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Court : Delhi

Decided On : May-30-2011

Judge : Sanjiv Khanna, J.

Appeal No. : W.P.(C) No. 1353/2011; W.P.(C) No. 2020/2011; W.P.(C) No. 2855/2011

Appellant : Uoi and anr.

Respondent : Indian Railways Civil Engineering Officer Association and ors.

Advocate for Def. : Mrs. Jyoti Singh; Mr.Amandeep Joshi; Mr. Naresh Kaushik; Mr. Aditya Vikram, Advs.

Advocate for Pet/Ap. : Mr. R.V. Sinha, Adv.

Judgement :

1. Regard being had to the similarity of issue that has emerged in these writ petitions, they were heard together and are being disposed by a common order. The fulcrum of controversy rests upon the adjudication of the issue whether the delay in convening the meetings of the Departmental Promotion Committees (DPCs) by the respondent, Railway Board, was due to reasons beyond control or because of administrative delay for which the respondent before the Central Administrative Tribunal (for short the tribunal) was held to be responsible and what

would be the consequence if the delay was caused due to the employer. At the very outset, we may note with profit that the Original Application No.2140/2009 preferred by Mr. N.P. Gupta and others which is the subject matter of WP(C) No.2855/2011 was dismissed by the tribunal on the foundation that the delay caused in holding of the meetings of the DPCs was genuine and beyond the control of the authorities and, therefore, the promotion would be prospective from the date of recommendation of the DPCs.

2. The tribunal in other original application directed that benefit of judgment dated 29.1.2010 rendered in Y.S. Choudhary, the applicant in O.A. No.280/2008 be given to the applicants by promoting them to Group A post with effect from 1.4.2002 with all consequential benefits.

3. For the sake of clarity and convenience, we think it appropriate to refer to the facts in WP(C) No.2020/2011 which pertains to the case of Y.S. Choudhary and others.

4. The applicants Y.S. Choudhary and four others were Group B officers and were substantively appointed in Group A/Junior Scale of the IRSE with effect from 14.1.2005 vide Ministry of Railways Notification dated 23.03.2005 and their revised inter se seniority in IRSE on their promotion to Group A from Group B was circulated vide Ministry of Railways notification dated 18.5.2006. They were aggrieved by the delayed induction from Group B to Group A. Being dissatisfied, they approached the tribunal in OA No. 280/2008 for setting aside the notification dated 18.5.2006 issued by the respondent inducting the applicants in Group A Junior Scale of IRSE with effect from 14.1.2005 instead of 2002-03 when the vacancies arose and further to command the respondents to provide the promotion/induction in Group A Junior Scale IRSE to the applicant from the date when the vacancies arose in 2002-03 instead from 14.1.2005 when the DPC was conducted.

5. It was put forth before the tribunal that the applicants requested the respondents by submitting numerous representations requesting that their promotions be made effective from 1.4.2002 as the DPCs for induction to Group A for the vacancies of 2002-2003 ought to have conducted before December, 2001 to be effective from

1.4.2002 (for the vacancies of the year 2001, for panel of 2002-2003) but the respondents failed to take any action in this regard. It was put forth that when clear vacancies in Junior Scale Group A of IRSE were available and eligible Group B officer with the requisite non fortuitous service was also available, there was no justification for the delayed induction and the action of the respondent for delayed promotion to Group A Junior Scale of IRSE from Group B with effect from 14.1.2005 (instead of 1.4.2005) against the vacancies of 2002- 2003 is highly illegal and prejudicial to their interest. It was averred in the Original Application that the applicants had been inducted against the vacancies pertaining to the examination year 2001 (vacancies of 2002-2003) in the promotion segment of Group A Junior Scale of IRSE for the year 2002-03 and according to the guidelines of the Department of Personnel & Training (DOPT), the panel for the vacancy for the year 2002-03 should have been available on 1.4.2002 whereas it was made effective from 14.01.2005, the date of the DPC, as a consequence of which the applicants have been placed under the direct recruit IRSE officers of 1998 Officers Examination Batch, causing loss of more than three years in their seniority and future promotional prospects for no fault of theirs. It was contended before the tribunal that there were instructions of the DOPT to take advance action for filling up vacancies of a year and arrange DPCs of Group B officers for promotion to Group A officer well in time so as to be effective from the next calendar year but the respondents had failed to follow these instructions.

6. The tribunal had gone through the rival contentions raised at the Bar and discussed the authorities which were cited relating to grant of conferral of benefit of retrospective promotion relating to DPC and the requirements of following the instructions of DOPT and eventually allowed the original application in part by quashing the notification dated 18.05.2006 and proceeded to direct as follows:

> **" . The respondents are directed to convene a review DPC to consider the promotion/induction of the applicants from the date when the vacancies arose in 2002-2003, and thereafter to pass appropriate follow up orders with regard to their seniority in Group A, subject to it being ensured that the seniority accorded**

does not result in the applicants superseding officers who were senior to them in Group B and have already been promoted to Group A. This may be done within a period of three months from the date of receipt of a copy of this order."

