

D.S. Kothari and anr. Vs. the State of Rajasthan and ors.

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SooperKanoon Citation : sooperkanoon.com/762264

Court : Rajasthan

Decided On : Sep-12-1974

Reported in : 1974WLN596

Judge : B.P. Beri, C.J. and; D.P. Gupta, J.

Appeal No. : D.B. Civil Special Appeal Nos. 82 and 92 of 1974

Appellant : D.S. Kothari and anr.

Respondent : The State of Rajasthan and ors.

Disposition : Appeal allowed

Judgement :

1. These two appeals arise out of the order passed by the, learned Single Judge dated April 25, 1974 by which he accepted the writ petition filed by the respondent Gopeshwar Bhatt and held that the order of the State Government dated April 2, 1973 regarding the, substantive appointments to the Selection grade of the Rajasthan Administrative Service (hereinafter referred to as the 'Service') was bad in law and struck down the same qua Gopeshwar Bhatt, who was the petitioner in the writ petition.

2. Really speaking the controversy in the present case is an offshoot of the decision of their Lordships of the Supreme Court in Guman Singh v. State of Rajasthan and Ors. 1971 (2) SC 452.

3. The relevant facts briefly stated are that the appellants in appeal No. 84 of 1974 as well as the respondent No. 5 to 9 are members of the Service which was initially constituted in the year 1950 and the rules governing the conditions of the members of the Service were framed in 1954 under Article 309 of the Constitution of India and are known as the Rajasthan Administrative Service Rules (hereinafter referred to as the Rules) Under the Rules the Service has three cadres of pay namely, the Ordinary Time Scale, the Senior Scale and the Selection Scale. The appointments to the Senior Scale and the Selection Scale are made by promotion on the basis of merit and seniority-cum- merit from the Ordinary Time Scale, the Senior Scale respectively according to the Rules Initially the promotions were made only on the basis of seniority-cum-merit. However; in the year 1965 an amendment was made in the Rules, introducing the system of making promotions to the higher grade in the Service on the basis of merit alone in Addition to the already existing system of making promotion on the basis of seniority-cum-merit. In the year 1965 the proportion of vacancies to be filled in by promotion on the basis of merit and on the basis of seniority-cum-merit was 1:1, but on August 26, 1966 the Rules were further amended and the proportion of promotions to be made on the basis of merit and seniority-cum-merit was modified as 1:2. On August 27, 1966 the Chief Secretary to the State Government issued a circular which introduced a marking system in the matter of selection, promotion & appointment to the Service. Promotions to the senior scale of the Service were made on the basis of the aforesaid marking formula in respect of the seniority-cum-merit quota by the order dated December 7, 1966 while, the promotions in respect of the merit quota were made by the order of the State Government dated January 4, 1967. The validity of these promotions as well as the legality and validity of the circular dated August 27, 1966 containing the marking, formula, on the basis of which they were made, were challenged by Guman Singh, a member of the Service, in this Court by means of a writ petition. The learned Single Judge held that Sub-rule (2) of Rule 28B of the Rules was bad in law and struck down the circular dated August 27, 1966 holding the same to be repugnant to the Rules as well as the promotion made under the order dated January 4, 1967 on the basis of the aforesaid circular.

4. The State and the promotees filed special appeals; which were allowed by the Division Bench by its order dated January 20, 1970 which held that Sub-rule (2) of Rule 28B was valid as also the circular as well as the promotions made in accordance therewith. Soon after the aforesaid decision of this Court, the State Government passed an order on January 22, 1970 confirming the persons who were appointed by promotion to the Senior Scale of the Service by; the: orders dated December 7, 1966 and January 4, 1967.

