Anil Kumar Joshi Vs Coal India Limited

Court: Calcutta High Court

Date of Decision: Sept. 26, 2014

Acts Referred: Constitution of India, 1950 â€" Article 14

Hon'ble Judges: Sambuddha Chakrabarti, J

Bench: Single Bench

Advocate: Partha Sarathi Sengupta, Sr. Advocate, Biswaroop Bhattacharyya, A. Chakraborty and Reshmi Ghosh, Advocate for the Appellant; R.N. Majumder, N.K. Roy and P. Basu, Advocate for the Respondent

Final Decision: Allowed

Judgement

Sambuddha Chakrabarti, J.
The petitioners are executives employed in the Coal India Limited (CIL, for short) working in the excavation

discipline in various subsidiaries of CIL. They are presently working in E-6 grade.

2. By an office order dated May 3/5, 2011 CIL circulated the guidelines for promotion of executives from E-6 to E-7 grade. The total marks for

the Departmental Promotion Committee (DPC, for short) was 100 of which for the executive evaluation report 70 marks were allotted, for the

length of service in the existing grade were allotted 20 marks and 10 marks were reserved for qualifications. It was inter alia indicated that based

on the total marks calculated the final merit list was to be drawn up in a descending order and promotions were to be made from the list in order of

merit subject to certain other conditions.

3. It is the grievance of the petitioners that the evaluation process in the new policy has been drastically changed from the existing one so as to

frustrate the promotion of the senior employees with greater experience. According to them the difference of marks between excellent and

commendable for Executive Evaluation Report (EER, for short) of three years was drastically increased to 8 marks as against 6 marks in the old

policy. Vacancies arose in the years 2009 and 2010 respectively and they after completing their requisite qualifications and terms of service in E-6

grade became eligible to be considered for promotion for the vacancies of 2010. But the CIL declined not to follow the old Common Coal Cadre

(CCC, for short) and did not hold any DPC in terms of the promotional policy which was in vogue. This has resulted in their stagnation in E-6

grade for years.

4. After preparation of the new guideline in May, 2011 CIL decided to fill up the vacancies of 2010 in accordance with the new guidelines instead

of the guidelines that prevailed at the time when vacancies arose. The petitioners further alleged that CIL chose to fill up the vacancies of 2009 and

2010 by two different policies.

5. While the 2009 vacancies were filled up according to the earlier guidelines the 2010 vacancies were filled up following the new guidelines. This

is the subject of challenge in the present writ petition. In continuation of such process CIL published the promotional orders on April, 2/4, 2013.

6. The petitioners have prayed for a writ in the nature of mandamus commanding the respondents inter alia to cancel, rescind, withdraw and

forbear from giving any effect or further effect to the impugned promotional policy, dated May 3/5, 2011 and the promotional order, dated April 2,

2013. The petitioners also prayed for a direction upon the respondents to initiate promotional exercise on the basis of the old promotion policy

which was done in respect of the vacancies for the year 2009 and for other reliefs.

7. The respondents have contested this application by filing an affidavit-in-opposition. The contention of the respondents so far as it is necessary

for the disposal of the present writ petition is that taking into consideration the various dimensions and dynamics of CIL"s growth the management

had taken a decision at the highest body of policy making to give more emphasis on the merit of the executives at the time of their promotion from

E-6 to E-7 grade in all the disciplines and that is the reason why the circular or guideline was issued on May 3/5, 2011.

8. Subsequently for effecting promotion from E-6 to E-7 grades the pre-revised promotion guidelines were deliberated by the Board of Directors.

The Board agreed to follow promotion from E-6 to E-7 grade for the year 2009 on the pre-revised guidelines and orders were issued on the basis

thereof. The respondents have taken a further point that the modus operandi of affecting promotion is a prerogative of the management taking into

consideration the health and sustained growth of the company as well as the executive"s development and career growth. The order dated April 2,

2013 by which the writ petitioners were considered for promotion from E-6 to E-7 grade was valid and legal. The allegation of any gross

suppression has been denied. They have maintained that the management had taken a judicious decision by following merit based criteria to give an

impetus to the hardworking executives as well as the improved efficiency level.

