

Uoi and Others Vs. Bansi Dhar

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Court : Delhi

Decided On : Mar-29-2012

Judge : Badar Durrez Ahmed & V.K.Jain

Appeal No. : W.P.(C) 1584 OF 2012

Appellant : Uoi and Others

Respondent : Bansi Dhar

Judgement :

V.K. JAIN, J.

1. This writ petition is directed against the order dated 19.09.2011 passed by the Central Administrative Tribunal, Principal Bench, whereby OA No. 2760/2010, filed by the respondent was allowed. The brief facts giving rise to the filing of the petitioner are as under:-

On 12.06.1978, the respondent was engaged as a Mazdoor in the pay scale of Rs 70-1-80 (196-3-220). The post of Mazdoor was upgraded and re-designated as Motor Pump Attendant (MPA) w.e.f. 12.06.1981 in the pay scale of Rs 210-290. On 02.10.1999, the respondent, on passing the prescribed trade test was promoted as Fitter General Mechanic HS (II) in the pay scale of Rs 4000-6000 w.e.f. 02.10.1999. On 12.06.1995, he was granted second ACP benefit in the pay scale of Rs 5000-150-8000 on completion of 24 years of service. An amount of Rs.55430 representing 40% of the arrears, consequent to fixation of his pay w.e.f.

01.01.2006 consequent to acceptance of the recommendations of the 6th Pay Commission, was paid to the respondent on 18.10.2008.

The Audit Authority, however, was of the view that the respondent was not entitled to second ACP since he had already been granted two promotions first as Motor Pump Attendant and the second as Fitter General Mechanic HS(II). Consequently, an amount of Rs 64,975/- was adjusted by the petitioners while paying the balance 60% of the arrears of pay to him.

2. The Tribunal noted that the second ACP granted to the respondent had never been withdrawn and in fact change of pay scale w.e.f 17.06.1981 was considered by authority only as re-classification/re-designation. The Tribunal felt that the audit authorities have considered the aforesaid change as promotion without giving any reason and the contention of the audit authorities was baseless and contrary to the petitioners' own record. The Tribunal was of the view that only one promotion had been granted to the respondent and that was to the position of FGM (HS). The Tribunal consequently allowed the OA and directed the petitioners before this Court (respondents in the OA) to re-fix the respondent's pay in the pay scale of Rs 5000-6000 w.e.f. 12.06.2002 when he completed 24 years of service and also pay to him in the revised pay scale in terms of the recommendations of the 6th Pay Commission w.e.f. 01.01.2006.

3. It is not in dispute that the respondent was promoted to the position of Fitter General Mechanic HS (II) w.e.f 02.10.1999. The only question before us is as to whether the respondent was promoted from the position of Mazdoor to that of Motor Pump Attendant w.e.f. 12.06.1981 as is claimed by the petitioner or there was no promotion as such to the respondent and all the posts of Mazdoor were upgraded and re-designated as Motor Pump Attendant, as was claimed by the respondent.

4. The distinction between upgradation and promotion was examined by Supreme Court in **Bharat Sanchar Nigam Ltd. v.R. Santhakumari Velusamy and Ors. 2011 (10) SCALE 136.** In that case, there were four grades of employees of Telecom Departments and promotions from one grade to higher grade were made on the basis of the seniority/departmental examination. 'One Time-Bound

Promotion' scheme (OTBP) was introduced in the year 1983-84 under which the employees who had completed 16 years of service in the grade were placed in the next higher grade. After some time, the Government decided to have a Biennial Cadre Review (BCR) under which a specified percentage of posts could be upgraded on the basis of functional justification. Under the said scheme, employees, who were in service on 01.01.1990 and who had completed 26 years of service in the basic cadre, were to be screened to assess their performance and determine their suitability for advancement and if found suitable, they were to be upgraded in the higher scale. The upgradation was restricted to 10% of the posts in Grade III. Vide Circular dated 11.03.1991, the Government issued some clarification regarding designations by another Circular dated 13.12.1995. The Government formulated a procedure for promotion to Grade IV. Under the said procedure, promotions to Grade IV were to be based on seniority in the basic grade, from amongst the officers in Grade III, subject to fitness determined in the usual manner of OTBP. By a clarificatory Circular dated 01.03.1996, the Government issued a clarification that promotion to Grade IV would be given from amongst officials in Grade III on the basis of their seniority in the basic grade, subject to fulfillment of other conditions and that normal rules of reservation would apply to promotions in Grade IV. The Circular dated 01.03.1996 was challenged by All India Non SC/ST Telecom Employees Association on the ground that principles of reservation would not apply for upgradation of existing posts which did not carry any change in duties and responsibilities. The Ahmedabad Bench of the Tribunal held that the Department could not apply reservation rules while upgrading the post in the BCR Scheme. The writ petition filed by the Government was dismissed by the Gujarat High Court. The Government then issued an order directing that review DPC be held and all ineligible officers, wrongly promoted to Grade IV by application of reservation roster, be reverted and all eligible officers should be placed in Grade IV. As a consequence, the contesting respondents were reverted from Grade IV to Grade III. Being aggrieved, they filed applications before the Madras Bench of the Tribunal, challenging the validity of the order, whereby they were reverted. A Full Bench of the Madras Tribunal differed from the decision of its Ahmedabad Bench and held that the appointment was a non-promotional appointment and distinction between upgradation and promotion

