

State of Uttarakhand and anr. Vs. Mohan Chandra Upreti

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Court : Uttaranchal

Decided On : Jun-10-2010

Judge : J.S. Khehar, C.J. and; Sudhanshu Dhulia, J.

Appellant : State of Uttarakhand and anr.

Respondent : Mohan Chandra Upreti

Advocate for Pet/Ap. : Mr. Manoj Tewari

Disposition : Appeal dismissed

Judgement :

J.S. Khehar, C.J.

CLMA No. 1105 of 2008

With

CLMA No. 4320 of 2010

1. Through Delay Condonation Application No. 1105 of 2008, the applicants/appellants have sought condonation of delay of 707 days in filing the main appeal. The primary basis of the delay, in filing the Special Appeal, has been depicted in paragraph 3 of the affidavit filed by Sri Vivek Pandey, Divisional Forest Officer, Forest Division Nainital. Paragraph 3 of the aforesaid affidavit is being extracted hereunder:

3. That the second appellant remained under a bonafide impression that by the steps taken by him the Hon'ble Court's judgment dated 3.3.2006 was complied with. However, on 12.12.2007 when the deponent contacted the State Counsel in connection with filing of counter affidavits to three writ petitions bearing numbers 355 (S/S) of 2006, 554 (S/S) of 2007 and 1617 (S/S) of 2007 whereby the concerned writ petitioners had prayed for a relief in terms of the impugned judgment dated 3.3.2006, the State Counsel after going through the relevant records suggested the deponent to first challenge the judgment dated 3.3.2006 and then file counter affidavit to the writ petitions.

2. The non-applicant/respondent has filed a reply/objection to the Delay Condonation Application No. 1105 of 2008, to repudiate the primary basis, whereby delay had been caused in preferring the Special Appeal. The non-applicant/respondent has responded to paragraph 3 of the Delay Condonation Application (extracted herein above) by recording the following objections:

4. That the contents of paragraph No. 3 of the affidavit in support of delay condonation application are misconceived inasmuch no ground has been suggested by the appellant for non-preferral of present appeal within time and the only alleged ground for non-preferral of Letters Patent Appeal (Special Appeal) within time as demonstrated in the appellant's Delay Condonation Application is that subsequently after about 1 year and 9 months, the State Counsel while drafting counters in Writ Petition No. 355 (SS) of 2006 came across the judgment impugned dated 3.3.2006 passed in petitioner's Writ Petition No. 342 (S/S) of 2005 and suggested to the appellants to challenge the order dated 3.3.2006 passed in petitioner's Writ Petition No. 342 (S/S) of 2005.

Deponent respectfully submits that the appellant has not only been callous and negligent in preferring the present appeal after about 2 years, but valuable rights have since accrued in favour of the answering respondent and if the present appeal is entertained, it would lead to great prejudice and injustice to the appellant.

3. The factual position (depicted in paragraph 3 extracted herein above) has not been contested by the non-applicant/respondent, except to assert, that the facts

depicted therein, depict the callous and negligent attitude of the appellants. In the totality of the facts and circumstances noticed herein above, it is clear, that the delay in filing the Special Appeal primarily rests on the shoulders of the Counsel representing the appellants, inasmuch as, he was unmindful of the order impugned in the Special Appeal and accordingly had not tendered his advice to prefer an appeal against the same. Surely, the appellants cannot be considered to be blameworthy for the same.

4. For the reasons recorded herein above, Delay Condonation Application No. 1105 of 2008 is allowed. Delay in filing the main Special Appeal is hereby condoned. CLMA No. 4320 of 2010 also stands disposed of.

Special Appeal No. 95 of 2010

5. Respondent Mohan Chandra Upreti was inducted into the service of the appellants as a Plantation Zamadar on 28.09.1965. It is not a matter of dispute, that the post of Plantation Zamadar is in Class III service. At the time of appointment of the respondent as Plantation Zamadar, one Uttam Singh Nayal was working as a Mali, in the same division in which the respondent was appointed as Plantation Zamadar. The post of Mali is undisputedly a part of Class IV service. In the aforesaid view of the matter, it is apparent, that at the time of induction of respondent Mohan Chandra Upreti in the employment of the appellants, he was holding a post in Class III service, whereas, Uttam Singh Nayal was holding a post in Class IV service. Uttam Singh Nayal came to be promoted as a Plantation Zamadar vide an order dated 09.08.1967. In sum and substance, therefore, it is apparent that Uttam Singh Nayal was promoted to the post of Plantation Zamadar almost two years after respondent Mohan Chandra Upreti was appointed as Plantation Zamadar.