5. Guman Singh filed an appeal before the Supreme Court against the aforesaid order passed by the Division Bench of this Court. Thereafter Moti Lal Kakkar, one of the appellants before us, also filed a writ petition under Article 32 of the Constitution of India before the Supreme Court challenging the validity of the circular dated August 27, 1966 as also the promotions made by the orders dated December 7, 1966 and January 4, 1967 to the Senior Scale of the Service & also the order of confirmation dated 22-1-1970 On; more writ petition was also filed to the same effect in the S.C. appellant Gamansingh as well as the writ petitioners Under Article 32 of the Constitution also filed stay applications before the S.C. and on 3.2.1970 and the Advocate General appearing on behalf of the State of Raj give an undertaking before the S.C. that the State Govt. shall not make any further promotions or confirmations to the senior scale or Selection Scale of the Service until the decision of the Supreme Court is those matters. Subsequently an application was moved on behalf of the State Government for the modification of the undertaking given earlier on its behalf and on July 20, 1970 the State Government gave a modified undertaking before the Supreme Court that all promotions, whether in the same line or some other line, shall be subject to the orders passed by the Hon'ble Supreme Court, which was accepted by their Lordships of the Supreme Court The State Government thereafter made appointments by promotion to the Scale of the Service by its order dated December 26, 1970 on the basis of seniority-cum merit as well as merit alone The selection against the merit quota was made on the basis of the marking formula contained in the impugned circular dated August 27, 1966 and the respondent Gopeshwar Bhatt as well as some other persons were promoted to the Selection Scale of the Service. It may be mentioned here that the two appellants before us in special appeal No. 84 of 1974 as well as the respondents No. 5 to 9 in that appeal

were also holding the posts in the Senior Scale of the Service along with Gopeshwar Bhatt at that time and were eligible for promotion to the Selection Scale, but they were not so promoted.

6. The Supreme Court ultimately by its order dated July 26, 1971 accepted the appeal, of Guman Singh and the writ petitions filed by Moti Lal Kakkar and another to the extent that the circular dated August 27, 1966 was struck down as 'illegal and invalid'. In the appeal, of Guman Singh certain other directions were given, with which we are not concerned, but in the writ petitions filed by Moti Lal Kakkar and another, their Lordships of the Supreme Court were pleased only to make a declaration that the aforesaid circular was illegal and invalid and that it was struck down. The remaining prayers regarding striking down of the promotions made by the order dated January 4, 1967 and their confirmation by the order dated January 22, 1970 were not allowed on the ground that they kept quite and allowed the officiating promotions of all officers to stand from 1967 and even kept quite till the State Government confirmed the promotions, of those officers by its order dated January 22, 1970. Their Lordships observed,-

We are entitled to take this circumstance into account for denying the larger reliefs claimed by the writ petitioners when they attack the orders dated January 4, 1970 (sic.) and January 22, 1970.

In the above excerpt January 4, 1970 appears to be a typing error. The correct, date intended was January 4, 1967. Thereafter the State Government "keeping in view the implications' of the aforesaid decision of the Supreme Court, constituted a Departmental Promotion Committee to re-consider the promotions made to the Selection Scale of the Service by the order date December 26, 1970 in view of the fact that the circular dated August 27, 1966 on the basis of which those selections were made was struck down by their Lordships" of the Supreme Court. The Departmental Promotion Committee considered the cases of all persons then eligible for promotion to the Selection Scale against the merit quota, including the persons appointed by the order dated 26, 1970 in accordance with the provisions of Rules 28B and 32 and altogether ignored the circular dated August 27, 1966 from consideration. On the basis of the recommendation' made by the Committee,

the State Government by its order dated April 12, 1971 modified its earlier order dated December 26, 1970, and the names of respondent Gopeshwar Bhatt and six others were removed from the list of persons appointed by promotion to the Selection Scale of the Service against me it quota, while the two appellants (in special appeal No. 84 of 1974) & five others were appointed to the aforesaid selection Scale in place, of those seven persons. It was also mentioned in the aforesaid order dated April 12, 1973 that the appointment of respondent Gopeshwar Bhatt and 6 Ors. to the Section Scale of the Service shall be deemed to have been cancelled with effect from December 26, 1970 and two appellants and five others, who were selected afresh by the newly constituted Departmental Promotion Committee, would be deemed to have been appointed to the Selection Scale of the Service substantively by promotion with effect from December 26, 1970.

