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Bashir Ahmad Bawan Vs. State and ors.

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Court : Jammu and Kashmir

Decided On : Apr-09-2003

Reported in : 2003(3)JKJ23

Judge : Syed Bashir-Ud-Din and; Y.P. Nargotra, JJ.

Acts : Constitution of India - Article 226

Appeal No. : LPA No. 2/2003

Appellant : Bashir Ahmad Bawan

Respondent : State and ors.

Advocate for Def. : M.H. Attar and; A.M. Magray, Advs.

Advocate for Pet/Ap. : R.A. Jan, Adv.

Disposition : Appeal dismissed

Judgement :

Nargotra, J.

1. By this letters patent appeal the legality of order dated 16th of January 2003 passed by Ld. single Judge, whereby interim relief sought by the writ petitioners/appellants has been refused, is being questioned.

2. The dispute in the instant case is to the seniority of Assistant Engineers between direct recruits and promotees. SRO 380 dated 6th of July 1978 provided for the appointment of Assistant Engineers from three sources in the ratio 20% direct, 60% by promotion from the degree holder Junior Engineers and 20% by promotion from diploma holder Junior Engineers. The private respondents applied for appointment in direct recruitment quota in pursuance of the advertisement issued by Public Service Commission some where in 1980. They were interviewed and were kept in waiting list whereas about 11 candidates came to be appointed direction till 1986, whereafter Government promoted 85 Junior Engineers and 24 Sectional Officers. Private respondents filed three writ petitions SWP No. 138/86, 597/87 and 742/1990 seeking a direction for their appointments. All the three writ petitions were allowed and consequently all the three private respondents came to be appointed.

3. The following direction passed by this Court need be noticed, in SWP No: 597/87:

'Consequently the petition is allowed and respondents are directed to consider the case of the petitioner also for appointment against the category of direct recruits in the selection list of 1982, appoint him appropriate seniority amongst his colleagues. The whole exercise being done within three months from today.'

4. In the year 2000 Suraj Parkash's Judgment reported in AIR 2000 SC 2386 came to be passed, where by some directions and guidelines concerning appointments and regularisation etc. were issued to the State Government. The State Government in compliance to the judgments of this Court and the Hon'ble Supreme Court issued an Order No. 386-PDD dated 5.12.2000 pursuant to the recommendations of PSC/DPC the appointments made in the cadre of Assistant Engineers were regularised. The appellants are promotees. They were regularised from 1.12.1985, whereas the private respondents direct recruits were regularised from 1.12.1987 and then private respondents were assigned Senior positions in comparison to the promotees in the seniority list.

5. The appellant promotees have challenged the seniority position of the private respondents in a writ petition before the Ld. Single Judge. They also sought

interim relief. The petitioner appellants have challenged the seniority of the respondents 4 and 5 in the writ. Ld. single Judge by his ad-interim order dated 19.9.2002 while issuing notice to the respondents stayed the operation of the seniority list for promotion to the higher post qua the consideration of respondents 3 to 5 till the next date of hearing.

6. The respondents 3 to 5 laid a motion/objections for vacation of the interim direction submitting that pursuant to the judgments passed in their writ petitions they were appointed and accordingly their seniority has been fixed and as such petitioners have no prima facie case in their favour.

7. Ld. Single Judge accepted the plea of the respondents and by the impugned order vacated the stay however subject to the condition that the respondents 3 to 5 if promoted to the higher post their promotion shall be subject to the outcome of the writ petition.

8. The contention of Ld. Counsel for the appellants is that the seniority of the respondents 3 to 5 has been fixed from the date on which they had not yet been appointed and as such is in violation to the law laid down by the Apex Court in the Suraj Parkash's judgment reported in AIR 2000 SC 2386. According to Ld. counsel the seniority under law car be fixed by taking into consideration the length of service rendered after the date of appointment and not from any other date. As the fixation of seniority of the respondents over the head of the appellants has been made from the date when they had not yet been appointed as such is illegal, therefore allowing further promotion of the respondents amounts to perpetuating the illegality. The impugned order therefore is unsustainable in law.

9. On the other hand the contention of the Ld. counsel for the respondents is that seniority has been fixed according to law and in compliance to the judgments of this Court passed in the writs of the respondents. Those judgments have attained finality and cannot be questioned indirectly by the appellants in the writ jurisdiction. The writ-petitioner/appellants have as such no legal footing to stand on much less to be entitled to interim relief.

