

Asis Kumar Samanta and ors. Vs. State of West Bengal and ors.

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Court : Kolkata

Decided On : Mar-24-1999

Reported in : (1999)2CALLT438(HC)

Judge : Tarun Chatterjee and ;Surya Kumar Tiwari, JJ.

Acts : [Constitution of India, 1950](#) - Articles 21, 226 and 309;; West Bengal Services (Determination of Service) Rules, 1981 - Rules 3 and 6;; West Bengal Forest Service (Condition of Service) Rules, 1982;; West Bengal Service (Determination of Seniority) Rules, 1981 - Rule 6(2)

Appeal No. : Civil Revisional Jurisdiction, W.P.S.T. No. 33(W) of 1997

Appellant : Asis Kumar Samanta and ors.

Respondent : State of West Bengal and ors.

Advocate for Def. : Mr. Balai Chandra Roy, Senior Adv., ;Mr. B.R. Bhattacharyya and ;Mr. S.K. Acharyya, Adv.

Advocate for Pet/Ap. : Mr. Rabindra Nath Bag, Adv.

Judgement :

S.K. Tiwari, J.

1. This writ application has been filed against the judgment dated 21st April, 1997, delivered by the West Bengal State Administrative Tribunal in case No. TA 1293 of 1996.

2. These 11 petitioners were recruited directly to State Forest Service in the month of March 1990. Respondents 4 to 19 to the original petition were promoted to the State Forest Service vide notification No. 940 dated 1.2.91. They were given retrospective seniority with effect from 31.12.90. It is not disputed that West Bengal Forest Service was constituted with effect from 31.7.1982. West Bengal Forest Service (Condition of Service) Rules, 1982, were also brought into force on the same day. According to Rule 3 (bid. determination of seniority in the service is to be governed by West Bengal Service (Determination of Seniority) Rules, 1981. According to Rule 6(2) of West Bengal Service (Determination of Service) Rules, 1981, 'the promotee shall be enbloc senior to the direct recruits of the same year'.

3. The petitioner have challenged the grant of retrospective seniority to respondents 4 to 19 by the State Government as arbitrary and contrary to service rules. The petitioner, therefore, prayed that the impugned notification be quashed and the State Government be directed to re-fix the seniority in according with law.

4. Only private respondents 4, 5, 7 and 9 to 19 contested the application by filing affidavits-in-reply. According to them, the promotees have a 5G',.: quota in the State Forest Service and the West Bengal Public Service Commission were approached as back as on 1.1.1989 to clear the promotion ' of 22 Forest Rangers in the State Forest Services. But their cases could not be processed because of the interim order passed by this court in C.O. No. 9700 (W) of 1988 restraining the authorities from giving promotion to West Bengal Forest Service. The said stay order was vacated on 11.12.1990 and only thereafter the selection process started and the cases of respondents 4 to 19 were considered by the Public Service Commission. Since their cases for promotion remained pending consideration before the Public Service Commission because of the interim order of this court, the Public Service Commission rightly recommended that the respondents 4 to 19 be given retrospective seniority with effect from 31.12.1990.

5. The learned Tribunal up-held the grant of retrospective seniority and dismissed the petitioners' application. Being aggrieved by the dismissal of their application, the petitioners have approached this court under Article 226 of the Constitution of India.

6. The learned counsel for the petitioners has placed reliance on the case of *State of Bihar v. Akhoura Sachindra Nath* : (1991)11LLJ312SC . In this case the petitioners were directly recruited Assistant Engineers. Subsequently, the State Government promoted Overseers as Assistant Engineers and gave them retrospective seniority over them which was challenged. The apex court held thus :--

'It is well settled that no person can be promoted with retrospective effect from date when he was not born in the cadre as to adversely affect others. It is well settled that amongst members of the same grade seniority is reckoned from the date of their initial entry into service'.

7. The learned counsel appearing for the private respondents has placed reliance on the case of *Ram Pal Malik v. State of Haryana* : AIR 1994 SC2481 . In the Instant case an ad-hoc promotee was working on the higher post and direct recruits were appointed and were placed higher in the gradation list. The ad-hoc promotee's application for confirmation on higher post remained pending with the State Government for a number of years. Subsequently the State Government considered and allowed the application of the ad-hoc promotee. The apex court held that the grant of retrospective seniority to the promotee was not contrary to any rules concerning promotion. The apex court in case of *D.D. Sury v. Union of India* : (1979)11LLJ431SC while considering the scope of 'next below rule' in the service jurisprudence held that an officer in a post (whether within the cadre of his service or not) is for any reason prevented from officiating in his term in a post on higher scale or grade borne on the cadre of the service to which he belongs, he may be authorised by the special order of the appropriate authority, 'proforma' officiating promotion into such scale of pay and thereupon may be granted the pay of that scale or grade. It is, therefore, clear that a competent authority can grant retrospective seniority to an employee in proper case. The latest authority on this

point is that of U.D. Lama v. State of Sikkim : (1997)1SCC111 wherein a three Judges Bench of the apex court up-held of grant of retrospective seniority to subsequently promoted officers over the direct recruits because the State Government of Sikkim had not constituted Public Service Commission for a considerable period of time. As a result of which the cases of in-service employees could not be considered for promotion as against the quota reserved for them. The apex court held thus :--