7. Petitioner Gopeshwar Bhatt challenged the order of the State Government dated December 26, 1970 on the ground that the State Government having, once made the appointments to the Selection Scale, of the Service had no power to review the same under Rule 32, that decision of the Supreme Court did not authorise such re-opening of the cases of persons who were not parties in Gunam Singh's case 1971 (2) SC 452 or were not petitioners before the Supreme Court, and lastly on the ground that the principles of natural justice were not followed while canceling the appointment of petitioner Bhatt. Kothari and Kakkar were two of the seven respondents in the said petition.

8. The State Government's answer was that selections to the Senior Scale of the Service were made in 1970 by employing the marking formula which was struck down by their Lordships in Guman Singh's case 1971 (2) SC 452 & therefore the appointments made on that basis including that of petitioner Bhatt were invalid and illegal. In view of the modified undertaking given by the State in the Supreme Court on July 20, 1970 to the effect that all promotions would be subject to the decision of the Supreme Court, the Government was under clear obligation to reconsider the appointments made on December 26, 1970, particularly because they were made with the use of the marking formula-declared illegal and invalid by the Supreme Court.

9. The learned Single Judge found that the State Govt. had no power to review the appointments made on December 26, 1970 under Rule 32 of the Rules that such appointments were only voidable & not altogether void and only the effected persons could have challenged such appointments. It was further held that as the appointment of Gopeshwar Bhatt was not challenged by any person affected by his promotion to the Selection Scale of the Service, it was not open to the State Government to review his appointment & the undertaking given by the State before the Supreme Court was limited to the parties concerned and -it did not entitle the State Government to make a general review. The learned Single Judge by his order dated April 25, 1974 allowed the writ petition filed by Gopeshwar Bhatt and set aside the order dated April 12, 1973 qua him and further directed the State Government to restore Gopeshwar Bhatt to the position he hid occupied prior to the passing of the aforesaid order dated April 12, 1973.

10. Aggrieved the aforesaid order Kothari & Kakkar have filed a joint appeal, being special appeal No 84 of 1974, while the State of Rajasthan has tiled a separate appeal, being appeal No. 92 of 1974. Both those appeals can be conveniently disposed of by a common judgment.

11. Mr. Mridul, on behalf of the appellants in special in appeal No. 64 of 1974, urged that on account of the undertaking given by the Sate on July 20, 1970 before the Supreme Court in Gumansingh's case 1971 (2) SC 452 & in the light of the decision of the Supreme Court, the promotion order dated 26.12.1970 being based on the illegal and marking formula could not have been permitted by the S ate to stand. What the Supreme Court said in Guman Singh's appeal and the writ petitions of Motilal Kakkar and another was clear and unequivocal that the marking formula of August 27, 1966 was 'illegal & invalid' & that was the law of the land under Article 141 of the Constitution, the State was bound to reconsider the promotions in the light there of Even assuming that the order of the State Government dated December 26, 1970 was voidable, the leraned Counsel urged, the said order could have been modified or versed by the State at the instance of the affected parties. If the affected parties bad approached this Court, added the leraned Counsel, in view of the Supreme Court's Judgment, the order of promotion dated December 26, 1970 was bound to be struck down by this Court as well

because it was made by the State in ignorance of the correct legal position. Mr. Mridul relied upon the decision of this Court in Rameshwar Singh v. State of Rajasthan (SB Civil Misc. Writ Petition No. 110 of 1967) and the special appeal preferred by Gopeshwar Bhatt decided on July 27, 1972.

12. The learned Additional Government Advocate appearing in the other appeal No. 92 of 1974 endorsed the argument of Mr. Mridul in appeal No. 84 of 1974.

13. Mr. Kasliwal, appearing for Gopeshwar Bhatt, supported the judgment of the learned Single Judge and adopted the reasons given by him. Mr. Kasliwal conceded that the promotions which were made on December 26, 1970 did employ the marking formula which the Supreme Court declared 'illegal and invalid' but the judgment could be applied to only four persons who were parties in Guman Singh's appeal and it did not empower the State to undo what it had done under Rule 32. The State Government declared before the Rajasthan Legislative Assembly that a general review was not contemplated pursuant to the decision of the Supreme Court, nor was it the intention of the judgment of the Supreme Court which even denied further relief to Motilal Kakkar and another petitioner. Gopeshwar Bhatt, added Mr. Kasliwal, could not be demoted after having been finally promoted because it was violative of Article 311 of the Constitution of India and the principles of natural justice.