7. Be it noted, in paragraph 34 the tribunal has observed as follows:

" As regards the plea of non-joinder of necessary parties, i.e., the direct recruits, to the present proceedings, the applicants counsel in his written submissions has submitted that the direct recruits are not necessary parties to the present OA because the grievance of the applicants is against the respondents only as due to their illegalities and irregularities, delay occurred in holding the DPC in time and in support of this, he has relied on the Judgment of the Honble Supreme Court in Post-Graduate Institute of Medical Education and Research and Anr. vs. A.P. Wasan & Ors., (2003) 5 SCC 321. There is merit in the submission of the learned counsel for the applicant, and the same is accepted in the facts and circumstances of the present case."

8. Though the tribunal in the concluding paragraph has directed that a review DPC shall be convened to consider the promotion of the applicants therein from the date when the vacancies arose in 2002-03 and pass appropriate orders while ensuring that the seniority accorded does not result in the applicants superseding officers who are senior to them in Group B and had already been promoted to Group A, yet, we really fail to understand how the seniority would not be affected and further what would be the real fall out when they are placed below. The aforesaid direction is likely to create an anomalous situation. There may be other promotions in the meantime.

9. As is manifest, the tribunal has repelled the submission with regard to non-impleadment or non-joinder of the direct recruits as necessary parties on the ground that the grievance of the applicants was against the respondent only due to

their illegalities and irregularities, and delay occurred in holding the DPC on time. For the aforesaid purpose, the tribunal has placed reliance on the decision in A.P.Wasan & Ors. (supra) wherein a contention was raised by the affected parties that their career prospects had been jeopardized by the decision of the High Court without giving an opportunity of being heard to them. Their Lordships, in paragraph 23, repelling the said submission have held thus:

> **"23. The arguments of the appellants appear plausible but do not bear close scrutiny. It was not necessary for Respondent 1 to have impleaded the interveners nor can the High Courts decision be criticized because they were not made parties. The grievance of Respondent 1 was against the appellant Institute and its alleged policy to promote Technologist Grade II sectionwise. It was for the appellant Institute to have justified its action. The justification would serve to protect the interests of other employees if it were legally sustainable. If it is not legally sustainable it must be negated and not hearing of employees who may be affected as a result of the rejection of the justification, would not vitiate such negation. G.M., S.C.Rly. v. A.V.R. Siddhantti; (1974) 4 SCC 335, A. Janardhana v. Union of India; (1983) 3 SCC 601 andV.P.Shrivastava v. State of M.P.; (1996) 7 SCC 759. Furthermore, both K.S.Sharma and R.K.Goel whose stand on the promotional policy of the appellant Institute coincides with those of the interveners, were partners and had the opportunity of presenting their case. Besides, the Division Bench had merely reiterated the view taken in 1989 by the learned Single Judge when he granted relief to R.K.Sareen holding that promotions should be made cadrewise and not sectionwise. No protest was made by the interveners at that stage. They were content to allow the appellant Institute to appoint R.K.Sareen on such basis. They cannot now make a grievance that they were not heard before the Division Bench granted Respondent 1 the same relief."**

10. In this regard we may usefully refer to the ruling in V.P.Srivastava & Ors. (supra) wherein the Apex Court has held thus:

> **"14. The conclusion of the Tribunal that non-inclusion of the affected parties is fatal to the appellants case is also unsustainable in law. It is to be stated that the appellants do not challenge the so-called ad hoc appointments of the promotee respondents but they do challenge the position of the said ad hoc promotee respondents over the appellants in the seniority list. In other words the very principle of "determination of seniority" made by the State Government is under challenge and for such a case State is the necessary party who has been impleaded. It has been held by this Court in the case of G.M., South Central Rly. v. A.V.R.Siddhantti; (1974) 4 SCC 335:**
>
> **As regards the second objection, it is to be noted that the decisions of the Railway Board impugned in the writ petition contain administrative rules of general application, regulating absorption in permanent departments, fixation of seniority, pay etc. of the employees of the erstwhile Grain Shop Departments. The respondents-petitioners are impeaching the validity of those policy decisions on the ground of their being violative of Articles 14 and 16 of the Constitution. The proceedings are analogous to those in which the constitutionality of a statutory rule regulating seniority of government servant is assailed. In such proceedings the necessary parties to be impleaded are those against whom the relief is sought, and in whose absence no effective decision can be rendered by the Court. In the present case, the relief is claimed only against the Railway which has been impleaded through its representative. No list or order fixing seniority of the petitioners vis-a-vis particular individuals, pursuant to the impugned decisions, is being challenged. The employees who were likely to be affected as a result of the readjustment of the**

petitioners seniority in accordance with the principles laid down in the Boards decision of 16-10-1952, were, at the most, proper parties and not necessary parties, and their non-joinder could not fatal to the writ petition.

