

In Re : Chandan Kumar Bhattacharjee and ors.

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Court : Kolkata

Decided On : Jun-15-1993

Reported in : (1993)2CALLT457(HC)

Judge : Paritosh Kumar Mukherjee, J.

Acts : [Constitution of India](#) - Article 226

Appellant : In Re : Chandan Kumar Bhattacharjee and ors.

Advocate for Def. : Prodosh Kumar Mullick and ;R.N. Majumdar, Advs.

Advocate for Pet/Ap. : Ashoke De, ;Asoke Kumar Janah and ;Syamal Kumar Das, Advs.

Judgement :

Paritosh Kumar Mukherjee, J.

1. The present joint writ petition was moved on behalf of 8 writ petitioners, challenging the rotational order of transfer dated August 14, 1992, whereby the petitioners, who were working as 'Junior Officers' of the Central Bank of India, were posted to their original posting as 'Senior Clerks' in the respective branches.

2. When the writ petition was moved ex parte before this Court on August 31, 1992, upon hearing Mr. Ashoke De, learned Advocate for the petitioners, this Court directed service of copy of the writ petition upon the Central Bank authorities

and the respondents were directed to maintain 'Status quo', as on the date, regarding the present officiating services of the writ petitioners as Junior Officers till September 14, 1992, with liberty to the petitioners to apply for extension thereof upon notice to the respondents. The said interim order was, however, extended on September 22, 1992, in the presence of Mr. R.N. Majumdar, learned Advocate appearing for the Central Bank authorities.

3. Ultimately, by an order dated November 20, 1992, the interim was extended and hearing of the writ petition was expedited.

4. The facts of the case is as follows :-

The petitioners are all Senior Clerks of Central Bank of India, Calcutta Main Office (hereinafter referred to as the said Bank). In the main office of the said Bank, there are considerable number of vacancies of Junior Officers and such vacancies were caused due to the retirement of a large number of Junior Officers. The authorities of the said Bank selected the writ petitioners and directed them 'to officiate' to the posts of Junior Officers.

5. The petitioners have been working as Junior Officers of the said Bank with effect from the following dates :-

Petitioner No. 1 September, 1986.

Petitioner No. 2 December, 1986.

Petitioner No. 3 September, 1986.

Petitioner No. 4 January, 1985.

Petitioner No. 5 September, 1986.

Petitioner No. 6 July, 1986.

Petitioner No. 7 November, 1986.

Petitioner No. 8 September, 1986.

6. According to the petitioners, from Senior Clerks the next higher promotion is to the post of Junior Officers. From the aforesaid dates, it is clear and evident that there is no debate that the petitioners were continuously working in the post of Junior Officers of the said Bank, from the date mentioned above and since the dates specified above there was no break.

7. Further, according to the petitioners, the authorities of the said Bank issued an office circular dated August 19, 1988, being Annexure 'A' to the writ petition.

8. Paragraphs 4 and 6 of the said circular are set out here in below :-

'4. Such officiating at branches for indefinite periods is neither desirable not in the best interests of the Institution. We once again reiterate that such placement on officiating basis for indefinite periods without any check over payment of halting allowance/reimbursement of total expenses and officiating allowance cannot be permitted under any circumstances. It should not be difficult to fill in the vacancies of Branch Managers in Scale I and II at any centre as officers are required to undergo rural and/or semi-urban stint for 2/3 years compulsorily to become eligible for promotion to next higher scale in the promotion process to be conducted after 1.6.1988. Thus we do not see any reason or justification for allowing any officiating at small and medium branches.

6. As regards award staff, it may also be assured that special allowance posts at offices are not kept on officiating basis for indefinite period and such posts are invariably filled promptly, as per the provisions of the Promotion Policy for award staff.'

9. It appears that in spite of the aforesaid rules, the Bank authorities did not regularise the writ petitioners' services in the post of Junior Officers, although some of them were allowed to work since September, 1986.

10. According to the petitioners, for discharging the duties as aforesaid, the writ petitioners were receiving a sum of Rs. 524/- per month 'as a special allowance'.

11. Therefore, according to the petitioners it is clear that although the spirit of the circular is that officiating basis should not continue for an indefinite period, but the

said Bank authorities had been accepting the services of the writ petitioners in the post of Junior Officers from the dates specified here in above, without any break.

12. Under such situation, suddenly the Bank authorities issued the impugned circular relating to transfer dated August 14, 1992, Annexure 'B' to the writ petition thereby purporting to transfer the writ petitioners to the post of Senior Clerks, which has been challenged in the instant writ petition.

13. Mr. Ashoke De, learned Advocate appearing on behalf of the petitioners submitted in the first place that such an order of transfer has been passed by way of demotion. Mr. De further submitted that as the petitioners' services had been obtained for a considerable period as Junior Officers, the petitioners had acquired some right in the post of Junior Officers.