'They were deprived of their chances Now that the Public Service Commission has been set-up, the State Government has to undo wrong that was initially done to these employees by subjecting them to tests which was not warranted Therefore they should not be made to suffer in the matter of seniority or promotion in any way by failure of the State Government to Implement the rule laid down by It. In these circumstances by directing the new recruits to be treated to have been recruited on the day the appellants were recruited, the State Government has not done anything contrary or wrong but has really removed the Injustice done to the respondents by the State Government's failure to recruit them into service in accordance with rule 4(1) (b)'.

8. In the light of Lama's case (supra), it is clear that the State Government and the Public Service Commission acted in accordance with law and their action cannot be called arbitrary or illegal. It would also be pertinent to keep in mind the legal maxim 'actus legis nemine est demnosus' meaning thereby that an act of court shall prejudice no one. There is no higher principle for the guidance of the courts than the one that no act of court should harm a litigant and it is the duty of the courts to see that If a person is harmed by mistake of the court he should be restored to the position he would have normally enjoyed. It is, therefore, pre-eminently Just and proper that the impugned order is up-held.

9. The learned counsel for the petitioners has cited : [1995]1SCR126 (Chandigarh Administrative v. Jagit Singh) wherein it has been laid down that bad precedents cannot make good law. Each case must be decided on its own merits in accordance with law or relevant legal principles and not on the basis of wrong decisions taken by the State Government. This case was cited to rebut the case

set-up by respondents 4 to 19 where they have cited certain Instances where some officers were given retrospective promotion in the past. We have not placed any reliance on any such precedent.

10. The next case cited by the learned counsel for the petitioners is reported in : (1995)1SCC156 (State of Milzoram v. Blakchhawana) wherein it has been laid down that when statute requires an action to be taken in a particular manner, the same has to be taken in the same manner. Suffice It to say that the instant case the State Government has not acted In contravention of any statutory rules.

11. The learned counsel for the petitioners has also cited : [1996]1SCR1154 (Gursharan Singh v. New Delhi Municipal Committee) which deals with reasonable classification, lit the present case the classification between petitioners and respondents cannot be called arbitrary or irrational.

12. The next, case relied upon was : AIR 1997 SC442 (Tejkumar Balakrishna Rula v. A.K. Menon) which lays down that if two views are possible, the one is preserved the constitutionality of the provision must be adopted. This case also has no relevance to the circumstances of the present case. Then the learned counsel placed reliance on the case of Air India Statutory Corpn. v. United Labour Union : (1997)ILLJ 1113 SC which was a case relating to contract labour. The apex court laid down that the date of engagement of labour shall be the criteria to determine the inter-se' seniority. In the present case, the statutory rules framed by the State Government under proviso to Article 309 of Constitution specifically deals with the inter-se seniority between the direct recruits and promotees. Hence the principle which was made applicable to the absorption of contract labour does not apply to the parties to this case.

13. The learned counsel appearing for the private respondents have placed reliance on a full bench decision of Kerala High Court reported in AIR 1984 NOC 219 (Ker.) (State of Kerala v. T.M. Somarajan & Ors.) wherein It has been laid down that mistake committed in preparation of seniority list between the promotees and direct recruits can be rectified and subsequent rectification would be valid.

14. The learned counsel Shri Balal Chandra Roy appearing for the State of West Bengal has placed reliance on : [1997]1SCR88 (Mahmood Hasart v. State of U.P.) wherein the apex court had quashed the ad-hoc promotion granted in terms of various orders of the High Court and directed further promotion to be made according to State level seniority list.

15. The next case relied by Shri Balal Chandra Roy is : [1988]1SCR398 (P.K. Dikshit v. State of U.P.) wherein the apex court laid down that the seniority of the promotee has to be reckoned on the date on which vacancy was available for confirmation. These cases do not clinch the real issue. However, in the light of U.D. Lama's case (supra), the State Government's order giving retrospective seniority must be up-held and the learned Tribunal committed no error in dismissing the petitioners' application.

16. We find no substance in this writ application and the same is dismissed. Certified xerox copy of the judgment if applied for, be given to the parties as expeditiously as possible.

T. Chatterjee, J.

17. I agree.

18. Application dismissed

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