

N. BIRENDRA SINGH
v.
L. PRIYOKUMAR SINGH AND ORS.

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MAY 5, 2006

[S.B. SINHA AND P.P. NAOLEKAR, JJ.]

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Service Law:

Seniority List—Regularisation—Division Bench upholding judgment and order of Single Judge—However, Division Bench giving directions in terms whereof benefit conferred by judgment and order of Single Judge taken away—Whether permissible—Held, what cannot be done directly cannot be done indirectly—Difficulty of State in implementing judgment and order passed by Single Judge is no reason to deprive the petitioners of the benefit conferred by the judgment—In the facts, directions issued by Division Bench set aside—Practice and procedure.

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High Court directed regularisation of service of appellants, N & others, employed as Assistant (Elect.) an *ad-hoc* and/or officating basis with effect from date of initial *ad-hoc* appointment and also gave directions for determining their seniority. State complied with the said directions and prepared final Seniority List. N & other persons filed writ petitions challenging the final Seniority List. Single Judge quashed final Seniority List and directed State to determine seniority from date of regularisation of petitioners therein in the post of Assistant Engineers. Writ appeals filed by State and affected employees were dismissed by Division Bench and judgment and order passed by Single Judge was upheld. However, Division Bench in paragraph 21 of its judgement and order gave certain directions in terms whereof N & other petitioners were deprived of the benefit of judgment and order of the Single Judge. Hence these appeals by N & other petitioners against directions passed by Division Bench in paragraph 21 of its judgement and by the State against dismissal of its appeal by the Division Bench.

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Appellants, N and others, contended that Division Bench having dismissed the appeals from the judgement and order passed by the Single

A Judge could not have issued directions in paragraph 21 of its judgement and order thereby taking away the benefit conferred upon them by the judgement and order of the Single Judge; and that despite their regularisation, State failed to take into account the period between dates on which they were appointed on *ad-hoc* basis and regular basis for the purpose of reckoning their seniority.

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State contended that if the entire seniority list is directed to be reopened, it may give rise to many more litigations.

C Dismissing the appeal filed by State and allowing the other appeals filed by petitioners the Court

HELD: 1. The judgment and order passed by the Single Judge was found to be correct by the Division Bench. The appeals preferred by the State and the other respondents herein were dismissed. If the judgment and order passed by the Single Judge was correct, there was no occasion for the Division Bench to issue certain directions in terms whereof the appellants herein were deprived of the benefit of the judgment and order of the Single Judge indirectly, which could not have been done directly. It is a trite law that what cannot be done directly, cannot be done indirectly. The Division Bench, in making observations and issuing directions in paragraph 21 of the impugned judgment, sought to do the same, which was impermissible in law. If the Division Bench was of the opinion that the Single Judge has committed mistakes in issuing the directions, it could interfere therewith by assigning appropriate and cogent reasons therefor. The observations made and directions issued by the Division Bench do not contain any reason as to how and in what manner the Single Judge went wrong in passing his judgment. The observations and directions issued by the Division Bench in paragraph 21 of the impugned judgment are set aside. [964-C-D; 965-A-C]

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2.1. The appellants herein have been pursuing their remedies under the law. They had been granted relief as orders were passed in their favour. The said order, admittedly, attained finality, and thus, cannot be reopened. It is thus, too late in the day for the State now to urge that the promotions granted to some of the appellants herein in the post of Assistant Engineer (Elect.) were not in accordance with law. Such a contention is barred under the principle of *res judicata*. [967-A-B]

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2.2. Having regard to its own conduct, the State of Manipur now cannot be heard to say that this Court should uphold the impugned judgment of the Division Bench, although in law the same is impermissible. As the Single Judge has directed the State to implement its own order, the legal consequences of the said order must ensue and if by reason thereof the concerned appellants had derived certain benefits, there is no reason to deprive them therefrom only because the State may feel some difficulty otherwise. [967-B-C; 967-D-E]

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 2126-2127 of 2001.

From the Judgment and Order dated 4.1.2000 of the High Court of Gauhati in W.A. Nos. 67 and 96 of 1997.

WITH

C.A.No. 2133, 2132, 2128-2131 and 8510-8513 of 2001.

M.L. Verma, V.N. Ganpule, Jaideep Gupta, A. Guneshwar Sharma, Satya Mitra, Ashok Kumar Sharma, David Rao, S. Janani, Sapan Biswajit and Ashok Kumar Singh for the Appellant.