10. Ld. Single Judge has taken into notice the Supreme court judgment rendered in Suraj Parkash's case reported in AIR 2000 SC 2386, in its application to the facts of the present case observing as follows:

'Much emphasis is laid on the judicial pronouncement handed down by the Apex Court in Suraj Prakash Gupta v. State of J&K;, AIR 2000 SC 2386 to canvass that a direct recruit cannot claim the seniority from a date prior to his appointment. Law is well settled that before applying the law, similarity of facts has to be ascertained and law will apply only if the facts are similar. The difficulty for the petitioners is that the facts of the writ petition are not similar to the case of Suraj Prakash Gupta and dissimilarity is evidenced even by the very averments made by the petitioners in the writ petition wherein it is specifically pleaded by them that they were adjusted on ad hoc/officiating basis on the posts of Assistant Engineers in the year 1985 and continued in the said capacity till 1987. Conversely the writ court declared the respondents 3 to 5 as rightful beneficiaries of the process of selection for the posts of Assistant Engineers concluded in the year 1982 by judgments of the Court which have attained finality. It is pertinent to mention here that in an attempt to escape the fall out of the judgments of the writ Court the Ld. counsel for the petitioners has contended that in absence of a definite direction in the operative part of the judgments of the writ court the respondent are not entitled to regularisation and seniority from 1984. The contention does not appear well founded because operative part of the judgment cannot be read in isolation of the context of the judgment. It is not only legitimate but proper as well to read the judgment in its context and reading of the judgment in its context and reading of the judgment as a whole leads to the conclusion that the writ court's direction confers a right of appointment upon the respondents from 1984 as direct recruits and entitles them to their placement in the seniority list on the basis of such year of appointment. It is also gathered from these judgments that official respondents had denied appointment to the respondents 3 to 5 in violation of the quota rule and such denial of appointment has not ben approved of by the writ court. The writ court has also arrived at a definite conclusion that last appointment from the selection list of 1982 was made in the year 1984. It was in the peculiar facts of the case that the High Court directed consideration for the appointment of the respondents 3 and 5 herein in the category of direct recruits from 1984 a date

subsequent to their selection. Not only this but the operative part of the judgment in writ petition 597/87 titled Tej Krishen Dhar v. State and Ors. is categoric and unambiguous to the effect that petitioner's (respondent 4 herein) appointment and seniority shall begin on the basis of his selection made in the year 1982 which entitles him to regularisation from 1984. Suffice it to say that the view taken is provisional in character and effect. The facts narrated in this para, are not true of Suraj Prakash Gupta's case where none of the parties had a judgment in his favour which had settled the date of appointment and seniority retrospectively and has attained finality having gone unchallenged. Thus, dissimilarity of facts is manifest.'

11. We find on record support to the above view of the Ld. Single Judge. The interim relief discretionary in nature as it is, is granted while taking into consideration the basis legal requirements applicable to the case that a strong prima facie case has been made out in as much as same can be accepted at its face value, without dwelling upon any critical evaluation and assessment of the facts alleged and that the balance of convenience too is on the side of the party seeking interim relief besides the irreparable injury likely to be caused being such, which cannot be compensated monetarily, in the event prayer for the relief is not granted. In AIR 1985 SC 330 the Apex Court held:

'We have come across cases where land reform and important welfare legislations have been stayed by courts. Incalculable harm has been done by such interim orders. All this is not to say that interim orders may never be made against public authority. There are, of course, cases which demand that interim orders should be made in the interests of justice. Where gross violation of the law and injustice are perpetuated or are about to be perpetuated. It is the bounded duty of the court to intervene and give appropriate interim relief. In cases where denial interim relief may lead to pubic mischief, grave irreparable private injury of shake a citizen' faith in the impartiality of public administration, a court may well be justified in ranting interim relief against the public authority. But since the law presumes that public authorities function properly bona-fide with due regard, to the public interest, a court must be circumspect in grating interim orders of far reaching dimensions or orders causing administrative burdensome inconvenience or orders preventing

collection of public revenue for no better reason than that the parties have come to the court alleging prejudicial inconvenience of harm and that the prima facie case has been shown. There can be and there are not hard and fast rules, But prudence discretion and circumspection are called for. There are several other vital considerations apart from the existence of a prima facie case. There is the question of balance of convenience. There is the question of irreparable injury. There is the question of public interest. There are many such factors worthy of consideration. We often wonder why in the case (of) indirect taxation where the burden has already been passed on to the consumer, any interim relief should at all be given to the manufacturer, dealer and like.'

12. In the present case the case of the petitioner hinges on the question as to from which date the private respondents are to be deemed to have been appointed for the purpose of fixation of seniority. The respondents were interviewed and selected in the wait list for the selections to be made in 1982. The posts in the direct quota were available but they were not appointed, and therefor, they had to approach this Court. This Court directed their appointment in consequence of which they have been appointed. The implication of such appointment is in issue in the writ petition which requires a serious consideration. The petitioner's case without determination of the aforesaid question cannot be accepted at its face value, in the interim stage,

13. The private respondents as on date occupy senior positions in the seniority list. Seniority is also one of the relevant factors for purposes of promotion. If the higher posts are not allowed to be filled up it is surely going to affect the smooth functioning of the department. Ordinarily if the interest of the petitioners can be protected the promotions to higher posts in our view should not be stopped. In our opinion the petitioners appellants have not in the present case been able to satisfy the aforementioned tests. Their interest has been fully protected by the Ld. Single Judge because the promotions to be made, have been made subject to the outcome of the writ petition. Therefore, we find no merit in this appeal as such dismiss the same.

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