6. A significant issue, that needs to be recorded while determining the present controversy, is that the original appointment of respondent Mohan Chandra Upreti and the aforesaid Uttam Singh Nayal (depicted in the foregoing paragraph) was in the temporary (non-confirmed) Soil Conservation Forest Division at Ranikhet. The aforesaid Ranikhet division was made permanent only in 1984.

7. Uttam Singh Nayal came to be transferred as Plantation Zamadar to the East Almora Forest Division. At the time of his transfer, the East Almora Forest Division was undisputedly a permanent division. Consequent upon his transfer to the East Almora Forest Division, Uttam Singh Nayal was confirmed against the post of Plantation Zamadar, w.e.f. 01.04.1973. It will be relevant to notice, that on the date of confirmation i.e. 01.04.1973, the aforesaid Uttam Singh Nayal was working in the temporary (non-confirmed) Soil Conservation Forest Division at Ranikhet.

8. Onward promotion from the post of Plantation Zamadar is to the post of Forester. The post of Forester is a circle cadre post, whereas, the post of Plantation Zamadar is a divisional cadre post. All Plantation Zamadars, falling in one circle, irrespective of their divisions, are eligible for onward promotion to the post of Forester, falling within the circle in which their division falls. In the process of promotion to the post of Forester, the claim of Uttam Singh Nayal was considered and he was granted promotion as Forester w.e.f. 25.05.1976. On the date of his promotion, as a matter of fact, he was still working in the temporary (non-confirmed) Soil Conservation Forest Division at Ranikhet, inasmuch as, Uttam Singh Nayal was transferred to the East Almora Forest Division only on 16.12.1977. Yet, he came to be promoted to the post of Forester w.e.f. 25.05.1976.

9. Respondent Mohan Chandra Upreti claimed promotion to the post of Forester, with effect from the date his junior Uttam Singh Nayal had been promoted as such. Since his claim was not being considered, he approached this Court by filing Writ Petition (S/S) No. 4493 of 2001. The aforesaid writ petition was disposed of by this Court vide an order dated 21.06.2004. A perusal of the order dated 21.06.2004 reveals, that the appellants herein were directed to consider the claim of promotion of respondent Mohan Chandra Upreti notionally. The order dated 21.06.2004 was not assailed by the appellants herein. The same was, however, assailed by respondent Mohan Chandra Upreti by filing Special Appeal No. 90 of 2004. The aforesaid Special Appeal was dismissed by a Division Bench of this Court on 02.12.2004, by passing the following order:

1. Heard Mr. Manoj Tewari, Learned Counsel for the appellant and Mr. K.P. Upadhyaya, learned Brief Holder for the State.
2. The appeal has no merits whatsoever. In fact, the petitioner i.e. the appellant herein has got more than what he actually deserved in view of the fact that the learned Single Judge has directed the consideration of his notional promotion.
3. The petitioner's case is that he is entitled, not only to the notional promotion, but also to the actual promotion and thereby, would be entitled to get all the monetary benefits. The petitioner, not having challenged his supersession which is somewhere in 1976, that relief could not have been given to the petitioner. The petitioner did not choose to challenge the supersession in time. It is, probably, after the petitioner has retired that it dawned upon the petitioner to claim the seniority or as the case may be, the deemed date of promotion.
4. We are not, at all, impressed by the writ petition. There is no reason to interfere with the order passed by the learned Single Judge. The appeal is dismissed.
10. Since the order dated 21.06.2004 had not been set-aside in Special Appeal No. 90 of 2004, the claim of the respondent Mohan Chandra Upreti was considered for promotion to the post of Forester, with effect from the date his junior Uttam Singh Nayal had been promoted as such, namely, w.e.f. 25.05.1976. In the process of consideration, appellant No. 2, i.e. the Conservator of Forest, South Kumaon Circle, Nainital, arrived at the conclusion, that the respondent herein was not entitled to promotion to the post of Forester w.e.f. 25.05.1976, i.e. the date when Uttam Singh Nayal was promoted as such. The aforesaid determination was rendered by an order dated 28.02.2005.
11. The order dated 28.02.2005 was assailed by respondent Mohan Chandra Upreti, by filing Writ Petition (S/S) No. 342 of 2005. The aforesaid writ petition was allowed by a learned Single Judge of this Court on 03.03.2006. While allowing the aforesaid writ petition, a writ in the nature of mandamus was issued to the appellants herein, directing them to grant notional promotion to respondent Mohan Chandra Upreti to the post of Forester, w.e.f. 25.05.1976. The appellants herein were also directed to release all consequential benefits to the respondent herein,

based on his notional promotion to the post of Forester w.e.f. 25.05.1976.