15. In the case of A.Janardhana v. Union of India, a similar contention was also repelled by this Court in the following words:

In this case, appellant does not claim seniority over any particular individual in the background of any particular fact controverted by that person against whom the claim is made. The contention is that criteria adopted by the Union Government in drawing up the impugned seniority list are invalid and illegal and the relief is claimed against the Union Government restraining it from upsetting or quashing the already drawn up valid list and for quashing the impugned seniority list.

Thus the relief is claimed against the Union Government and not against any particular individual. In this background, we consider it unnecessary to have all direct recruits to be impleaded as respondents.

16. Further in view of the finding of the Tribunal that Respondents 3 and 4 successfully safeguarded the interest of the promotees, the Tribunal erred in law in holding that non-inclusion of the affected parties is fatal to the proceeding. It has been held by this Court in the case of Prabodh Verma v. State of U.P.; (1984) 4 SCC 25, that:

"A High Court ought not to hear and dispose of a writ petition under Article 226 without the persons who would be vitally affected by its judgment being before it as respondents or at least some of them being before it as respondents in a

representative capacity if their number is too large to join them as respondents individually."

17. Even in Janardhana case referred to supra, this Court also rejected a similar objection on the ground that 9 of the direct recruits having been impleaded as party, the case of direct recruits has not gone unrepresented and therefore the non-inclusion of all the 400 and odd direct recruits is not fatal to the proceedings."

11. In Tridip Kumar Dingal and others v. State of West Bengal and others, (2009) 1 SCC 768, a two-Judge Bench of the Apex Court dealt with non-impleadment of affected persons and came to hold as follows: -

"Regarding protection granted to 66 candidates, from the record it is clear that their names were sponsored by the employment exchange and they were selected and appointed in 1998-99. The candidates who were unable to get themselves selected and who raised a grievance and made a complaint before the Tribunal by filing applications ought to have joined them (selected candidates) as respondents in the original application, which was not done. In any case, some of them ought to have been arrayed as respondents in a "representative capacity". That was also not done. The Tribunal was, therefore, wholly right in holding that in absence of selected and appointed candidates and without affording opportunity of hearing to them, their selection could not be set aside."

12. In Public Service Commission, Uttaranchal v. Mamta Bisht and others, (2010) 12 SCC 204, their Lordships have opined thus

"In Prabodh Verma v. State of U.P., AIR 1985 SC 167 and Tridip Kumar Dingal v. State of W.B., (2009) 1 SCC 768, it has been held that if a person challenges the selection process, successful

candidates or at least some of them are necessary parties."

13. In J.S. Yadav v. State of U.P. and another, 2011 (4) Scale 733, it has been ruled thus -

> **"In Service Jurisprudence if an unsuccessful candidate challenges the selection process, he is bound to implead at least some of the successful candidates in representative capacity. In case the services of a person is terminated and another person is appointed at his place, in order to get relief, the person appointed at his place is the necessary party for the reason that even if the Plaintiff/Petitioner succeeds, it may not be possible for the Court to issue direction to accommodate the Petitioner without removing the person who filled up the post manned by Plaintiff/Petitioner."**

14. In the case at hand, as is noticeable, the tribunal has repelled the plea of non-joinder of parties on the ground that the direct recruits were not necessary parties to the original application as the grievance of the applicant was against the respondents. The only illegalities and irregularities was the delay that occurred in holding the DPCs in time. For the aforesaid purpose, the tribunal has based its foundation on the decision rendered in A.P. Wasan and others (supra). On a perusal of the authorities in the field, it is quite vivid that unless the very principle of determination of seniority or promotion is called in question, the necessary parties are to be impleaded. If the policy is basically illegal or a rule is constitutionally invalid, then there may not be a necessity to implead an affected person but in the case at hand, the whole thing hinges on the fact whether the DPCs were belatedly conducted and whether the promotion relates back to the date of arising of the vacancy. This would certainly affect third persons who were appointed / promoted.

15. True it is, the tribunal has directed that their promotion shall relate back to the date of vacancy but they would not have seniority over others who were promoted earlier. But, this situation is inconceivable. This is likely to create anomaly. In our

considered opinion, the finding recorded by the tribunal on this score is absolutely pregnable and vulnerable and, accordingly, we set aside the same. Once we set aside this finding, other findings are to be set aside as the matter has to be remitted to the tribunal for a fresh adjudication after granting opportunity to the applicants therein to implead the affected persons as parties and thereafter proceed to deal with the matter in accordance with law.