based on the nomenclature only does not appear to be tenable. The Government was directed to restore the contesting respondents to their promoted posts. The writ petition filed by the Telecommunication Department was dismissed by Madras High Court. The order of the High Court was challenged before the Supreme Court and it was contended that there was a clear distinction between upgradation and promotion. It was submitted that upgradation does not involve promotion to a higher position as the pedestal of the employees remains the same and he is only conferred some benefit by granting a higher pay scale to overcome stagnation. The appellants before the Supreme Court contended that since there was only upgradation of existing post with creation of additional post, principles of reservation would not apply. Supreme Court, after reviewing the case law on the subject, was of the view that even in cases where no additional posts were created, but, a process of selection was involved in the upgradation, the process has to be considered as a process of promotion and not as an upgradation simplicitor and, therefore, the principle of reservation would be attracted. The following principles were laid down by the Court, indicating the distinction between the promotion of upgradation:-

“(i) Promotion is an advancement in rank or grade or both and is a step towards advancement to higher position, grade or honour and dignity. Though in the traditional sense promotion refers to advancement to a higher post, in its wider sense, promotion may include an advancement to a higher pay scale without moving to a different post. But the mere fact that both that is advancement to a higher position and advancement to a higher pay scale - are described by the common term „promotion?, does not mean that they are the same. The two types of promotion are distinct and have different connotations and consequences.

(ii) Upgradation merely confers a financial benefit by raising the scale of pay of the post without there being movement from a lower position to a higher position. In an upgradation, the candidate continues to hold the same post without any change in the duties and responsibilities but merely gets a higher pay scale.

(iii) Therefore, when there is an advancement to a higher pay scale without change of post, it may be referred to as upgradation or promotion to a higher pay

scale. But there is still difference between the two. Where the advancement to a higher pay-scale without change of post is available to everyone who satisfies the eligibility conditions, without undergoing any process of selection, it will be upgradation. But if the advancement to a higher pay-scale without change of post is as a result of some process which has elements of selection, then it will be a promotion to a higher pay scale. In other words, upgradation by application of a process of selection, as contrasted from an upgradation simplicitor can be said to be a promotion in its wider sense that is advancement to a higher pay scale.

(iv) Generally, upgradation relates to and applies to all positions in a category, who have completed a minimum period of service. Upgradation, can also be restricted to a percentage of posts in a cadre with reference to seniority (instead of being made available to all employees in the category) and it will still be an upgradation simplicitor. But if there is a process of selection or consideration of comparative merit or suitability for granting the upgradation or benefit of advancement to a higher pay scale, it will be a promotion. A mere screening to eliminate such employees whose service records may contain adverse entries or who might have suffered punishment, may not amount to a process of selection leading to promotion and the elimination may still be a part of the process of upgradation simplicitor. Where the upgradation involves a process of selection criteria similar to those applicable to promotion, then it will, in effect, be a promotion, though termed as upgradation.

(v) Where the process is an upgradation simplicitor, there is no need to apply rules of reservation. But where the upgradation involves selection process and is therefore a promotion, rules of reservation will apply.

(vi) Where there is a restructuring of some cadres resulting in creation of additional posts and filling of those vacancies by those who satisfy the conditions of eligibility which includes a minimum period of service, will attract the rules of reservation. On the other hand, where the restructuring of posts does not involve creation of additional posts but merely results in some of the existing posts being placed in a higher grade to provide relief against stagnation, the said process does not invite reservation.”