12. Through the instant Special Appeal, the appellants have assailed the order passed by this Court dated 03.03.2006, allowing Writ Petition (S/S) No. 342 of 2005.

13. The first contention advanced by the Learned Counsel for the appellants is based on the order dated 02.12.2004, passed in Special Appeal No. 90 of 2004. It is the vehement contention of the Learned Counsel for the appellants, that notional promotion could not have been granted to the respondent, in view of the observations recorded in paragraph 3 of the order dated 02.12.2004.

14. Having considered the first submission advanced by the Learned Counsel for the appellants, we are satisfied, that by the order dated 02.12.2004 passed in Special Appeal No. 90 of 2004, this Court did not upset the order passed by the learned Single Judge on 21.06.2004, whereby Writ Petition (S/S) No. 4493 of 2001 was disposed of. In sum and substance, therefore it is apparent, that the direction issued by this Court on 21.06.2004, to consider the claim of the respondent for notional promotion to the post of Forester, remained untouched. In fact, this is also apparent from the observations recorded in paragraph 2 of the order dated 02.12.2004 (already extracted herein above), whereby Special Appeal No. 90 of 2004 was dismissed. In view of the above, we find no merit in the first contention advanced by the Learned Counsel for the appellants.

15. The second contention advanced by the Learned Counsel for the appellants is based on the fact, that respondent Mohan Chandra Upreti was appointed in the temporary (non-confirmed) Soil Conservation Forest Division at Ranikhet. It is the submission of the Learned Counsel for the appellants, that since the aforesaid Soil Conservation Forest Division was made permanent only w.e.f. 1984, respondent Mohan Chandra Upreti could be considered for confirmation/substantive appointment only w.e.f. 1984 and not prior thereto. As such, it is submitted that the claim of respondent Mohan Chandra Upreti was not comparable with the rights vested in Uttam Singh Nayal, who had been transferred on 16.12.1977 to the East Almora Forest Division, which was a permanent forest division.

16. The instant submission advanced by the Learned Counsel for the appellants is clearly unacceptable. If the submission advanced by the Learned Counsel for the appellants was legally justifiable, Uttam Singh Nayal could not have been confirmed w.e.f. 01.04.1973, inasmuch as, on 01.04.1973, he was still a member of the temporary (non-confirmed) Soil Conservation Forest Division, Ranikhet. The submission made by the Learned Counsel for the appellants is further more unacceptable, on account of the fact, that Uttam Singh Nayal was promoted as Forester w.e.f. 25.05.1976, on which date also, he was still a member of the temporary (non-confirmed) Soil Conservation Forest Division, Ranikhet. If Uttam Singh Nayal could have been confirmed and promoted with effect from a date prior to the date of his appointment in the East Almora Forest Division, which according to the appellants, was a permanent division, the same could be done for respondent Mohan Chandra Upreti as well.

17. There is yet another reason for not accepting the submission advanced by the Learned Counsel for the appellants. In paragraphs 22 and 23 of the writ petition, it was expressly averred by the respondent herein, that non-confirmed Plantation Zamadars were promoted to the post of Forester in 1965 and even thereafter. Paragraphs 22 and 23 of the writ petition are being extracted hereunder:

22. That it may further be stated here that the confirmation has never been a consideration for promotion of the post of Forester. In the year 1965, 4 persons, namely, Beer Singh Bisht, Pitamber Pandey, Jwala Dutt Bhatt, Deviki Nandan Joshi, were promoted on the post of Forester from the post of Plantation Zamadars. They were not confirmed on the post of Plantation Zamadars.

23. That after 1965 also some persons, namely, Sri Kailash Giri Goswami, Dhyan Singh Mandrawal, Ganesh Dutt Pujari and Ishwari Lal Arya who were also posted in Additional Soil Conservation Division, Ram Nagar (Nainital) were promoted on the post of Forester from the post of Plantation Zamadars. These persons were not confirmed on the post of Plantation Zamadar. Similarly, other persons have also been promoted on the post of Foresters who were not confirmed.