S.K. Bhattacharya, L.K. Paonam and S. Janani and Deepak Goel, for the Respondents.

The Judgment of the Court was delivered by

S.B. SINHA, J. These appeals involving common questions of law and fact were taken up for hearing together and are being disposed of by this common judgment.

The case has a chequered history. We would, however, note the factual matrix of the matter, from C.A. Nos. 2126-2127 of 2001. The appellant was appointed as a Section Officer, Grade-I (Elect.). He was promoted to the post of Assistant Engineer (Elect.) on an *ad-hoc* basis on 5.2.1980. By a Government order dated 30th September, 1985, on recommendations of Departmental Promotion Committee (DPC), the appellant was appointed as an Assistant Engineer on officiating basis w.e.f. 15.7.1985. The State, in supercession of the said order, promoted him as an officiating Assistant Engineer (Elect.) on a SC/ST reserved seat. A tentative seniority list was published in the year 1991 wherein his name was not included, presumably on the basis that his services had not been regularised. His services were,

A however, regularised w.e.f. 29.8.1992, but no retrospective effect thereto was given, whereupon he filed a writ petition before the Gauhati High Court. A learned Single Judge of the said court by an order dated 27.11.1992 directed the State Government to regularise his *ad-hoc* and/or officiating service w.e.f. 5.2.1980. The said direction was complied with by the State by issuing Government order dated 3.2.1993, in terms whereof the services of the Appellant were regularised with retrospective effect, i.e., w.e.f. 5.2.1980. It stands admitted that the said order dated 27.11.1992 was passed following a Division Bench decision of the said court dated 23.3.1992 passed in C.R.No.586/91 in the matter of one *Kh. Ningthemjao Singh*, who is also an appellant before us, wherein directions were issued in the following terms:

C “...Considering the submission made by the learned counsel for petitioner as well as the learned Govt. Advocate and after going through the judgment of the Division Bench of this Court passed in civil Rule No.586/91, I dispose of the petition with the direction to regularise the petitioner’s services with effect from the date of his initial *ad-hoc* appointment i.e. 5.2.1980. The seniority of the petitioner shall be determined in accordance with the rules and in the absence of such rules as per Govt. instructions and in the light of the judgments of the Apex Court as well as of this Court.”

E He thereafter filed a representation for determination of his seniority. As the question of seniority was pending before the High Court at the instance of some other officers, the appellant herein also filed a Writ Petition claiming similar reliefs which was marked as C.R.No.226/93.

F A tentative Seniority List was published on 30.6.1994 wherein he was shown at Serial No.7. He filed a representation claiming that his seniority be reckoned from the date of his regularisation. A final Seniority List was published on 6.5.1995 wherein his position was shown as Serial No.49. According to the appellant, his name should have appeared at Serial No.13 of the seniority list. A writ petition was again filed by him praying for quashing of the final Seniority List and for determining his seniority from the date of regularisation, which was marked as C.R.No.308/95. Several interim orders were passed therein. The said interim orders came to be vacated by an order dated 4.10.1996, but it was made clear that any promotion to the post of Executive Engineer (Elect.) made during pendency of the said writ petition shall be only on officiating basis and subject to the results of the three writ petitions pending before the High Court thence. The State thereafter promoted H 15 Assistant Engineers to the post of Executive Engineer on *ad-hoc* basis

which appointments were later on directed to be on officiating basis. A

By a judgment and order dated 16.5.1997, the learned Single Judge allowed four Writ Petitions being C.R.Nos.308/95 and 916/95 filed by the appellant, N. Birendra Singh, C.R.No.929/95 filed by Kh. Manglemtomba Singh, C.R.No.345/95 filed by Kh. Ningthemjao Singh and C.R.No.320/90 filed by the Association, whereby the said final Seniority List dated 6.5.1995 was quashed and the State was directed to determine the question of seniority from the date of regularisation of the petitioners therein in the post of Assistant Engineers stating: B

“.....I am, therefore, of the view that the seniority list is required to be prepared afresh counting the seniority of the petitioners from the date of regularisation of their services in the post of Asst. Engineers. Consequently, the final seniority list Annexed-A/12 of C.R. 345/95 is required to be cancelled. Accordingly, the final seniority list of the Asst. Engineers published by the Govt. on 6.5.1995 Annexure-A/12 is hereby quashed. Govt. is directed to prepare a fresh seniority list of the Asst. Engineers counting the services of the petitioners from the date of their regularisation in the post of A.E. The State Govt. is, further, directed to work out the vacancies for the post of Asst. Engineers in the Electricity Department and thereafter absorb the petitioners in the vacant posts available under promotion quota and count their seniority from that date. The year in which vacancy under promotion quota is available, the petitioners should be absorbed in those years and seniority will count from that date.” C D E