9. The respondents have also tried to justify the issue of the new promotion policy with reference to the change in the overall scenario. The old

policy was evolved in the background of the then prevailing scenario of the executives, i.e., their stagnation, growth etc. But with time a new socio-

economic dimension emerged and having regard to the fact that the respondent company is a global player in the energy sector the new policy was

promulgated by adopting best practices from mine to market with due care to the environmental and social aspects.

10. A further justification of the new policy was that it was likely to pave the way for junior executives in getting early promotion on the basis of

their overall performance, EER ratings, length of service, qualification etc. The whole spirit behind the formulation of the new scheme was to have a

fast-track promotional avenue for the more meritorious and deserving executives and to motivate others to improve their performance for getting

an early chance of promotion. Thus, according to the respondents, it is wrong to contend that the intention of the respondents was to frustrate the

senior employees'' right of promotion. The quoted EER was very objective from which the performance of the executives could be assessed in the

right direction and CIL has adopted further Improvement Performance Management System based on balance scores which would yield more

objective assessment of an individual.

11. The respondents have made it clear that the order of promotion from E-6 to E-7 grade for the 2009 vacancies on the old promotion policy

was issued on December 27, 2011 and the members of the DPC were aware of the decision of the CIL Board.

12. A more specific case of the respondents is that even if the claim of the petitioners for their promotion was considered on the old promotion

policy, i.e., seniority-cum-merit, they would not have been promoted to E-7 grade as per their positions in seniority list; otherwise they could not

have been promoted in 2012 on the basis of the seniority itself. The respondents have, therefore, prayed for dismissal of the writ petition.

13. Thus the issues that principally fell for consideration are whether the vacancies of 2010 could be filled up by the policy of 2011 or whether the

same ought to have been filled up in terms of the policy prevalent in the same year and whether the rules relating to promotion can be drastically

altered midway.

14. Mr. Partha Sarathi Sengupta, the learned senior counsel for the petitioners, submitted that if the vacancies arising in the year 2009 could be

filled up by the promotional policy which were prevailing at the relevant time the vacancies arising in the year 2010 could have been similarly filled

up by the same policy which was subsisting when the latter vacancies arose. According to him keeping the old guideline in mind CIL was not

required to drastically alter the evaluation process in comparison to the earlier guidelines. CIL did not stop at that. The new policy of 2011 had

been given a retrospective effect and was applied to fill up the vacancies of 2010. In the process the rights of the senior executives with greater

experience stood frustrated. The petitioner had complied with the criteria of required qualification and terms of service in E-6 grade and thus

acquired a legitimate expectation to be considered and in fact had become eligible for promotion if those vacancies were filled up in 2010 itself in

accordance with the earlier promotion policy. According to Mr. Sengupta the petitioners are really not to blame for the fault on the part of the CIL

in not filling up the vacancies on time as enumerated in the CCC.

15. According to Mr. Sengupta, under the CCC promotion from E-2 to E-6 grades is on the basis of seniority-cum-merit whereas from E-6

onwards the same should be on the basis of merit-cum-seniority through the DPC. According to para 4.5(d) of Chapter IV of the CCC such DPC

should be held every year for considering the promotion of the executives from one grade to another. Therefore, when the vacancies are created

every year the eligible executives are entitled to be considered for promotion to the vacancies of the higher grade. The petitioners after attaining the

requisite qualification, experience and seniority became eligible to be considered for further promotion for the vacancies of 2010. But CIL did not

hold any DPC whatsoever which has resulted in deprivation of the rights of the petitioners. The discrimination, the petitioners allege, becomes

striking when CIL decided to fill up the 2009 vacancies in terms of the rules operating the field at that point of time.

16. The law on the point is fairly well-settled that vacancies should be filled up in terms of the rules governing the field when the vacancies arose

and as such 2010 rules should have been filled up not by the rules which were made in the year 2011.