14. In our opinion, it is correct to say that the State Government has no power to review its decision made under Rule 32 of the Rules but we have to consider the effect of the undertaking given by the State Government before the Supreme Court during the pendency of Guman Singh's appeal in that Court. The learned Single Judge has observed that the undertaking given by the State Government before the Supreme Court was to safeguard the interests of Guman Singh and others who were before their Lordships and it was for that reason that the appointments to be made by the state Government were subjected to the decision in that case and the undertaking could not be construed to have a wider range and this is inferable from the limited relief granted in that appeal and the petitions. We are of the opinion that the undertaking given by the State Government will have to be examined in the perspective of the events which led to the giving of that

undertakings Twenty nine persons were temporarily promoted to the Senior Scale of the Service by the order of the State dated December 7, 1966 under the seniority-cum-merit quota and 15 persons were temporarily promoted by the order dated January 4, 1967 under the merit quota. All these promotions were made on the marking formula introduced by circular dated August 27, 1966. No promotion to the higher grades in the service were made thereafter obviously because they were the subject matter of challenge before this Court in the writ petition filed by Guman Singh and the subsequent special appeal preferred by the State. The Division Bench by its order dated January 20, 1970 dismissed the appeal and soon thereafter the State Government confirmed the aforesaid 44 persons to the Senior scale of the Service. Thereafter Guman Singh filed an appeal before the Supreme Court and one of the appellants before us Motilal Kakkar also filed a writ petition under Article 32 of the Constitution. On more writ petition was also directly filed before the Supreme Court and say applications were moved in the appeal as well as in the writ petitions. In order to stall a stay order the Advocate General appearing on behalf of the State of Rajasthan gave an undertaking on February 3, 1970 to the effect that further promotions shall not be made to the higher grades in the Service. Pro-baby it was felt later that the undertaking given was in too wide terms and it would not be proper to keep promotions to higher grades in the Service in abeyance for a long time and therefore the State Government applied for the modification of the undertaking given by it and on July 20, 1970 it gave a modified undertaking before the Supreme Court which was accepted and an order was passed by their Lordships in the following terms:

All promotions whether in the same line or in some other line shall be subject to the orders of this Court.

15. In order to ascertain the ambit of the undertaking, in our opinion, the important words are 'all promotions' and 'in the same line or in some other line'. The adjective 'all' before promotions excludes the possibilities of exceptions. It is not restricted by such words as affecting the parties before the Supreme Court. The word 'all' is clearly all-embracing. The words 'in the same line or in some other line' covers in its sweep promotions in all lines of the Service. These words doubtlessly widen the area covered by the undertaking rather than restrict it to the parties

affected in the litigation. In any event it was not the intention of the undertaking when it was made to confine it to cases of the appellant and the petitioners before the Supreme Court. The undertaking became the order of the Supreme Court. It was not possible for the State on July 20, 1970 to anticipate the ultimate result of the pending litigation before the Supreme Court, wherein the fate of the formula adopted by it in making promotions was itself in balance. In our opinion, therefore, the undertaking given by the State Government before the Supreme Court clearly related to all promotions made to the posts in the Service which was the subject matter of consideration before the Supreme Court in the appeal of Guman Singh and the writ petitions. At any rate, one of the appellants before us, Motilal Kakkar, was a party before the Supreme Court as he was one of the petitioners in the Supreme Court in whose case the undertaking was given by the State Government. It is not disputed that Moti Lal Kakkar was affected by the order of promotion to Selection Scale posts by the State Government on December 26, 1970. After the aforesaid undertaking was given by the State before the Supreme Court and even if the undertaking be taken to be confined to the parties before the Supreme Court, because of the fact that Motilal Kakkar was affected by the order of December 26, 1970 the State Government was under an obligation, to reconsider the said order in the light of the decision of the Supreme Court declaring the circular dated August 27, 1966 as invalid and illegal.