Writ appeals thereagainst were filed by the State as also by the affected employees. F

A Division Bench of the High Court while admitting the said Writ Appeals passed an order of *status quo*. However, during pendency of the said Writ Appeals the services of the 15 Executive Engineers, who were appointed on officiating basis, were regularised. The Division Bench of the High Court, however, while upholding the judgment and order passed by the learned Single Judge and dismissing the appeals, in paragraph 21, directed that: G

“21. Though we have dismissed the appeal, yet it is made clear that things like further promotion etc. already made in accordance with R.R. on the basis of that seniority list quashed shall not be reopened. Promotions if made on *ad hoc* basis, at the time of regularisation of H

A such promotions the cases of the persons who come ahead of such promotees after refixation of seniority shall also be considered if they come within the zone of consideration being otherwise eligible. *Adhoc* promotions on the basis of seniority list quashed shall not be regularised without refixation of seniority. This judgment shall not be used as a handle by the writ petitioners for another round of litigation to claim further benefit etc. on the principle of "next below rule".

B Things shall be allowed to rest as if on this count. We are constrained to give this direction as the learned Single Judge almost opened a Pandora's box giving direction to fix seniority from 1979-80 which will make the situation topsy turvy. That is not the function of the writ Court. A writ court must not behave like a horned bull in a china clay shop. The seniority shall be refixed by the authority within 6 months from the date of the judgment by adhering to Rules and directions of this court by inviting objections from all who will be affected by such redetermination. The writ court being a court of equity at the time of moulding the relief can put the parties to terms to make it just, proper and workable. Justice does not turn up bottom side up. We must bear in mind that our justice delivery system is a human institution, created by human agents to serve human ends and in doing so always we must strike a balance in such a manner that our decision should not usually be an attempt to touch a hornet's nest to create further complications and problems that should be avoided as far as possible."

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Civil Appeal Nos.2126-2127/2001 has been filed by N. Birendra Singh, Civil Appeal No.2132/2001 has been filed by Kh. Ningthemjao Singh and Civil Appeal No.2133/2001 has been filed by Kh. Manglemtomba Singh

F questioning that part of the judgment. Civil Appeal Nos. 2128-2131/2001 has been filed by the State of Manipur against the judgment of the Division Bench dismissing the said appeals. One L. Priyokumar Singh, who, however, had already been promoted as Executive Engineer and who had filed a writ petition questioning the *inter-se* seniority of the employees appointed, has also filed an appeal separately which is marked as Civil Appeal Nos.8510-8513 of 2001.

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The short question raised in these appeals by the learned counsel appearing on behalf of the appellants is that the Division Bench having dismissed the appeals by a judgment and order dated 4.1.2000 preferred from

H the judgment and order dated 16.5.1997 passed by the learned Single Judge

could not have issued the afore-mentioned directions.

Ms. S. Janani, learned counsel appearing on behalf of the State of Manipur and Mr. S.K. Bhattacharya, learned counsel appearing on behalf of private respondents, on the other hand, would draw our attention to two orders dated 20th August, 1990 and 4th January, 2000 passed by the Division Bench of the said Court and submitted that although, the Division Bench, while allowing the writ petitions filed by the Assistant Engineers praying for their regularisation with retrospective effect directed that they be given appropriate seniority, on that basis, however, on an application for modification having been filed before the said court, directed that:

“So far as the service benefits as enumerated in general terms in the operative portion of the order as reproduced above, it shall not include conferring benefit of seniority *inter-se* seniority of the Asstt. Engineers is governed by rules. While the other monetary and post retirement benefits, remain unaffected the word “seniority” appearing in the operative portion of the order is deleted, which shall be governed and determined in accordance with the existing rules taking into consideration the case of others as well.”

