

(1994) 04 CAL CK 0004

Calcutta High Court

Case No: Matter No. 3292 of 1989

Director of Agriculture, W.B. and
Others

APPELLANT

Vs

Sita Nath Dutta

RESPONDENT

Date of Decision: April 21, 1994

Citation: 98 CWN 976

Hon'ble Judges: Nikhil N. Bhattacharjee, J; Bhagabati Prasad Banerjee, J

Bench: Division Bench

Advocate: D.P. Kundu, for the Appellant; S.K. Ganguly, for the Respondent

Judgement

Bhagabati Prasad Banerjee. J.

1. This is an appeal against the judgment and order dated 1.2.91 passed by the learned Trial Judge. In the writ application the writ petitioner opposite party challenged the validity of seniority list which was published in the year 1984 and in the seniority list the position of respondent No.4 was 6th whereas the position of writ petitioner opposite party was 9th. It was the case of the writ petitioner opposite party that the regularisation of Bimal Kumar Roy, who was respondent no. 4 in the writ application, was irregular and as such the person whose appointment was regular from very beginning his name could not find place in the seniority list. The learned Trial Judge accepted the contention of the Writ petitioner and held that the appointment of Bimal Kumar Roy from the very beginning was illegal. The facts of the case are that Bimal Kumar Roy's service was regularised from 1.11.86. Similarly, the persons who were occupying the No. 7th and 8th position in the gradation list were also regularised with effect from the said date. The learned Trial Judge has held that as the appointment of Bimal Kumar Roy was illegal in that event the position of the writ petitioner who was 9th in the seniority list should be revised. It appears that the initial gradation list was prepared in the year 1980 and on the basis of the said gradation list the said Bimal Kumar Roy was given promotion in the year 1982. The writ petitioner opposite party was promoted in the year 1987. In the

meantime, for revising the gradation list a representation was filed by the writ petitioner before the Authorities concerned but that representation was turned down and ultimately a further memorial in the form of an appeal not provided in the statute was filed before the higher authorities but the same was also turned down on the ground that the seniority of Bimal Kumar Roy could not be disturbed unless the validity of the order of regularisation made in favour of Bimal Kr. Roy was challenged and ultimately it was found that the appointment of Bimal Kumar Roy was void ab initio. In the writ application the gradation list was challenged on the ground that the initial appointment of Bimal Kumar Roy was illegal and as such he could not get any seniority over the writ petitioner. The gradation list as well as the order of promotion passed in the year 1982 was challenged before the learned Trial judge in the year 1989 and the judgment was delivered on 1.2.91. In the meantime, on 31st October 1990 the said Bimal Kumar Roy, the respondent No.4 in the writ application, retired from the service and that it is only after he has retired from the service a pronouncement was made that his appointment was irregular even though there was no direct challenge with regard to the invalidity of such appointment.

2. Mr. D.P. Kundu, the Learned Counsel appearing on behalf of the appellant, submitted relying on the decision of the Supreme Court in the case of Babita Prosad vs. State of Bihar reported in 1993 Supp. (3) Supreme Court Cases page 268 that those who have been appointed and were placed in the panel some vested right accrued to continue in service. In other words, it was submitted applying the principle of that case that the appointment of said respondent No.4 in the writ application could not have been set at naught after lapse of so many years as that would create a havoc on the service career of respondent No.4 Bimal Kumar Roy who has already retired from service and whose service was regularised with effect from 1.11.86.

3. Mr. S.K. Ganguly, the Learned Counsel appearing on behalf of the respondent, submitted that as the appointment of Bimal Kumar Roy was illegal there was nothing wrong on the part of the learned Trial judge to set aside the said appointment and further submitted that if the name of Bimal Kumar Roy was not there in the gradation list in that event the promotion which the said Bimal Kumar Roy got in the year 1982 could have been obtained by mm, inasmuch as, the promotion was given to the persons who were holding 6th, 7th and 8th position in the seniority list and if the Bimal Kumar Roy's name was not there in that event automatically the writ petitioner would have been promoted. Even assuming that the appointment of Bimal Kr. Roy was illegal but the said Bimal Kr. Roy has served in the post since 1966 and during this long period of his service his appointment was not challenged on the grounds of invalidity. It is well settled that even if an order is void the grant of invalidity does not carry on the, forehead of the order. If anything is void ab initio in that event the same has to be challenged and has to be declared to be null and void in a proceeding. The view that was taken by the Authority

concerned on the basis of representing filed by the writ petitioner that unless the regularisation of said Bimal Kumar Roy was challenged and found to be irregular and void no relief could be granted in revising the seniority list is in our view correct in view of the fact that the regularisation made in the year 1966 could not be set at naught by filing a writ application in the year 1989 when the seniority list was published in 1980 and on the basis of the seniority list the promotion was given to Bimal Kr. Roy in the year 1982. Incidentally, the writ petitioner was promoted on the basis same seniority list in the year 1987. In this connection, reference may be made to a decision of the Supreme Court in the case of S.S. Sarma vs. Union of India reported in AIR 1981 S.C. page 588 where the question of delay in setting aside an appointment was also considered and it was held that like every public institution the Court's function in the security of public confidence and public confidence resides most where the institution of discipline prevails. This observation was made by the Supreme Court where after lapse of long time the action was challenged and the Court set aside the action. In the case of State of Orissa vs. Arun Kumar reported in AIR 1976 S.C. page 1639 the Supreme Court held that the extraordinary jurisdiction of the High Court should not be exercised in favour of a person who is unmindful of so-called right for many long years. In the above case also the writ petition was filed challenging the action of the Government after long time because of the fact the representation was filed and representation as valid by a memorial and the question of delay was not considered by the High Court a fatal one and the Supreme Court held that appointment made in March 1962 of a person who had held the rank of Superintendent long years were as if "rip in water". In the case of Nayagarh Co-operative vs. Moravan reported in AIR 1977 S.C. page 112 the Supreme Court observed that but the appointment could not be invalidated after lapse of several years on the ground of acquiescence.

4. Applying the above principles we are of the view that in the instant case in the writ application it was not proper to invalidate the appointment of said Bimal Kr. Roy after lapse of so many years. A Court cannot direct moving a clock anti-clock wise and in the instant case the right which had vested upon Bimal Kr. Roy could not be divested after lapse of several years on a writ application which has not directly challenged the appointment as invalid and/or void ab initio but in a co-lateral proceeding the validity of appointment of the said Bimal Kr. Roy was challenged.

5. We are of the view that even assuming the appointment of Bimal Kr. Roy was invalid the same could not be reopened after lapse of so many years in the facts and circumstances of this case. Accordingly, we set aside the order of the learned Trial Judge but we make it clear that whatever service benefits the said Bimal Kr. Roy has received or will be received on the basis of such appointment should not be disturbed but this will be without prejudice to the rights and contention of the writ petitioner for getting any relief and that we also direct the appellants to extend some benefit if it is permissible to the writ petitioner without prejudice to the accrued rights of the said Bimal Kr. Roy.

6. All parties concerned to act on a signed copy of the minutes of the operative part of this Judgment on the usual undertaking.

Nikhil Nath Bhattacharjee, J.

I agree.