

(1999) 10 CAL CK 0001

Calcutta High Court

Case No: G.A. No. 3779 of 1999, A.P.O.T. No. 684 of 1999 and W.P. No. 8 of 1999

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| Tea Board and Others | APPELLANT |
| Vs | |
| Sankar Narayan Dhar and Others | RESPONDENT |

Date of Decision: Oct. 13, 1999

Acts Referred:

- Tea Act, 1953 - Section 31(2)

Citation: (2000) 1 CALLT 276

Hon'ble Judges: Samarendra Nath Bhattacharjee, J; Ruma Pal, J

Bench: Division Bench

Final Decision: Dismissed

Judgement

R. Pal, J.

The appeal arises out of an order allowing the writ application filed by the respondent No. 1. By that order, which is dated 29th July 1999, the learned single Judge directed the Chairman, Tea Board (the appellant No. 2) to fix the seniority of the respondent No. 1 above Ajit Rakshit and the other private respondents and to award consequential benefits.

2. In the writ application which was filed on 5th January 1998 the respondent No. 1 claimed that he had joined the services of the appellant No. 1 on 15th November 1967. The respondent No. 1 was thereafter promoted from time to time and was ultimately promoted to the post of Assistant Accountant on 16th April 1987. These facts are not disputed by the appellants. It is also not in dispute that each of the private respondents were junior to the respondent No. 1 and that Ajit Rakshit, who was the respondent No. 5 in the writ petition, was immediately junior to the respondent No. 1.

3. The trouble appears to have started when the respondent No. 1 was selected for serving in the post of India based Assistant Accountant designated as Accountant at the Dubai Office of the appellant No. 1 on 5th August 1991. The respondent No. 1

joined duty at Dubai where he was till May 1995. While he was posted in Dubai, Ajit Rakshit and the other private respondents were granted promotion to the post of Accountant. Each of the promotion orders issued mentioned that the respondents No. 1 and another Assistant Accountant posted at New York (who was also senior to the private respondents in the cadre of Assistant Accountant), would get seniority pay protection over the promotee in the cadre of accountant when the promotion would be offered and accepted by them. However, when the respondent No. 1 returned to Calcutta on 19th May 1999, he was asked to join duty as Assistant Accountant and to work under a Junior. The respondent No. 1 protested and ultimately on 26th July 1995 he was promoted to the post of Officiating Accountant from the date he assumed charge. But the respondent No. 1's name was not included in the seniority list of Accountant and continued to be shown even thereafter in the substantive post of Assistant Accountant.

4. In the meanwhile, Ajit Rakshit, who had been promoted to the post of Accountant on 6th August 1993, was given a further promotion to the post of Accounts Officer. Admittedly, prior to the last promotion of Ajit Rakshit, the respondent No. 1 had claimed that he should be considered for promotion to the post of Accounts Officer. The respondents did not reply. On the other hand several of the private respondents were promoted to the post of Accounts Officer over the respondent No. 1 ignoring the respondent No. 1's protests. It was only on 28th December 1996 that the appellant No. 3, the Secretary of the Tea Board, informed the respondent No. 1 that his claim for seniority could not be acceded to. The Respondent No. 1 continued to protest by several letters dated 10th January 1997, 11th February 1997 and 18th March 1997.

5. On 20th August 1997 the under-Secretary, Ministry of Commerce in answer to queries raised by the appellant wrote to the appellants stating :

On repatriation of an overseas transferee to his parent cadre whether or not he has been allowed proforma promotion, he will get his notional promotion and seniority with reference to the original panel in which name was included by the DPC w.e.f. from the date of promotion of his immediate junior. If it has not been done, a review DPC would have to be convened to consider his case.

The pay of the officer on his reversion to the parent cadre will be fixed in terms of FR 22(001-35) and he will be promoted with retrospective effect. In the absence of vacancies the person junior to him who has already been promoted will need to be reverted to accommodate such a person.

6. The respondent No. 1 drew the attention of the appellants to this communique but without success. On 19th November 1997 the appellants again promoted another private respondent who was junior to the respondent No. 1 as Accounts Officer.

7. As already noted on 5th January 1998, the respondent No. 1 filed the writ petition praying for promotion with retrospective effect so as to place him above his juniors being the private respondents and to place him in the correct position in the seniority list. The learned single Judge allowed the writ application holding that the respondent No. 1 was entitled to the benefit of the "next below rule", since he was on deputation and that as such after the respondent No. 1's reversion to the parent department he was entitled to get seniority over all his juniors in the promoted post.