The response thereto was recorded in paragraph 18 of the counter affidavit filed by the appellants herein. Paragraph 18 of the counter affidavit is also being

extracted hereunder:

18. That the averments made in Paragraph 22 and 23 of the writ petition are baseless and misconceived hence denied. In reply it is clarified that before 18 October, 1980 no service rules were in force for the members of Lower Subordinate Forest Cadre like Forest Guard and Plantation Zamadar/Moharrirs. Therefore, the allegations made by the petitioner in the Paragraph under reply are not tenable.

It is, therefore, clear that it was not imperative for a person, claiming promotion from the post of Plantation Zamadar to the post of Forester, to be confirmed against the post of Plantation Zamadar. Therefore, the assertion at the hands of the appellants, that the claim of the respondent could not be considered for promotion to the post of Forester merely on account of the fact that he was not confirmed against the post of Plantation Zamadar, is not acceptable in law.

18. There is yet another reasons for not accepting the contention advanced by the Learned Counsel for the appellants, that substantive appointment against the post of Plantation Zamadar was a pre-requisite for promotion to the post of Forester. Promotion to the post of Forester, we are informed, at the relevant time, was regulated by the Subordinate Forest ('Rangers', 'Deputy Rangers' and 'Foresters') Service Rules. The aforesaid Service Rules were notified on 17.04.1951. The aforesaid Rules shall hereinafter be referred to as the '1951 Rules'. Rule 5(C) deals with the issue of promotion to the post of Forester. Rule 5(C) is being reproduced hereunder:

C-Foresters

1 By promotion of

(i) forest guards and other subordinates of long and meritorious service and holding the Hindustani Middle Examination Certificates.

(ii) Younger Forest guards and other subordinates holding High School. Provided that the Forest Guards of tried ability and obity, who were recruited to the service before September 1948, would be eligible for promotion irrespective of the

educational qualifications possessed by them.

Note-Not more than fifty percent of the total number of posts of Foresters may be filled by promotion. 2- By directed appointment of candidates who hold the High School Examination Certificate (or equivalent qualification).

Note-Procedure regarding training of subordinates at the State Forests Training Class is given in the Forest manual.

It is not disputed at the hands of the Learned Counsel for the appellants, that the cadre of Plantation Zamadars and that of Forest Guards, depicted in Rule 5(C)(extracted herein above), is the same. Having perused Rule 5(C) of the 1951 Rules, we are satisfied, that confirmation or substantive appointment is not a pre-requisite for consideration of the claim of a Plantation Zamadar to the post of Forester. Thus viewed, the denial of the claim of the respondent for promotion to the post of Forester, merely on account of the fact, that he had not been confirmed, is unacceptable in law.

19. Having arrived at the conclusion, that the claim of respondent Mohan Chandra Upreti was liable to be considered for promotion to the post of Forester, it still remains to be decided, whether or not, the respondent's claim was liable to be considered with the claim of Uttam Singh Nayal. The factual position, depicted herein above, reveals that when respondent Mohan Chandra Upreti was appointed by way of direct recruitment as Plantation Zamadar, the aforesaid Uttam Singh Nayal was holding the post of Mali. While the post of Plantation Zamadar is in Class III service, the post of Mali is in Class IV service. The aforesaid Uttam Singh Nayal was promoted to the post of Plantation Zamadar only on 09.08.1967, and that too, in the same division in which respondent Mohan Chandra Upreti was appointed. Between respondent Mohan Chandra Upreti and the aforesaid Uttam Singh Nayal, superiority has definitely to rest on the shoulders of respondent Mohan Chandra Upreti, firstly, on account of his having been appointed to a higher class of post as against Uttam Singh Nayal, and secondly, on account of his having been appointed as Plantation Zamadar almost two years prior to the appointment of the aforesaid Uttam Singh Nayal against the said post. On account of his aforesaid superiority in the feeding cadre, namely, the cadre of Plantation

Zamadars, respondent Mohan Chandra Upreti was liable to be considered for promotion to the post of Forester, when the aforesaid Uttam Singh Nayal was considered and promoted as such. Accordingly, the determination rendered by the learned Single Judge, allowing notional promotion to respondent Mohan Chandra Upreti to the post of Forester w.e.f. 25.05.1976, when Uttam Singh Nayal was promoted as such, cannot be faulted with.

20. For the reasons recorded herein above, we find no merit in this Special Appeal and the same is accordingly hereby dismissed.

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