An application has been filed for bringing additional facts and documents on record on behalf of respondent Nos.3, 6, 7, 8 and 10, wherein an order dated 27.2.1998 passed in Writ Appeal No.154/97 and other connected appeals, while setting aside the orders of the learned Single Judge dated 18.3.1997 and 21.5.1997, it was directed to fill up 20 vacant posts on regular basis stating:

“It has been submitted by Mr. A. Nilamani Singh that as of now, there are about 20 vacancies in the grade of Executive Engineer, Electricity to be filled up on regular basis. If that is so, the respondents are now directed to fill up those posts on regular basis within a period of 2 (two) months from the date of receipt of this order. Submission has also been made by Mr. B.I. Sharma that his client Shri B. Sisirkumar Sharma would be retiring sometime in the month of August, 1998. This would also be a ground why the respondent should not fill up the posts on regular basis expeditiously.”

The learned counsel appearing on behalf of the respondents contended that the cases of the appellants Kh. Ningthemjao Singh and Kh. Manglemtomba Singh had been considered by the departmental promotion committee as they

A fell within the zone even without taking into consideration the date of regularisation with retrospective effect, but they have not been found suitable therefor. Learned counsel appearing on behalf of the State, however, pointed out that the appellant N. Birendra Singh had been given all the benefits due to him and the State would furthermore give him all the monetary benefits treating him to have been regularised in the post of Assistant Engineer w.e.f. 5.2.1980. It was pointed out that as the minimum qualification required for promotion to the post of Superintending Engineer is Degree in Bachelor of Engineering, both, N. Birendra Singh and Kh. Manglemtomba Singh, being only diploma-holders, cannot be considered for promotion to the post of Superintending Engineer.

C It is not in dispute that the post of Executive Engineer is a selection post.

We, however, may not go into the question of correctness or otherwise of the opinion of DPC held in 1998 finding the appellant K. Ningthemjao Singh and Kh. Manglemtomba Singh unsuitable for promotion to the post of Executive Engineer, as the writ petitions are pending before the Guwahati High Court in relation thereto. It has further been brought to our notice that some of the appellants have already been promoted to the post of Superintending Engineer. L. Priyokumar has been promoted as Superintending Engineer on 2.9.1995, whereas Ng. Sarat Singh has been promoted on 10.2.2006. T. Raghmani Singh, however, has not been promoted. Kh. Ningthemjao Singh is said to have retired from service.

F The grievances of the appellants appear to be that although they were eligible for being promoted to the post of Assistant Engineer on regular basis in October, 1976, their cases have been ignored. Further more, despite their regularisation, the State had failed to take into account the period between the date on which they were appointed on *ad-hoc* basis and regular basis for the purpose of reckoning their seniority.

G Before advertng to the other contentions raised in these appeals, we must, at the outset, observe that the Division Bench of the High Court committed a manifest error in making observations as against the learned Single Judge as contained in paragraph 21 of the impugned judgment. We have noticed hereinbefore that the judgment and order passed by the learned Single Judge was found to be correct by the Division Bench. The appeals preferred by the State and the other respondents herein were dismissed. If the judgment and order passed by the learned Single Judge was correct, in our

opinion, there was no occasion for the Division Bench to issue certain directions in terms whereof the appellants herein were deprived of the benefit of the judgment and order of the learned Single Judge indirectly, which could not have been done directly. If the Division Bench was of the opinion that in passing his order the learned Single Judge has not taken into consideration certain aspects of the matter and, in particular, some orders which were relevant for determination of the issue, the Division Bench could have said so and dealt with the same appropriately. It did not.

It is a trite law that what cannot be done directly, cannot be done indirectly. The Division Bench, in making observations and issuing directions in paragraph 21 of the impugned judgment, sought to do the same, which was impermissible in law. If the Division Bench was of the opinion that the learned Single Judge has committed mistakes in issuing the directions, it could interfere therewith by assigning appropriate and cogent reasons therefor. The observations made and directions issued by the Division Bench do not contain any reason as to how and in what manner the learned Single Judge went wrong in passing his judgment.

The order dated 25th November, 1994 passed by a Division Bench of the said Court in C.M.A.No.352/93, appears to have been passed on an application for modification of an order dated 20th August, 1990 passed by another Division Bench of the said Court in C.R.No.819/88/322/88/90. We are not aware as to what was those writ petitions about. However, we would proceed on the premise that the said order had direct bearing with the order of the learned Single Judge dated 27.11.1992 passed in favour of the appellants. That Division Bench in its order dated 20th August, 1990, held:

“Mr. Pramod Singh, learned Govt. Advocate has an apprehension that, if no post was available, regularisation may create problem. We see no force in the above submission inasmuch as, by giving retrospective effect to the order of regularisation, the petitioner shall be entitled to the benefit of counting the entire period of service for pay, i.e. increment, seniority, pension and other pensionary benefit.”