17. In the case of Y.V. Rangaiah and Others Vs. J. Sreenivasa Rao and Others, the Supreme Court had held that the vacancies which had

occurred prior to the amended rules would be governed by the old rules and not by the amended rules. The Supreme Court observed: ""We have

not the slightest doubt that the post which fell vacant prior to the amended rules would be governed by the old rules and not by the new rules.

18. Again in the case of State of Rajasthan Vs. R. Dayal and Others, the question that cropped up for consideration was whether selection of

respondents nos. 12 and 13 was a valid one when the eligibility conditions stood changed with the amendment in the recruitment rules. Relying on

the case of Y.V. Rangaiah (Supra) the Supreme Court specifically held that the posts which fell vacant prior to the amendment of the rules would

be governed by the original rules and not by the amended rules. As a necessary corollary the vacancies that arose subsequent to the amendment of

the rules were required to be filled up in accordance with the law existing as on the date when the vacancies arose. The Supreme Court further laid

down that even a carried-forward vacancy was required to be considered in accordance with the law existing unless suitable relaxation was made

by the government.

19. This question again cropped up for consideration in the case of B.L. Gupta and Another Vs. M.C.D., There the statutory recruitment rules of

Delhi Electric Supply Undertaking of 1998 were amended in the year 1995. A similar question about the applicability of the rule to the vacancies

arising before 1978 came up for consideration before the Supreme Court. The Supreme Court held that the decision in the case of Y.V. Rangaiah

(Supra) represented the correct legal position and passed necessary directions upon the concerned High Court. It had specifically held that

vacancies which had arisen prior to the amendment of the rules in 1995 could only be filled up in accordance with the 1978 rules.

20. A further point of grievance of the petitioners is that the change has been effected very drastically in the evaluation process compared to the

one that existed before. Mr. Sengupta very emphatically submitted that the result of completely departing from the existing service rules and

applying the same retrospectively is to deprive some executives with due seniority and greater experience of their right to be considered for

promotion.

21. The petitioners developed the submission with reference to a concrete illustration. In the earlier policy an executive working for five years was

awarded with 19 marks whereas the new policy stipulated that an executive had to spend 14 years to obtain 20 marks which meant that in five

years he would now obtain only five marks. Again the method of EER had also been changed. In the earlier policy 27 marks were allotted for an

executive who obtained 85% to 100%, 21 marks for those who obtained between 60% to 84% and 14 marks for those who were placed

between 41% and 59%. In the new policy such marks are computable to the respective percentage allotted for the concerned EER.

22. A third limb of attack upon the applicability of the new policy to the older vacancies is that the necessary requirements for such application had

not been followed. Task Assignment and Acceptance Document (TAAD, for short) is a primary document introduced by the respondents

authorities. But this has never been obtained from the petitioners. This statement in paragraph 19 of the writ petition has not been specifically

denied by the CIL in their opposition.

23. The petitioners have submitted that since no EER was conducted to the executives the entire proceeding was rendered void and vitiated by

non-observance of procedural impropriety. In support of his contention Mr. Sengupta has relied on the case of Dev Dutt Vs. Union of India (UOI)

and Others, where the Supreme Court observed that natural justice has an expanding content and is never stagnant and, therefore, it is open to the

court to develop new principles of natural justice in appropriate cases. Thus, the Supreme Court developed the principle of natural justice by

holding that fairness and transparency in public administration required that all entries, irrespective of whether they were poor, fair, average, good

or very good in the annual confidential report of a public servant in any state service whatsoever, expect the military service, must be

communicated within a reasonable period so that he can make a representation for its upgradation. This was to be applied to all cases even though

there might be no rule or government order requiring communication of an entry or even if there is a rule or a government order prohibiting such

communication. This was because the principle of non-arbitrariness in state action as envisaged in Article 14 of the Constitution of India required

such communication as Article 14 overrides all rules or government orders. The Supreme Court further confirmed the right of a public servant to

make a representation against an entry to the authority concerned and an authority higher than the one who made the entry must decide the

representation in a fair manner and within a reasonable period. This was necessary, the Supreme Court observed, as it would be conducive to

fairness and transparency in public administration and would result in fairness in public service. The state must be a model employer and must act

fairly towards its employees. Only then good governance would be possible.