14. In support of his contention, Mr. De has placed reliance on the judgment of the Supreme Court in the case of Jacob M. Pathupurambil v. Kerala Water Authority, reported in : (1991)11LLJ65SC , where the writ petitioners were appointed on ad hoc basis and continued for a period of more than two years and possessed requisite qualification. In the said case, Supreme Court held that their services were entitled to be regularised.

15. In paragraph 15 of the said judgment, Supreme Court observed as follows :-

'15. Now, to the text of Rule 9(a)(i) of the Rules. It empowers the appointing authority to appoint a person temporarily otherwise than in accordance with the rule if (i) it is necessary in the public interest, and (ii) where an emergency has arisen to fill any particular post which has fallen vacant, immediately. In the present case it is difficult to say that all appointments made after 1st April, 1984 were required to be filled immediately because of an emergency of the type contemplated by the said rule. On the contrary it seems appointments were routinely made in purported exercise of power conferred by this rule. The proviso on which reliance is placed, which we have extracted earlier, merely states that ordinarily such appointments will be of those persons who possess the requisite qualifications for the post. If any person who does not possess the requisite qualifications is appointed under the said clause, he will be liable to be replaced by

a qualified person. Clause (iii) of Rule 9 states that a person appointed under Clause (i) shall, as soon as possible, be replaced by a member of the service or an approved candidate qualified to hold the post. Clause (e) of Rule 9, however, provided for regularisation of service of any person appointed under Clause (i) of Sub-rule (a) if he had completed continuous service of two years on December 22, 1973, notwithstanding anything contained in the rules. This is a clear indication that in the past the Government also considered it just and fair to regularise the services of those who had been in continuous service for two years prior to the cut-off date. The spirit underlying this treatment clearly shows that the Government did not consider it just, fair or reasonable to terminate the services of those who were in employment for a period of two or more years prior to the cut-off date. This approach is quite consistent with the spirit of the rule which was intended to be invoked to serve emergent situations which could not brook delay. Such appointments were intended to be stop-gap temporary appointments to serve the stated purpose and not long term ones. The rule was not intended to fill a large number of posts in the service but only those which could not be kept vacant till regular appointments were made in accordance with the rules. But once the appointments continued for long, the services had to be regularised if the incumbent possessed the requisite qualification as was done by Sub-rule (c). Such an approach alone would be consistent with the constitutional philosophy adverted to earlier. Even otherwise, the rule must be so interpreted, if the language of the rule permits, as will advance this philosophy of the Constitution. If the rule is so interpreted it seems clear to us that employees who have been working on the establishment since long, and who possess the requisite qualifications for the job as obtaining on the date of their employment must be allowed to continue on their jobs and their services should be regularised. It is unfair and unreasonable to remove people who have been rendering service since sometime as such removal has serious consequences. The family of the employee which has settled down and accommodated its needs to the emoluments received by the bread winner will face economic ruination if the job is suddenly taken away. Besides, the precious period of early life devoted in the service of the establishment will be wholly wasted and the incumbent may be rendered 'age barred' for securing a job elsewhere. It is indeed unfair to use him, generate hope and a feeling of security in

him, attune his family to live within his earnings and then suddenly to throw him out of job. Such behaviour would be an affront to the concept of job security and would run counter to the constitutional philosophy, particularly the concept of right to work in Article 41 of the Constitution. Therefore, if we interpret Rule 9(a)(i) consistently with the spirit and philosophy of the Constitution, which it is permissible to do without doing violence to the said rule, it follows that employees who are serving on the establishment for long spells and have the requisite qualifications for the job should not be thrown out but their services should be regularised as far as possible. Since workers belonging to this batch have worked on their posts for reasonably long spells they are entitled to regularisation in service'.

16. Mr. De, also submitted that the above Rule 9(a)(i), as specified in paragraph 15 of the said judgment has a close similarity with the officiating rule contained in paragraphs 4 and 6 of the said rules, as contained in Annexure 'A' to the present writ petition.

17. In the second place, Mr. De submitted that in view of the observations of the Supreme Court in the case of Karnataka State Private College Stop-gap Lecturers Association v. State of Karnataka, reported in : (1993)IILLJ831SC , wherein the teachers who were appointed temporarily for years with a break of a day or two every three months by privately managed Degree college, the Supreme Court directed that such teachers' services should be regularised and in paragraph 7 of the said judgment, Supreme Court passed directions as follows :-

'(1) Services of such temporary teachers who have worked as such for three years, including the break till today shall not be terminated. They shall be absorbed as and when regular vacancies arise.

(2) If regular selections have been made the government shall create additional posts to accommodate such selected candidates.