8. Being aggrieved by the order this appeal was preferred. The appellants submitted that the writ application should have been dismissed because of the delay in moving it. It was submitted on the basis of the decision of the Supreme Court in B.S. Bajwa and Another Vs. State of Punjab and Others, that the respondent No. 1 could not unsettled the settled position in the seniority list. It was also submitted that the respondent No. 1 had asked for extension of his service at Dubai for a period of six months and as such he could not get the benefit of seniority. It was submitted that in any event the respondent No. 1 could not seek promotion to the post of Accounts Officer as it was a selection post and that the qualification for such promotion was two years experience as Accountant. According to the appellants, in 1997, after the respondent No. 1 had completed two years in the post of Accountant after his return from Dubai he was offered the post of Accounts Officer. It was submitted that the respondent No. 1 could not have been considered earlier for the post of Accounts Officer as he did not have the actual experience in the feeder post and was not qualified for selection in 1995 when Ajit Rakshit was promoted from Accountant to Accounts Officer. It is further stated that the respondent No. 1 had declined the offer of being promoted as Accounts Officer in 1997. It is submitted that therefore the appellant could not claim to be an Accounts Officer at this stage.

9. We are of the view that the learned Judge was justified in view that he had taken The Under Secretary of the Ministry of Commerce had clearly stated in the communiqu  to the appellants dated 20th August 1997 (which has been quoted above) that an Officer/Official of the Tea Board whether posted or deputed abroad would be entitled to notional promotion and seniority as he possessed from the date of the promotion of his immediate junior. This communiqu  is binding on the appellant u/s 31(2) of the Tea Act 1953 which provides "the Board shall carry out such directions as may be issued to it from time to time by the Central Government for the efficient administration of this Act".

10. The communiqu  also directed the fixation of pay of such Officer in terms of Fundamental Rule (FR) 22 (001-35). FR 22 Order 35 relates to "the counting of service on emergency commission on return to Civil employee and the application of next below rule". Briefly speaking paragraph 35 provides the service rendered by an Officer in defence service on emergency commission would be counted for the purposes of appointment to a higher post as also increment in a post on a higher scale "provided that the precedent conditions for the applications of the "next below

rule" as set forth in Order 32 have been fulfilled".

11. FR 22 Order 32 provides for the exact scope of the next below rule. It was made clear that the intention underlying the rule was that an Officer out of his regular line should not suffer by forfeiting the officiating promotion which he would otherwise have received had he remained in the original line. The relevant extract of the rule is set out :

Rule-When an officer in a post (whether within the cadre of his service or not) is for any reason prevented from officiating in his turn in a post on higher scale or grade borne on the cadre of the service to which he belongs, he may be authorised by special order of the appropriate authority pro forma officiating promotion into such scale or grade and thereupon he granted the pay of that scale or grade, if that be more advantageous to him, on each occasion on which the officer immediately junior to him in the cadre of his service (or if that officer has been passed over by reason of inefficiency or unsuitability or because he is on leave or serving outside the ordinary line or forgoes officiating promotion of his own volition to that scale or grade then the officer next junior to him not so passed over) draws officiating pay in that scale or grade.

12. This is also the law laid down by the Supreme Court in State of Mysore Vs. M.H. Bellary, of which reads as under :

The other submission of learned counsel was that a Government servant though he had a right to increments in a time-scale applicable to the post that he held on the date of his transfer on deputation and on which he had a lien, had no legal right to be promoted to a higher post and that the construction adopted by the High Court virtually conceded or guaranteed to officers on deputation a right to an automatic promotion which they would not have had if they had not been posted on deputation. We see no force in this contention either. Learned counsel is right only in so far as the promotion involves relates to a selection post. But where it is based on seniority-cum-merit, these considerations are not relevant. The service of an officer on deputation in another department is treated by the rule as equivalent to service in the parent department and it is this equation between the service in the two departments that forms the basis of Rule 50(b). So long therefore as the service of the employee in the new department is satisfactory and he is obtaining the increments and promotions in that department, it stands to reason that satisfactory service, and the manner of its discharge in the post he actually fills, should be deemed to be rendered in the parent department also so as to entitle him to promotions which are open on seniority-cum-merit basis. What is indicated here is precisely what is termed in official language the "next below rule" under which an officer on deputation is given a paper promotion and shown as holding a higher post in the parent department if the officer next below him there is being promoted. If there are adverse remarks against him in the new department or punishments inflicted on him there, different considerations would arise and these adverse

remarks etc. would and could certainly be taken into account in the parent department also, but that is not the position here. In view of the facts of the case it is not necessary to discuss this aspect in any detail or any further.