24. Again in the case of Sukhdev Singh Vs. Union of India (UOI) and Others, a three-judge bench of the Supreme Court approved the view taken

in the case of Dev Dutta (Supra) as legally sound and helping in achieving three-fold objectives. First, the communication of every entry in the ACR

to a public servant helps him or her to work harder and achieve more that helps him or her in improving the work and give better results. Secondly,

on being made aware of the entry in ACR a public servant may feel dissatisfied with the same. It enables him to make a representation for

upgradation of an entry in the ACR. And thirdly, communication of every entry in the ACR brings transparency in recording the remarks relating to

a public servant and the system performs more in conformity with the principles of natural justice. The Supreme Court also approved the view

taken in Dev Dutta (Supra) that every entry in ACR whether poor, fair, average, good or very good must be communicated to him or her within a

reasonable time.

25. The law on the points involved in the writ petition is fairly well-settled and there is hardly any scope to take a different view as a pure question

of law. The only thing to be considered was whether the action taken by the respondents could be said to be falling within an area which made the

general rule not applicable to CIL.

26. Mr. Majumder, the learned advocate for the respondents, has argued along the line taken in their affidavit-in-opposition. The guidelines or the

policies formulated by CIL are not statutory in nature and were framed by the Board of Directors. Therefore, it is for the company to fix and

decide the criteria for promotion and it pertained to the area of policy making.

27. Relying on the case of K. Samantaray -Vs.- National Insurance Company Co. Ltd., reported in (2004) 9 SCC Cal 86 Mr. Majumder argued

that while laying down the promotion policy or a rule it is always open to an employer to specify the area and the parameter or weightage to be

given in respect of the merit and seniority separately so long as the policy is not a colourable exercise of power or has the effect of violating any

statutory provision. With reference to the facts of that particular case the Supreme Court held that prior to the formulation of policy in February,

1990 there was no codified prescription. Merely certain guidelines existed and the object of the policy were to rationalize and codify the existing

guidelines relating to promotions within Officers Cadre. In that context the Supreme Court observed that it was for the employer to stipulate the

criteria for promotion as the same pertained really to the area of policy making. Mr. Majumder laid great stress on the observation made by the

Supreme Court that it was permissible for a an employer to have their own criteria for adjudging the claims on the principle of seniority-cum-merit

giving primacy to merit as well, depending upon the class, category and nature of posts in the hierarchy of administration and the requirements of

having such posts.

28. According to Mr. Majumder in the above judgment the National Insurance Company was an employer whose promotional policy was not

changed as it was a government company like CIL in the present case. Mr. Majumder tried to distinguish the judgments relied on by the petitioners

in the case of Y.V. Rangaiah (Supra) and B.L. Gupta (Supra) on the ground that these two judgments have been distinguished by the Supreme

Court itself in the case of Rajasthan Public Service Commission Vs. Chanan Ram and Another,

29. It is true that the two judgments relied on by the petitioners have been distinguished by the Supreme Court in the case of Ranasthan Public

Service Commission (Supra). In paragraph 15 of the said case the Supreme Court referred to the case of Y.V. Rangaiah (Supra). The Supreme

Court held that Y.V. Rangaiah (Supra) obviously did not apply to the facts of that case for two reasons and had given elaborate reasons for that.

For the present purpose it is not necessary to go into the detailed reasons given by the Supreme Court. It does not form part of the issues involved

in the present case. Suffice, however, it to say that the Supreme Court facutally made this case inapplicable to the case which they were

considering.

30. Similar was the observation of the Supreme Court with regard to the application of the case of B.L. Gupta (Supra) and held that the ratio

could not be of any assistance to the respondent petitioner company.

31. Mr. Majumder also has relied on the judgment of the Supreme Court in Deepak Agarwal and Another Vs. State of Uttar Pradesh and Others,

to show that in that case also the judgment in Y.V. Rangaigh (Supra) was factually distinguished.