(3) The teachers who have undergone the process of selection under the directions of the High Court and have not been appointed because of the reservation policy of the Government be regularly appointed by creating additional

posts.

(4) From the date of judgment every temporary teacher shall be paid salary as is admissible to teachers appointed against permanent post.

(5) Such teachers shall be continued in service even during vacations.'

18. Mr. De has also referred to another judgment of the Supreme Court in the case of Dharwarwad District P.W.D. Literate Daily Wage Employees' Association and Ors. v. State of Karnataka and Ors., reported in : (1990)ILLJ318SC , where the question of regularisation of casual workers with parity in pay was considered. One of the question was that while considering the viability of the question of regularisation the Court will keep in mind both the anxiety of the aggrieved workers as also the economic constraint of the State or its instrumentality. Considering the various judgments, Supreme Court, directed regularisation of the casual workers, working continuously for a long period and further held that those employees must be regularised in service with parity in pay.

19. Mr. De submitted that in the instant case also it cannot be denied that the Central Bank of India has been suffering from economic constraints and on the contrary paying Rs. 524/- to each petitioners for officiating in the posts of Junior Officer per month.

20. Thereafter, Mr. De referred to the following decisions :-

1. U.P. Income Tax Department Contingent Paid Staff Welfare Association v. Union of India, reported in : (1988)ILLJ396SC .

2. Delhi Municipal Karmachari Ekta Union v. P.D. Singh, reported in AIR 1989 SC, page 519.

3. Daily Rated Casual Labourers employed under P &T; Department through Bharatiya Dak Tar Mazdoor Manch v. Union of India, reported in : (1988)ILLJ370SC .

21. In all the aforesaid cases, Supreme Court directed to regularise the services of the casual workers, who had worked continuously for more than one year.

22. Mr. Prodosh Kr. Mullick, learned Senior Advocate, appearing with Mr. R. N. Majumdar, for the Central Bank of India placed the Promotion Policy which has been set out in the affidavit-in-opposition.

23. Mr. Mullick submitted that the petitioners have no right to be promoted to the post of Junior Officers, unless they go through the corridors of promotion policy. Mr. Mullick submitted that officiation does not create any right for getting any promotion. Mr. Mullick further submitted that Rule 18.9 of the Promotion Policy, it has been provided that officiating by itself in an officer's vacancy shall not entitle an employee for promotion to officer cadre except as per rules laid down in the agreement dated December 20, 1975.

Rules 18.1 and 18.9 of the said agreement dated December 20, 1975 are set out below :-

18.1. Officiating shall not be claimed as a matter of right. In the event the Management decides to allow officiating in a higher post or in a post attracting Special Allowance, following rules shall apply.

18.9. Officiating by itself in an Officer's vacancy shall not entitle an employee for promotion to officer cadre, except as per rules laid down in this Agreement.'

24. Mr. Mullick further submitted that mere officiation in the post of Junior Officer does not entitle the writ petitioners to claim promotion to the posts of officer cadre from a clerical post can be made only after following the rules as laid down in the said promotion policy agreement dated December 20, 1975 and not otherwise.

25. Mr. Mullick further referred to paragraphs 5.12, 5.13, and 5.14 of the said agreement dated December 20, 1975, which are set out below :-

'5.12. Candidates selected for promotion shall be posted, strictly in order of ranking according to Clauses 5.10 and 5.11 above anywhere in India but outside their Selection Area to which they belong as Clerks. 'Selection Area' means as defined in Schedule 'A', annexed hereto.

5.13. Subject to Clause 5.12 above, a candidate on promotion to All India Service shall be ordinarily posted in a division whose headquarters are not less than 200 kilometres in distance from the headquarters of the division station where he was working as clerk.

5.13(a). Notwithstanding what is contained in paragraph 5.13 physically handicapped employees on promotion under All India Service may be given posting at any place including the place from where they are promoted. Explanation : Physically handicapped employees for the purpose of the above paragraph means Orthopaedically handicapped employees who have a minimum of 40% permanent partial disability of both upper and lower limbs together. (Amendment dated 25.2.1984).

5.14. The promotion and posting orders shall be issued to the selected candidates at least 45 days in advance of their posting. However, for all purposes, promotions shall be effective from the actual date of joining at their place of posting, but in any case not earlier than the date specified in the promotion order.'

26. It was further submitted by Mr. Mullick that by virtue of continuous officiation, the petitioners had not accrued any right to be absorbed to the post of Junior Officer.

27. In paragraphs 15 and 16 of the affidavit-in-opposition, it has been contended on behalf of the respondent Bank that Bank had the power to discontinue such officiation of the writ petitioners.

28. In paragraph 23 of the said affidavit-in-opposition, it has been also contended that a forum under Industrial Disputes Act, 1947 is open to the writ petitioners and as such, the present writ petition is not maintainable.