16. In view of the aforesaid, the findings recorded in the case of Y.S. Chaudhary forming the subject matter of OA No. 280/2008 and OA No. 2140/2009 with OA No.2661/2010 are set aside and the matter is remanded to the tribunal to afford the applicants therein to implead the necessary parties and to proceed afresh.

17. As far as WP (C) No. 2855/2011 is concerned, it relates to the case of N.P. Gupta and others wherein the tribunal has recorded a finding that the delay that was caused in holding the meetings of the DPC was genuine and beyond the control of the respondents. The tribunal to arrive at the said conclusion has opined thus

> **"6. The facts in the instant OA are quite distinct. As a result of the judgement dated 04.08.1995, which was complied by the Respondents, orders of promotions issued in September, November, December 1992, February 1993 and March 1994 were cancelled and fresh orders for regular promotions and ad Honble Court promotions were issued from September 1995 to April 1996. In the process of readjustment and recalculation of vacancies, DPCs for the year 1994 and 1995 could not be held. As a result the other DPCs were also delayed. However, the proposals for the vacancy years 2001-02 and 2000-01 were also considered by the DPC held in March 2002. The judgement of the Honourable Supreme Court necessitated entire re-look at the promotions made from 1994 onwards up to the year 2000. There is no doubt that several complicated and complex issues arose as a result of this reconsideration. The suggestion of the**

Respondents to adjust the officers empanelled for the year 1996 onwards by a judgement against the vacancies of 1994 onwards was actuated by bona fide desire to cause least disturbance and protect the interest of the concerned officers. When the proposal was rejected by the UPSC, another alternative proposal was made, which was also rejected. With the advantage of the hindsight, these proposals may be considered to have been erroneous and wrong, but it cannot be said that there was any malafide of the Respondents in placing those proposals before the UPSC. Formulation and consideration of such proposals does take time because these have to be thought through as several complex issues are involved. It is not possible that immediately on receiving the advice of the UPSC, the alternative proposal should be ready the next day. While accounting for the time, we have to take into account the fact that administrative processes are such that the files have to travel from one level to the other, which would take some time. On the whole, it seems that the Respondents have been able to explain the reasons for delay in holding the meeting of the DPCs in a reasonable manner. There were certainly factors beyond the control of the Respondents. In view of this the judgement in Y.S. Chaudhary (supra) would not apply to the facts of this case, as the explanation given for delay in the former case was quite different from the explanation given for delay in the instant OA.

7. It may be useful at this stage to advert to the Office Memorandum dated 29.07.2004, which is extracted below:

" .Normally, there should be no delay in holding of DPCs and the system should be so streamlined that the delay, if any, are minimized. In fact, ideally the DPC should be held as per the model calendar prescribed vide Do PT OM dated 8th September, 1998.

However, there may still be a case where the DPC may be delayed for a valid reason. If the Department is unable to hold the DPC in time for any bonafide reason, it does not give rise to any vested right for promotion from the date/year of vacancy in terms of some of pertinent judgments enclosed."

(emphasis added)

The Office Memorandum of the DOP&T regarding the guidelines for the meet of the DPCs provide that:

"6.4.1 Where for reasons beyond control, the DPC could not held in a year (s), even though the vacancies arose during that year (or years), the first DPC that meets thereafter should follow the following procedures:-

(i) Determine the actual number of regular vacancies that arose in each of the previous year(s) immediately preceding and the actual number of regular vacancies proposed to be filled in the current year separately.

(ii) Consider in respect of each of the years those officers only who would be within the field of choice with reference to the vacancies of each year starting with the earliest year onwards.

(iii) Prepare a Select List by placing the select list of the earlier year above the one for the next year and so on."

It is further provided that:

"6.4.4 Promotions only prospective:- While promotions will be made in the order of the consolidated select list, such promotions will have only prospective effect even in cases where the vacancies relate to earlier year (s)."

(Source: Swamys complete manual on establishment and administration, 10th edition, 2006, pages 857 to 860)

We are of the considered opinion that the delay caused in the holding of the meetings of DPCs was genuine and beyond the control of the Respondents. In view of this the instructions at paragraph 6.4.4 would apply and the promotion would be prospective from the date of recommendations of the DPC.

8. In view of this the OA is found to be without any merit and is, therefore, dismissed. There will be no orders as to costs."

18. In our considered opinion, there is no reason to interfere with the said finding of fact and, accordingly, we concur with the same, as a consequence of which the writ petition has to pave the path of dismissal and, accordingly, it is so directed.

19. Resultantly, WP (C) No. 1353/2011 and WP (C) No.2020/2011 are allowed to the extent indicated hereinbefore and WP (C) No.2855/2011 is dismissed. The parties shall bear their respective costs.

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