As regards the case before it, Supreme Court noted that the BCR scheme did not involve creation of additional posts but merely restructured the existing posts, as a result of which 10% of the posts in Grade III were placed in a higher grade (Grade IV) to give relief against stagnation and the purpose of screening was only to find out whether the service record of the employees contained any adverse entries or whether the employee had suffered punishment. It did not involve consideration of comparative merit or selection. The Court, therefore, held that BCR Scheme was an upgradation scheme to give relief against stagnation.

5. In the case before this Court, it is not the case of the petitioners that re-designation and upgradation from the post of Mazdoor to that of Motor Pump Attendant was not made available to every employee, who at that time was working as Mazdoor and was available only to some of them. This is also not the case of the petitioners that an element of selection was involved in upgradation and re-designation from the position of Mazdoor to that of Motor Pump Attendant. This is not their case that some eligibility condition such as a higher educational qualification and/or experience was prescribed for upgradation and re-designation as Motor Pump Attendant and only those who fulfilled the eligibility condition were given the benefit of the upgradation. If it was a case of upgradation simplicitor, benefit of which was available to every Mazdoor, it cannot be said to be a promotion in terms of principles laid down by Supreme Court in **Bharat Sanchar Nigam Limited** (supra). Vide principle (iv) Supreme Court observed that even upgradation can be restricted to a percentage of post in a cadre with reference to the seniority and it will be an upgradation simplicitor. The Court was of the view that only if there is a process of selection and consideration of comparative merit or suitability for granting the upgradation or benefit of advancement to a higher pay-scale, it will be a case of promotion. In the case before us, this is not the case of the petitioners that they had evaluated the comparative merits of those who were working in the cadre of Mazdoor or that a process of selection of persons suitable for upgradation as Motor Pump Attendant was undertaken by them. Thus, it cannot be said that upgradation from the position of Mazdoor to that of Motor Pump Attendant involved a process of selection adopting a criterion similar to that applicable to promotion. The principles laid down by Supreme Court in **Bharat Sanchar Nigam Limited** (supra) leave no doubt with respect to the legal position

that a case of upgradation simplicitor without elements of selection and evaluation of comparative merit would not amount to promotion.

6. The learned Counsel for the petitioners has relied upon the following observations made in **Uday Pratap Singh And Others v. State of Bihar And Others: 1994 Suppl. (3) SCC 451:**

“x x x It is true, as laid down in **Bishan Sarup Gupta v. Union of India (1973) 3 SCC 1**, that effect of upgradation of a post is to make the incumbent occupy the upgraded post with all logical benefits flowing therefrom and can be treated as promoted to the post.”

We find that whether upgradation would amount to promotion or not was not an issue either in **Uday Pratap Singh** (supra) or in **Bishan Sarup Gupta** (supra). In **Bishan Sarup Gupta** (supra), Supreme Court while examining the issue of seniority of direct recruit Income-Tax Officers vis--vis promotes Income-Tax Officers, inter alia, observed as under:

“What is then the position with regard to the seniority list after the year 1958? It appears that for sometime before 1959 Govt. was considering upgrading a large number of class II, Grade III posts to class I, Grade II posts. Direct recruits who, after probation, started working, in the department had naturally no experience of assessment work. On the other hand, class II, Grade III officers had at least three years experience of assessment work. The department thought that it would be expedient and just to increase the number of class I, Grade II posts and to appoint to them on selective merit class II, Grade III officers who had sufficient experience of the assessment. That is how a decision was taken at the end of 1958 to upgrade a number of posts in class II, Grade III and appoint officers in Grade II in those upgraded posts. On January 16, 1959 Government in the Ministry of Finance wrote to all Commissioners of Income-tax that the President had sanctioned the upgrading to class I of 100 temporary posts of Income-tax officers, Class II. Upgrading of a post involves the transfer of a post from the lower grade to the higher grade and the promotion of one of the incumbents of that post to the upgraded post. If 100 posts are upgraded from class II to class I, class II posts will dwindle by 100 posts and class I posts will increase by 100 posts. These extra

upgraded posts are then filled by selection of 100 officers of class II. If that is not done, 100 class II officers will have no posts in class II after 100 posts are upgraded to class I.”

Nowhere has Supreme Court held in this case that upgradation of all the posts in a particular cadre, without elements of selection and without evaluation of comparative merits, where benefit of upgradation is available to everyone in the cadre, would amount to promotion. On the other hand, this was the issue directly involved in **Bharat Sanchar Nigam Limited** (supra) therefore, reliance upon **Uday Pratap Singh** (supra) is wholly misplaced.

For the reasons stated hereinabove we find no merit in the writ petition. The writ petition is hereby dismissed with no order as to costs.

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