29. Thereafter, Mr. Mullick referring to the judgment of the Supreme Court in the case of S.B. Patwardhan v. State of Maharashtra, reported in : [1977]3SCR775 , which was referred by the Court, submitted that the said judgment had no manner of application in the facts of the present case.

30. In the said judgment, the validity of Bombay Service of Engineers (Class I and Class II) Recruitment Rules, 1960 and particularly the validity of Rule 8(iii) was challenged. In the said case, Supreme Court, inter alia, held that the said rule was violative of Articles 14 and 16 of the Constitution.

31. Referring to the prayers made in the writ petition, Mr. Mullick submitted before this Court that the petitioners in the present writ petition have prayed for an order of regularisation in the posts of Junior Officers on the ground that they have been officiating in the said posts continuously for a long period of time and it is not the petitioners' prayer that they should be promoted to the post of Junior Officers of the said Bank.

32. Mr. Mullick further submitted that if this Hon'ble Court allows the writ petition and directs absorption and/or regularisation of the writ petitioners as Junior Officers, that will create tremendous administrative anarchism. First of all, it will have a repurcussion across the territorial jurisdiction of this Hon'ble Court on all India basis. Secondly, the Promotion Agreement dated December 20, 1975, would be converted into a scrap of paper and would practically be nullified although vires of the said Agreement is not under challenge before this Hon'ble Court. Thirdly, there will bound to be supersession of large number of clerks in other branches or offices who are senior to the writ petitioners in common seniority list, as prescribed in the Clause 1.3 of the agreement. Fourthly, the other clerks who are officiating to the post of Junior Officers in other branches and offices of the Respondent Bank would make similar grievance.

33. Before parting, Mr. Mullick submitted that the petitioners' claim in reality is a claim for promotion in a circuitious way.

34. After having heard the rival submissions of both the parties, it has, therefore, become necessary for this Court to arrive at a decision as to whether the petitioners are entitled to be permanently absorbed in the post of Junior Officers and further whether the petitioners can claim for promotion to the post of Junior Officers in view of the catena of decisions cited by Mr. De, referred to hereinbefore.

35. In deciding the said point, this Court observed that the concept of promotion and regularisation are two different things. The distinction of promotion and confirmation has been discussed in the case of A.K. Subraman v. Union of India, reported in : (1975)ILLJ338SC . In paragraph 22 of the said judgment, the Supreme Court held that the tests to be applied for the purpose of 'promotion' and 'confirmation' are entirely different. When promotion is made by selection, it is passed on the assessment of the relative merit from a field of choice consisting of senior most persons in the lower cadre upto about five or six times the number expected vacancies, while for confirmation and regularisation the only aspect considered is whether the performance of the incumbent is satisfactory and there is nothing objectionable from the vigilance angle.

36. In the present case it appears that for last 7 years, the petitioners' services have been obtained by the Respondent Bank as Junior Officer and as such, by a sudden direction issued through the Annexure 'B' to the writ petition, their services cannot be and should not be converted to Senior Clerks, as in my view, the present writ petitioners have accrued a right to the post of Junior Officer, by reason of their uninterrupted officiation in the post of Junior Officer for last 7 years.

37. Further, in my view, the present petitioners are entitled to regularisation of their services because of their continuous discharging duties for a period of more than 7 years, in the post of Junior Officers in view of the following decisions :-

1. Jacob M. Pathuputambil v. Kerala Water Authority (supra),
2. Karnataka State Private College Stop-gap Lecturers Association v. State of Karnataka (supra),
3. P.W.D. Literate Daily Wage Employees' Association and Ors. v. State of Karnataka (supra),
4. U.P. Income Tax Department Contingent Paid Staff Welfare Association v. Union of India (supra),
5. Delhi Municipal Karmachari Ekta Union v. P. D. Singh (supra),

6. Daily Rated Casual Labourers employed under P & T Department through Bhartiya Dak Tar Mazdoor Manch v. Union of India (supra),

7. S. B. Patwardhan v. State of Maharashtra (supra).

38. This Court is further of the view that the petitioners in the instant case did not claim for promotion to the post of Junior Officers but, inter alia, prayed for regularisation and/or absorption to the said post because of their continuous discharging of duties as Junior Officers for more than 7 years and, as such, the rotational transfer order dated August 14, 1992, cannot be sustained in law and is being quashed by issuance of appropriate Writ of Certiorari.

Let a writ in the nature of Mandamus be issued directing the respondents and each one of them not to give any effect or further effect to the rotational transfer order dated August 14, 1992, Annexure 'B' to the writ petition, in respect of the present writ petitioners.

The writ petition is allowed to the extent indicated above.

There will be no order as to costs.

Let xerox copy of this order be supplied to the learned Advocate for the petitioners, on usual undertaking.

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