13. This new has been reiterated in a more recent decision of the Supreme Court in *Gangadhar Kar v. Durgacharan Panda* : 1995 (6) SLR 110 : 1995 Supp. (3) SCC 133.

14. It is nobody's case that the respondent No. 1 had not rendered satisfactory service while he was serving in Dubai. The learned single Judge was therefore correct when he directed the appellants to grant the respondent No. 1 notional promotion in the post of Accountant with effect from 6th August 1993 when Ajit Rakshit was promoted as Accountant.

15. The next question is whether the respondent No. 1 is entitled to the benefit of the pay which he should have received had he been given the promotion as Accountant in 1993. We are unable to construe the rule quoted earlier as entitling the respondent No. 1 to this relief. The Communiqu  dated 20th August 1997 directed fixation of pay with reference to the notional promotion. In other words, when the writ Petitioner rejoined his services in Calcutta he should have been posted as Accountant and been granted the pay as if he had served as such Accountant since 5th August 1993.

16. The appellants have however submitted that the decision in *State of Mysore v. M.H. Bellary* (supra) and *Gangadhar Kar v. Durgacharan Panda* (supra) and the next below rule would not in any event apply as far as the post of Accounts Officer was concerned. It is true that in M.H. Bellary's case the Supreme Court specifically excluded selection posts from the "next below rule". But the Supreme Court did not say that the notional promotee could not be considered for promotion to the selection post provided he was otherwise found fit by the promoting authority. Furthermore, the communiqu  drew no such distinction between selection posts and other promotional posts for applying the next below rule.

17. As far as the post of Accounts Officer is concerned the Recruitment and Promotion Rules relating to various categories of Posts under the Board (referred to as the Recruitment Rules) provide that an Accounts Officer will be appointed "By selection from the category of accountants possessing requisite experience and qualification."

"Promotion by selection" has been defined in Recruitment Rule 10(1) as follows :

(1) "Promotion by selection" shall mean selection on merit irrespective of seniority of service and merit shall include and mean an employees" performance at an oral and/or a written test as may be prescribed from time to time, the report on his conduct and work and academic qualifications and experiences of a particular work.

The selection is made under Recruitment Rule No. 7 which provides :

Selection of candidates for promotion to various categories of posts shall be made by the Departmental Promotion Committees to be constituted for such purpose. The recommendations of the Departmental Promotion Committee for promotion to various categories of posts shall be placed before the competent appointing authority for final selection. The Departmental Promotion Committee will consist of Dy. Chairman, Secretary, Director of Tea Promotion, Director of Tea Development and Financial Advisor & Chief Accounts Officer.

18. There can be no doubt that the respondent No. 1 would have been within the zone of consideration for selection as an Accounts Officer had he not been sent to Dubai. The appellants have relied upon an Administrative order issued on 10th September 1985 in which it has inter alia been mentioned that for promotion from a Group-B post (Accountant) to a higher post in Group-B (Accounts Officer) the minimum period which should be completed in the feeder cadre should be two years. However, Recruitment Rule 2 mandates that :

The duties, qualifications, experience, age-limit etc. required for each category of post have been specified in the annexed schedule. As regards educational qualification and age-limits, the appointment authorities may relax these requirements when a departmental candidate is considered for promotion.

19. The schedule to the Recruitment Rules specifies that for the post of Accounts Officer the Educational Qualification and Experience should be :

Essential : A decree of a recognised University, must have passed the final examination of the Institute of Chartered Accountants (India or London) or S.A.S. Examination held by the Comptroller and Auditor General of India.

Desirable : Experience in a Government or Semi-Government or Semi-Govt. Office or a reputed Commercial undertaking for at least 5/7 years.

20. It is not in dispute that the respondent No. 1 has these qualifications. No administrative decision can override the recruitment of the Recruitment Rules except for the purpose of relaxation. No. additional requirement of experience can be added on to the eligibility criteria mentioned in the schedule to the Recruitment Rules. Where actual experience is necessary the Recruitment Rules have so provided. Thus, as far as the Accountants are concerned under the Method of Promotion it has been stated :

Seniority-cum-merit from amongst the Asstt. Accountants & Cashier with at least 3 years experience in the line.