32. Mr. Majumder further relied on an observation made in the case of Deepak Agarwal (Supra) where the Supreme Court had held that a

candidate has a right to be considered in the light of the existing rules which implies the rule in force on the date the consideration takes place.

There is no universal or absolute application that vacancies were to be filled up invariably by the law existing on the date when the vacancy arose.

The requirement of filling up old vacancies under the old rules is interlinked with a candidate having acquired a right to be considered for

promotion. The right to be considered for promotion accrues on the date of consideration of the eligible candidates, unless of course the applicable

rule lays down any particular time-frame within which the selection process is to be completed.

33. Mr. Majumder heavily placed reliance on the case of Deepak Agarwal (Supra) and submitted that even if one assumes that the rules were

statutory in nature no statutory duty was cast on CIL to complete the promotion within a fixed time frame. According to him the rights of the

petitioners could only have accrued on the date of consideration for promotion which was in the year 2011 and their rights to be considered for

promotion had to be judged in the light of the new promotional policy.

34. The submissions made by the respondents do not really satisfy the conscience of the court that the actions impugned by the respondents could

in any way be made an exception to the general rule holding the field. The respondents have not been able to show why the settled law will not

apply to the present case or must be deviated from by CIL in view of the admitted factual position. On the contrary I quite agree with the

submissions made by Mr. Sengupta that the decision relied on by Mr. Majumder in the case of Jaswant Singh Gill Vs. Bharat Coking Coal Ltd.

and Others, has no application to the facts of the present case. The CCC was never under challenge in that case and the issue involved was also

very different. In the given facts of that particular case the rules challenged by the petitioners were declared to be non-statutory in view of the fact

that a particular statutory rule prevailed which governed the service and retiral benefits. Mr. Sengupta very elaborately argued why the CCC

should be held to be a statutory rule as this was framed under clause 12 of the Government of India''s letter, dated September 27, 1975. But we

may leave the issue at that and it is not necessary for us to decide for the present purpose the issue whether it is a statutory rule or not.

35. Even assuming that it is not a statutory rule but an administrative instruction, it does not alter the settled principle of law that in the absence of a

statutory rule the guidelines must have to govern the field. An administrative order which confers rights or benefits must be held to be binding and

enforceable and, therefore, it has been very rightly observed that shorn of legislative character it has a statutory flavour and no administration can

be said to be entitled to act in contravention of the instructions framed by itself for that will be clearly violating the fundamental rights of an

employee and will introduce palpable discrimination.

36. The judgment relied on by Mr. Majumder in the case of K. Samantaray (Supra) has obviously no application to the facts of the present case.

There the appellant was working as an administrative officer of the National Insurance Company and the respondent company formulated a

promotional policy. He was not found suitable for promotion and made representation. It was contended that promotion was to be granted on the

basis of seniority-cum-merit; but as 42 marks out of 100 were earmarked for seniority the principle of seniority-cum-merit was given a go-by and

undue stress was placed on merit. The case of the respondent company on the other hand was that the basis for promotion was not seniority alone

but seniority-cum-merit and other relevant aspects which were clearly linked and connected with the process of selection for promotion.

Moreover, it was very specifically held that before February, 1990 there was no codified prescription. The factual aspect of that case have no

similarity to those in the present one.

37. The case of Rajasthan Public Service Commission (Supra) was not specifically relied on in support of the respondent''s contention by Mr.

Majumder. It was merely relied on to show that the two judgments cited by the petitioners have been distinguished in that case. It cannot be lost

sight of that when an earlier case is factually distinguished in a latter one the former does not lose its binding authority as a precedent nor does it

destroy the authoritative value of the same. All that it means is that the ratio decided in the facts of that particular case does not apply to a given set

of facts where that judgment had been sought to be applied. In other words, the court dealing with the subsequent case holds that the earlier

judgment had been wrongly sought to be applied to the facts of the latter case. The ratio decided in the earlier case is not altered or overruled

either explicitly or impliedly. Therefore, the effort of Mr. Majumder to show that this judgment was distinguished in subsequent judgments cannot

really destroy or demolish the binding ratio of the said judgment as an authoritative precedent.