16. Mr. Kasliwal contended that because the order dated December 26, 1970 is passed under Rule 32(2) and because no mention of the undertaking giving by the State Government is made in the order of December 26, 1970, the order of the 26th December, 1970 is absolute and the appointments made thereunder are neither temporary nor provisions. The argument has no force in the context of the events. The State Government was aware that it had given an undertaking before the Supreme Court and we cannot presume that the State of Rajasthan had given the undertaking to the Supreme Court with an intention not to honour it. Merely inexact quotations of the Rules or an omission to state the undertaking could not, in our opinion wipe out the effect of a solemn undertaking given before the Supreme Court.

17. Mr Kasliwal also contended that Gopeshwar Bhatt was not a party to the undertaking given by the State Government to the Supreme Court and the State Government did not pass the subsequent order dated April 12, 1973 showing that it was due to that undertaking and that it did not affect him. Gopeshwar Bhatt in our opinion could be promoted only because of the modified undertaking given by the State on July 20, 1970. His appointment was, therefore, clearly subject to the terms of the undertaking.

18. It was finally contended that the final judgment of the Supreme Court dated July 26, 1971 while deciding Guman Singh's appeal and the two writ petitions did not give any direction or order in respect of the promotions made during the pendency of those case and because Motilal Kakkar was given a mere declaration the undertaking given by the State should be deemed to have merged in the final orders of the Supreme Court. A bare perusal of the order dated April 12, 1973 shows that the State Government appointed a Departmental Committee for recommendation of the promotions made to the Selection Scale of the Service in the year 1970 on account of the implications of the decision of their Lordships of the Supreme court in Guman Singh's case, 1971 (2) SC 452. The Supreme Court had struck down the marking formula and it was, therefore, incumbent upon the State to reconsider the order of promotion made on December 26, 1970, because it was on the basis of that formula that these promotions were made. The State Government had given the undertaking that promotions made during the pendency would be subject to the decision of the Supreme Court. The promotions on December 26, 1970 were made during the pendency of the appeal in the Supreme Court and the State did employ the discredited marking formula in the process of those promotions. Therefore, a reconsideration was clearly called for. After excluding the marking formula the orders dated April 12, 1973 was passed. The Supreme Court denied relief to Motilal Kakkar and another, other than mere declaration because they were guilty of laches. The same reasoning could not be made applicable in respect of the promotions made by the order dated December 26, 1970 because writ petitions of Motilal Kakkar and another were already pending before the Supreme Court when that order was passed. The Supreme, Court could not have given any direction in respect of the order dated December 26, 1970 as it was not the subject matter of challenge before their Lordships. We

are unable to agree that the granting of a declaration to the effect that the circular dated August 27, 1966 was 'illegal and invalid' had the affect of nullifying the undertaking for actions taken by the State during the pendency of the appeal and the petitions before the Supreme Court. What their Lordships observed in regard to the marking formula was that it was illegal and invalid & it became in law of the land in accordance with the provisions of Article 141 of the Constitution. All actions taken by the State Government during the pendency of the appeal and the writ Petition before the Supreme Court were subject to the final decision of the Supreme Court in other words they were without prejudice to the ultimate decision. On court of aforesaid undertaking it was not necessary for their lordships of the Supreme Court to elaborate and say that any action taken during the pendency of the appeal and the petitions should be in accordance with the law declared by them.

19. In so far as the controversy whether the order dated 26-2-70 is void or voidable. it is not necessary for us to enter into it because in our view the said order is subject to the decision of their Lordships of the Supreme Court's on account of the undertaking given by the State Govt., on 20-7-1970. A clear obligation was cast on the State Government to reconsider the order of promotion dated December 26, 1970. The Supreme Court's declaration could not be ignored by the State Government and more so in view of its express undertaking referred to above. The learned Single Judge has himself observed that the legal principle laid down by the Supreme Court is to be taken as law at all relevant times and, therefore, the circular in question should be considered to be illegal and invalid at all material times since its very inception. We only wish to add that the natural consequence of this declaration must also follow. We might add that Motilal Kakkar was an affected party so far as the order dated January 4, 1967 and the order of confirmation dated January 22, 1970 were concerned, as he was also eligible for promotion to the Senior Scale of the Service and all the persons, who were promoted by the aforesaid two orders against the merit quota and male respondents No. 2 to 15 in his writ petition before the Supreme Court, were all his juniors as mentioned in para 12 of the judgment in Guman Singh's case 1971 (2) SC 452. Thus Motilal Kakkar was directly an affected party and he was eligible to challenge the appointments of persons who were promoted to the Senior Scale of