21. In *Gangadhar Kar v. Durgacharan Pan* (supra) the writ petitioner was employed as a Laboratory Assistant and had opted to join a different department. On repatriation he claimed promotion to the post of Assistant Controller from the date his juniors in the cadre of Laboratory Assistants were promoted to that post. The High Court granted him the relief. The employee then filed a second writ application

claiming promotion to the next higher post from the date his immediate junior was promoted. This writ application was also allowed by the High Court. The authorities appealed to the Supreme Court. The Supreme Court rejected the plea of the authorities and dismissed the appeal in the following language :

This view of the High Court seems to be unassailable for the reasons that once the first respondent was granted pro-forma promotion retrospectively his seniority has to be fixed from the date on which he was granted such promotion. It is nobody's case that any condition was imposed in regard to seniority while permitting him to repatriate to the cadre of Laboratory Assistant nor is it any body's case that the decision of the Government to grant him promotion retrospectively was qualified by a condition that he will not be entitled to seniority. If he was granted retrospective promotion without any qualification whatsoever the High Court is right that his seniority must be determined on the basis as if he had continued in his parent department retaining his original seniority.

22. Adopting the language of the Supreme Court, we can safely hold that since no condition was imposed with regard to seniority when the respondent No. 1 was repatriated to the cadre of Assistant Accountant, and as the rules which granted promotion to repatriated employee retrospectively are not qualified by any condition that the employee would not be entitled to seniority, the respondent No. 1's seniority must be determined on the basis as if he had continued in his parent department retaining his original seniority thereby entitling him to be considered for the post of Accounts Officer.

23. Needless to say that since the post of Accounts Officer is a selection post the respondent No. 1 would have to be selected by the DPC. If upon such selection he is found fit for promotion to the post of Accounts Officer, he must be granted such promotion with effect from the date on which Ajit Rakshit was appointed to that post. As far as monetary benefit is concerned this would only result in the re-fixation of the respondent No. 1's salary with reference to the date from which such notional promotion is granted i.e. August, 1995.

24. The mere fact that the respondent No. 1 had refused to be considered for selection as Accounts Officer along with his juniors when the offer was made to him on 14th August, 1997 would not deprive him of his right to notional promotion to the post of Accounts Officer in 1995. As already noted the respondent No. 1's case all along was that he was entitled to be placed above Ajit Rakshit in the seniority list. That was also his demand not only in July, 1997 before Ajit Rakshit was promoted as Accounts Officer but even subsequent thereto. If the offer which was made in August, 1997 had been accepted by the respondent No. I this would have resulted in his being junior to the private respondents herein and would have effectively deprived the respondent No. 1 of the benefit of the next below rule.

25. The appellants submission that the writ application should not have been entertained by reason of delay is factually incorrect and legally untenable. The Supreme Court in B.S. Bajwa v. State of Punjab (supra) cited by the appellants dealt with a situation where the grievance had been raised by the writ petitioner more than a decade after the writ petitioner had been denied the relief claimed in this case the appellant raised the issue immediately upon his repatriation. His representation was rejected for the first time on 28th December, 1996. The communiqué of the under-Secretary, Ministry of Commerce clarifying the position of repatriated employees was issued on 20th August, 1997. The writ application was filed within a few months thereafter viz. on 5th January, 1998. There has been as such no delay in fact.

26. Besides, the appellants themselves had all along recognized the right of the respondent No. 1 to the next below rule. While granting promotion to the private respondents and by making such promotions subject to the seniority right of the respondent No. 1. In these circumstances there is no question of unsettling any settled position as each of the private respondents were well aware that their position in the seniority list was subject to the seniority of the respondent No. 1. Even otherwise, as observed by the Supreme Court in Narender Chadha and Others Vs. Union of India and Others, : "We are aware that the view we are taking may upset the inter se seniority between those promotees who were included in the Select Lists of 1970, 1982 and 1984 and those who were included later on or who have not been included at all till now. The existence of this possibility should not deter us from adopting a uniform rule in the case of all promotees and direct recruits to adjust the equities amongst them as regards their relative seniority in the light of the violent departure made by the Government both as regards direct recruitments and promotions which it had to make every year under the Rules. The prejudice which the promotees included in the Select Lists might suffer is marginal and has to be ignored....

If as a result of the preparation of the seniority list in accordance with the decision and the review of the promotions made to higher grades any of them is likely to be reverted such officers shall not be reverted. He shall be continued in the higher post which he is now holding by creating a supplementary post, if necessary to accommodate him. His further promotion shall however be given to him when it becomes due as per the new seniority list to be prepared pursuant to this decision."

For the reasons aforesaid the appeal is dismissed with costs. The appellants are directed to carry out the order of the learned single Judge in keeping with the observations made in this judgment within a period of 4 weeks from date.

S.N. Bhattacharjee, J.

27. I agree.

Appeal dismissed.