38. Mr. Majumder also referred to the case of Jai Singh Dalal and Others Vs. State of Haryana and Another, The only reason, it appears, for

referring to the said judgment was that it was referred to in the case of Rajasthan Public Service Commission (Supra). In the case of the Jai Singh

Dalal (Supra) normal channel of recruitment to Hariyana Civil Services was direct recruitment and induction of state government officers through

the Public Service Commission. But under a certain rule of 1930 the State Government in exigencies of service would make special recruitment to

the service by such method as it might by notification specify after consultation with the Public Service Commission. The State Government took a

decision to fill up 21 posts under the government but final selection was to be made by the Commission. Out of the candidature of 90 officers

government sponsored 75 to the Commission for making a final selection out of them. While the Commission was in the process of making

selection on the basis of service and interview the new government took over which decided to revise the criteria for selection. The question before

the Supreme Court was whether it was permissible to change the earlier decision, and the rule, when the selection process was at its advance

stage. It was in this context the Supreme Court had held that no right of the petitioners had been violated. For obvious reasons this case has

absolutely no application to the facts of the present case.

39. Moreover, the case of Deepak Agarwal (Supra) also has no application to the facts of the present case. The issue before the Supreme Court

was the right of the petitioners which were to be considered for promotion. But in the present case there was a duty cast upon the respondents to

fill up the vacancies and conduct DPC every year which was not really done.

40. The persistent grievance of the petitioners is that the respondents authorities decided to alter the rule in the midst of the game when a very

valuable right in favour of the petitioners had accrued for promotion on the basis of the existing promotional policy which was governing the field. It

is inequitable for the respondents to claim that the petitioners should be bound by the drastically altered promotional policy after not holding the

DPC for the year 2010. That apart the observation made in the case of Deepak Agarwal (Supra) does not make it in any way coming to help of

the respondents, rather in a sense it supports the contention of the petitioners. The Supreme Court observed that the requirement of filing up of old

vacancies under the old rule is interlinked with a candidate having acquired right to be considered for promotion. The right to be considered for

promotion accrues on the date of consideration on the eligible candidates unless of course, as held in Y.V. Rangaiah (Supra), the applicable rule

lays down a particular time frame within which such selection process is to be completed.

41. Thus, the ratio in the case of Y.V. Rangaiah (Supra) applies squarely to the facts of the present case and the Supreme Court having made a

separate provision for cases covered by the circumstances contemplated in Y.V. Rangaiah the facts of Deepak Agarwal is not made applicable to

the facts of the petitioners'' case.

42. Thus I find that the petitioners have been able to establish their challenge to the impugned orders made by the respondents. The respondents

have equally failed to justify the actions taken by them. The argument put forward by them have not been controverted entirely by the respondents.

From the affidavit of the respondents and the submissions of Mr. Majumder I find no reason why the 2010 vacancies were sought to be filled up

by a promotional policy which was yet to see the light of the day. The logic given by the respondents for making a distinction between the

vacancies of 2009 and 2010 is rather feeble and unconvincing.

43. In such view of it I find sufficient logic in the challenge to the impugned orders and the petitioners have been successfully able to sustain the

same through the course of hearing.

44. consequently and for the reasons mentioned above the impugned promotion policy, dated May 3/5, 2011, as well as the consequential

promotional order, dated April 2, 2013, are hereby set aside and quashed. There shall also be a writ of Prohibition prohibiting the respondents

from giving any effect or further effect to the impugned promotional policy. The respondents are directed to fill up the vacancies arising in the year

2010 on the basis of the promotional policy governing the field when the vacancies arose.

45. The writ petition is allowed.

46. There shall, however, be no order as to costs.

47. Urgent Photostat certified copy of this order, if applied for, be supplied to the parties on priority basis upon compliance of all requisite

formalities.

Later

48. After the delivery of the judgment in Court, Mr. R.N. Majumder, learned advocate for the respondents prays for stay of the operation of the

order. In view of what has already been discussed in the above judgment, such prayer of stay is heard, considered and rejected.