The application for modification was filed by the employees who were not parties to the said proceeding. Some of the said applicants appear to be appellants before us. By reason of the said order, a modification was directed to be made only to the effect that the seniority of the concerned Assistant Engineers, in terms of order of regularisation, shall be considered in terms of the Rules and not in terms of the order passed by the Division Bench. We

A fail to appreciate the difference between the two inasmuch as the apprehension expressed by some of the Assistant Engineers that the services of the writ petitioners were directed to be regularised with retrospective date, i.e., on the date when they were appointed on *ad-hoc* basis, they would have a march over the other employees, was wholly misconceived. When the earlier Division Bench spoke of seniority amongst the Assistant Engineers, not only the same

B was required to be determined in terms of the rules, there was no question of the writ petitioners gaining a march over the other employees similarly situated or who were otherwise senior to them. Even otherwise, the learned Single Judge in his order dated 27.11.1992 exactly did so stating that

C “...the seniority of the petitioner shall be determined in accordance with the rules and in the absence of such rules as per Government instructions and in the light of the judgments of the Apex Court as well as of this Court.”

D What was, therefore, directed to be obeyed was the law operating in the field.

By reason thereof, the Division Bench and consequently, the learned Single Judge never meant that despite the fact that the appellants were held to be entitled to the benefit of regularisation in service with effect from the date on which they were appointed on an *ad-hoc* basis, the concerned

E respondent herein would be deprived of their seniority to which they were otherwise entitled to in law.

Interlocutory Application Nos.9 and 10 of 2005 filed on behalf of respondent Nos.3, 6, 7, 8 and 10 have not been moved and no order has been passed thereupon. We, at this stage, cannot rely on the contents of the said

F applications. The contentions of the said applications do not appear to have been brought on record before the High Court. The question which arose for consideration therein appear to be confined to fixation of pay and allowances in terms of Fundamental and Supplementary Rules. It was held that they had been holding substantive post of Assistant Engineer and they were on current

G charge of Executive Engineer and as such, they were not entitled to the pay and allowances to the post of the Executive Engineer in terms of F.R. 49. If some observations have been made therein having regard to the submissions made by a counsel for a party, the same would not mean that the right of those who were not parties thereto, would be affected thereby. Reliance placed on the judgment and order dated 20.8.90 is, thus, not tenable.

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We appreciate the anxiety on the part of the State that if the entire seniority list is directed to be reopened, it may give rise to many more litigations. It must think itself therefor. But it is the State alone who is responsible for such a situation. The appellants herein have been pursuing their remedies under the law. They had been granted relief as orders were passed in their favour. The said order, admittedly, attained finality, and thus, cannot be reopened. It is, thus, too late in the day for the State now to urge that the promotions granted to some of the appellants herein in the post of Assistant Engineer (Elect.) were not in accordance with law. Such a contention is barred under the principle of *res judicata*.

We are, therefore, of the opinion that having regard to its own conduct, the State of Manipur now cannot be heard to say that this Court should uphold the impugned judgment of the Division Bench, although, in law the same is impermissible. We decline to do so. We, therefore, while setting aside the observations and directions issued by the Division Bench in paragraph 21 of the impugned judgment, place on record the concession made by the learned counsel appearing on behalf of the State that the appellant, N. Birendra Singh, would be given all monetary benefits w.e.f. 5.2.1980. We do not find any merit in the appeal preferred by the State. As the learned Single Judge has directed the State to implement its own order, the legal consequences of the said order must ensue and if by reason thereof the concerned appellants had derived certain benefits, there is no reason for us to deprive them therefrom only because the State may feel some difficulty otherwise.

In the result, Civil Appeal Nos.2128-2131 of 2001 preferred by the State are dismissed and other connected appeals filed by the appellants herein are allowed. The writ appeals are disposed of with the aforementioned observations and directions.

Having regard to the fact that some of the writ petitions questioning the order of promotion and seniority are pending consideration before the High Court, we would request the High Court to consider the desirability of disposing of the matters as expeditiously as possible.

In the facts and circumstances of the case, the parties shall bear their own costs.

A.K.T.

CA No. 2128-2131/2001 dismissed and
CA Nos. 2126-2127, 2133, 2132 and 8510-8513/2001 allowed.