the Service by superseding him, yet the Supreme Court denied the relief of striking down the aforesaid two orders challenged by him. It is, therefore, clear that the reason for refusing to strike down the said orders was not that the circular and the orders made in pursuance thereof were voidable or that Motilal Kakkar was not an affected party but, it was only on account of the laches that their Lordships of the Supreme Court refused the relief as is clear from para 51 of the judgment in Guman Singh's case 1971 (2) SC 452. Moreover, once the circular was declared illegal and invalid it was for all persons and the State Government had to reconsider the promotions made on the basis thereof by the order dated December 26, 1970.

20. One more aspect of the matter requires consideration. Even if the promotions made by the order dated December 26, 1970 on the basis of the aforesaid circular were considered to be voidable, then they could have been successfully challenged by means of a writ petition before this Court by appellants Kakkar and Kothari before us, who were undoubtedly affected parties. In these circumstances, there was nothing improper if they made representations, to the State Government and the State Government itself rectified its error by reconsidering the appointments made on the basis of the said illegal and invalid circular. The affected parties could demand justice at the hands of the State Government before coming in for a writ of mandamus and the State was justified in rendering justice to them. In Rameshwar Singh's case, referred to above, this Court held that the Supreme Court did not strike down the circular in question only prospectively but held it to be invalid without any qualification. The special appeal preferred by Gopeshwar Bhatt was dismissed by the Division Bench, to which one of us was a party, by its order dated July 17, 1972, inter alia, making the following observations:

That circular has been struck down. Selection made on the touchstone of that invalid document cannot survive. When the balance which weighed, was itself ill-adjusted, the assessment of the weights of the 3 appellants and respondents, No. 2 to 5 could not be said to be correct... Proper rating of eligible competitors can be done justly by a common competition (sic) assessment.

If the appellants before us had approached this Court as Rameshwar Singh did, this Court would have no hesitation in striking out the order dated December 26, 1970 for the same reason which has been given by this Court in Rameshwar Singh's case, namely that the selection on the basis of that invalid document could not survive. If the State Government had done what was expected of it, it would not be proper for this Court to interfere with the order of the State Government and issue a writ. Substantial justice has been done between the parties and we are of the opinion, with respect, that the learned single Judge was not justified in striking out the order of the State Government dated April 12, 1973 in the circumstances of the case.

21. Mr. Kasliwal's argument, that there is violation of the provisions of Article 311 of the Constitution of India in the present case, is devoid of force. The order dated December 26, 1970 was subject to the application of the undertaking given by the State Government before the Supreme Court and the undoing of it does not visit petitioner Gopeshwar Bhatt with any stigma attracting the applicability of Article 311 of the Constitution. The order dated December 26, 1970 was inherently tentative subject to the decision of the Supreme Court.

22. Lastly it was argued by M. Kasliwal that the principles of natural justice were violated as the order dated April 12, 1973 as passed by the State Government without affording petitioner Gopeshwar Bhatt an opportunity of hearing. Learned Counsel relied upon the Central Manager, Northern Railway, Baroda House, New Delhi and *Anr. v Madan Lal Chopra* 1971 (1) SLR 629 and *State of Punjab v. K.R Beyond Sobhag Rai Mehta* 1972 SLR 836 in this connection. Both these cases are not applicable to the circumstances of the case before us. Gopeshwar Bhatt in this writ petition has not pleaded that his merits were not taken into consideration by the Departmental Promotion Committee.

23. In result, we allow both these appeals and set aside the order of the learned Single Judge and dismiss the writ petition filed by Gopeshwar Bhatt. There will be no order as to costs.