hon'ble Supreme Court repeatedly struck down and decried any attempt on the part of the appointing authority to give a notional seniority from retrospective date. Shri Bhuyan in this context relied upon the observation of the Hon'ble Supreme Court, which finds place in paragraph 8 of the judgment, which reads as under:

8. There cannot be any dispute that the appointment of the appellant, according to rules, was made on basis of the recommendation of the Commission, on 12.5.1960. In this background, there was no occasion to take into consideration the period when the appellant was continuing on ad-hoc basis especially during the period when the post itself was a non-gazetted post. The appellant was given seniority w.e.f. 4.1.1957, but the post of the Foreman which the appellant was holding itself became a gazetted post since 16.1.1959. Any officiation on the post

when it was a non-gazetted post cannot be held to be a continuous officiation on the post so as to entitle the appellant to count that period towards his continuous officiation. The High Court has rightly held that while appointing him on the basis of the recommendation of the commission, the date of appointment could not have been ante dated and made to be effective w.e.f. 4.1.1957. This Court has repeatedly struck down and decried any attempt on the part of the appointing authority to give a notional seniority from a retrospective date, especially, when this process affects the seniority of those who have already entered into the service. In the present case the respondent No. 1 had been appointed as Assistant Director of Industries on 18.2.1959 on basis of an advertisement made in the year 1958 and on the recommendation of the commission. His seniority in the service could not have been affected by the State Government by giving notional date of appointment of the appellant w.e.f. 4.1.1957.

11. During the course of argument, Shri Bhuyan further submitted that no person can be promoted with retrospective effect from the date when he was not born in the cadre so as to adversely affect others. In this context, Shri Bhuyan argued that on the date of effecting notional promotion of those officers, they were not born in the cadre. Therefore, the benefit of notional promotion from the dates shown against their names with retrospective effect is apparently illegal. The learned Counsel for the writ petitioner in support of his contention relied in the case of State of Bihar and Ors. v. Akhouri Sachindra Nath and Ors. and Shri Baldeo Prasad and Ors. v. Akhouri Sachindra Nath and Ors. reported in : (1991)11LLJ312SC . In paragraph 12 of the judgment the Hon'ble Supreme Court held as under:

12. In the instant case, the promotee respondents Nos. 6 to 23 were not born in the cadre of Assistant Engineer in the Bihar Engineering Service Class-II at the time when the respondent Nos. 1 to 5 were directly recruited to the post of Assistant Engineer and as such they cannot be given seniority in the service of Assistant Engineer over the respondent Nos. 1 to 5. It is well settled that the person can be promoted with retrospective effect from a date when he was not borne in the cadre so as to adversely affect others. It is well settled by the several decisions of this Court that amongst members of the same grade seniority is

reckoned from the date of their initial entry into the service. In other words, seniority inter se amongst the Assistant Engineers in Bihar Engineering Service Class-II will be considered from the date of the length of service rendered as Assistant Engineers. This being the position in law the respondent Nos. 6-23 cannot be made senior to the respondent Nos. 1 to 5 by the impugned Government orders as they entered into the said service by promotion after the respondent Nos. 1 to 5 were directly recruited in the quota of direct recruits. The judgment of the High Court quashing the impugned Government orders made in Annexures- 8, 9 and 10 is unexceptionable.

12. Shri Bhuyan, learned Counsel for the writ petitioner further submitted that the respondents authority caused prejudiced to the writ petitioner by giving benefit of notional promotion to his junior officers denying the writ petitioner of such benefit. When the junior officers were given benefit of such promotion, the senior officers, should also be given the same benefit immediately in order to avoid anomalies in the context of seniority. In support of his submission Shri Bhuyan re-lied on a decision in the case between the Union of India and Ors. v. K.B. Rajoria reported in (2003) SCC 562. Shri Bhuyan mostly put emphasis in Paras 15 and 21 of the judgment, which read as under:

15. The office memorandum referred to in the order dated 10.6.1998 and in terms of which notional promotion was granted to Krishnamoorti contains several provisions of which one is relevant for our purpose:

18.4.3. If the officers placed junior to the officer concerned have been promoted, he should be promoted immediately and if there is no vacancy the junior-most person officiating in the higher grade should be reverted to accommodate him. On promotion, his pay should be fixed under FR at the stage it would have reached, had he been promoted from the date the officer immediately below him was promoted but no arrears would be admissible. The seniority of the officer would be determined in the order in which his name, on review, has been placed in the select list by DPC. If in any such case a minimum period of qualifying service is prescribed for promotion to higher grade, the period from which an officer placed below the officer concerned in the select list was promoted to the higher grade,

should be reckoned toward the qualifying period of service for the purpose of determining his eligibility for promotion to the next higher grade.

21. The notional promotion was given to Krishnamoorti to right the wrong that had been done to him by his suppression on 22.2.1995. If Krishnamoorti is denied the right to be considered for promotion to the post of Director General on the basis of such notional promotion, particularly when the relevant provisions so provide, it would result in perpetuating the wrong done to him. That is exactly what the High Court has done.

13. In view of the law laid down by the Hon'ble Supreme Court in the cases of S.K. Saha v. Prem Prokash Agarwal and Ors. reported in : (1994)ILLJ577SC (supra), State of Bihar and Ors. v. Akhouri SachindraNath and Ors. and Shri Baldeo Prasad and Ors. v. Akhouri Sachindra Nath and Ors. reported in : (1991)ILLJ312SC (supra) and the Union of India and Ors. v. K.B. Rajoria reported in (2003) SCC 562 (supra) it would be appropriate to hold that to maintain an equilibrium, the benefit of notional promotion with retrospective effect, when there was apparently no adverse remarks prior to 21.12.1994, the date when the writ petitioner was promoted to the rank of Assistant Commandant should also be given to the writ petitioner.

14. It was argued by the learned Central Government standing counsel that the case of the writ petitioner could not be considered for giving benefit of notional promotion with retrospective effect since there were adverse remarks in his ACRs and the Union Public Service Commission did not consider his name for such promotion. This submission, perhaps does not hold good in view of the promotion of the officers at a later date including Sri M.K. Warman and Shri Ramesh Mishra. We do not find any force in the argument so advanced by the learned Central Government Standing Counsel.

15. In this writ petition this Hon'ble High Court vide order dated 1.8.2007 directed the learned Central Government Counsel to produce all relevant records to indicate the basis on which the persons (officers) mentioned vide order dated 25.10.1999 (Annexure-F) to the writ petition were given notional promotion while such notional promotion was refused to the writ petitioner. Pursuant to the said

direction, learned Central Government Counsel submitted some document viz. Subject : 'Review DPC Proceeding held in March, 1999'. From the perusal and scrutiny of the proceedings, nothing substantial emerged out for the purpose of assessment why the case of the writ petitioner was not considered for notional promotion with retrospective effect.

16. Having considered all the facts and circumstances of the case, we are of the opinion that this is a fit case where a direction can be given to the respondents to offer the benefit of notional promotion to the writ petitioner with retrospective effect with effect from a date prior to 29.6.1991. The respondents authority is accordingly directed to consider the case of notional promotion with retrospective effect to the writ petitioner prior to 29.6.1991.

With this direction, the writ petition is disposed of.

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