

STATE OF JHARKHAND
v.
BHADEY MUNDA & ANR.
(Civil Appeal No. 8616 OF 2014)

SEPTEMBER 10, 2014

[MADAN B. LOKUR AND C. NAGAPPAN, JJ.]

Service law: Promotion - Names of respondents recommended for promotion along with other functional managers - Bifurcation of State - Services of respondents allocated to State of Jharkhand - Others whose names recommended for promotions and allocated to State of Bihar promoted - However respondents not promoted on the ground that recommendations of DPC of State of Bihar not binding on State of Jharkhand and vacancy for promotion also did not exist - Held: If there is no vacant post for the appointment of a direct recruit or for the promotion of an employee, recruitment or promotion cannot be made Recommendations of the DPC held anterior to the date of the constitution of the Jharkhand High Court and the State of Jharkhand could not be implemented and the exercise of accepting the recommendation of the DPC from a date prior to the date of formation of the State of Jharkhand could have been taken only by the State of Bihar and not by the State of Jharkhand.

Allowing the appeal, the Court

HELD: 1. Mere chance of a promotion is not a condition of service. In the instant case, service condition had not been varied to the disadvantage of the respondents. A vacancy can be filled up only if it exists. If there is no vacant post for the appointment of a direct recruit or for the promotion of an employee, a promotion or recruitment cannot be made. . The Jharkhand High

- A Court could not have directed implementation of the recommendations of the DPC held on 15th February, 1999 that is from a date anterior to the date of the constitution of the Jharkhand High Court and the State of Jharkhand and the exercise of accepting the
- B recommendation of the DPC held on 15th February, 1999 that is from a date anterior to the date of the constitution of the Jharkhand High Court and the State of Jharkhand and the exercise of accepting the recommendation of the DPC from a date prior to the date of formation of the State
- C of Jharkhand could have been taken only by the State of Bihar and not by the State of Jharkhand. [Paras 19,20, 26, 29] [773-G; 774-B-C; 776-D-E]

- Mohd. Shujat Ali vs. Union of India* (1975) 3 SCC 76:1975 (1) SCR 449; *Mohammad Bhakar v. Y. Krishna Reddy* 1970 SLR 768; *State of Mysore v. G.B. Purohit* (1967) 1 SLR 753; *Ramchandra Shankar Deodhar v. The State of Maharashtra* (1974) 1 SCC 317: 1974 (2) SCR 216; *Madan Lal v. State of J&K* (1995) 3 SCC 486:1995 (1) SCR 908; *Debabrata Dash v. Jatindra Prasad Das* (2013) 3 SCC 658: 2013 (2) SCR 331; *State of Uttarakhand v. Umakant Joshi* (2012) 11 SCC 164 - relied on.

Case Law Reference:

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|---|-------------------|-----------|---------|
| F | 1975 (1) SCR 449 | Relied on | Para 19 |
| | 1970 SLR 768 | Relied on | Para 19 |
| | (1967) 1 SLR 753 | Relied on | Para 19 |
| | 1974 (2) SCR 216 | Relied on | Para 19 |
| G | 1995 (1) SCR 908 | Relied on | Para 21 |
| | 2013 (2) SCR 331 | Relied on | Para 21 |
| | (2012) 11 SCC 164 | Relied on | Para 22 |

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CIVIL APPELLATE JURISDICTION : Civil Appeal A
No.8616 of 2014

From the Judgment and Order dated 17-02-2012 of the
High Court of Jharkhand at Ranchi in LPA No.394 of 2011.

A. Sharan, Kunal Verma for the Appellant. B

Sumeet Gadodia, Kaushik Poddar for the Respondents.

The Judgment of the Court was delivered by

MADAN B. LOKUR, J. 1. Leave granted. C

2. From sometime in 1990, both the respondents were
holding the post of Functional Manager in the Department of
Industries in the erstwhile State of Bihar. Later, they were
working as in-charge General Manager/Deputy Director of
Industries with effect from 9th November, 1998 and 1st
November, 1996 respectively. D

3. On 15th February, 1999 a meeting of the Departmental
Promotion Committee (DPC) was convened for recommending
promotions of Functional Managers to the next higher post of
General Manager/Deputy Director of Industries. The DPC
recommended seven Functional Managers (including both the
respondents) be promoted to the post of General Manager/
Deputy Director of Industries. E

4. For one reason or another, the recommendation of the
DPC was neither accepted nor rejected. Consequently, four of
the seven persons recommended for promotion, including
Bindeshwari Das, filed a writ petition in the Patna High Court
being C.W.J.C. No. 115 of 2004. It was prayed in this writ
petition filed against the State of Bihar that a direction be
issued to the State of Bihar to promote them to the post of
General Manager/Deputy Director of Industries. F G

5. In the meanwhile, a significant development took place H

A on 15th November, 2000 namely that by virtue of the Bihar
 Reorganization Act, 2000 (for short the Act), the State of Bihar
 was bifurcated into the State of Bihar and the State of
 Jharkhand. However, as mentioned above, Bindeshwari Das
 and others did not implead the State of Jharkhand as one of
 B the respondents in their writ petition, apparently because their
 cadre controlling authority remained the State of Bihar, the
 service not having been bifurcated at that time.

C 6. Be that as it may, the writ petition filed by Bindeshwari
 Das and others was disposed of by the Patna High Court on
 30th April, 2004. The operative portion of the order passed by
 the learned Single Judge of the Patna High Court reads, inter
 alia, as follows:-

D "The claims of the petitioners are being admitted by the
 State authorities for their promotion to the posts of General
 Managers/Deputy Directors of different District Industries
 Centers. The State authorities should take a decision in
 the matter as early as it is possible. It appears that approval
 is being sought for from the Cabinet Secretariat right from
 E 1999 and one pretext or the other, the matter is being
 delayed for untenable reasons. It is not the case of the
 State respondents that queries made by the Cabinet
 Secretariat have not been satisfied rather it appears that
 when the matter was returned with certain queries, the
 F approval was again sought for in 2002 which necessarily
 implies that the queries were satisfied and the matter was
 again sent.

G Considering the facts and circumstances of the case, the
 State authorities are directed to take final decision
 pertaining to promotion of the petitioners, as referred
 above, within a period of three months from the date of
 receipt/production of a copy of this order."

H The order of the High Court passed on 30th April, 2004
 was not complied with by the State of Bihar.

7. About a year later, sometime in April 2005, the Government of India issued Office Order No. 17(B)/2005 in exercise of powers conferred by Section 72 of the Act. The Order was to the effect that the services of every person mentioned in the annexure to the Order (which included both the respondents and Bindeshwari Das) who had been working in connection with the functioning of the State of Bihar just before 15th November, 2000 and has been working in the Northern Bihar State or the State of Jharkhand finally since 15th November, 2000 shall be considered to have been allocated to the State of Jharkhand. The result of this Order was that now the State of Jharkhand became the cadre controlling authority of the respondents leading to necessary consequential steps including the transfer of records etc.

8. The bifurcation of the State of Bihar complicated the matter insofar as the respondents are concerned inasmuch as the State of Jharkhand apparently took the view that it was not bound by the recommendations made by the DPC on 15th February, 1999 when the State of Bihar was the cadre controlling authority of the respondents.

Proceedings before the learned Single Judge

9. The change of fortunes led the respondents to file Writ Petition (S) No. 2530 of 2010 in the High Court of Jharkhand. In the writ petition it was prayed that the State of Jharkhand be directed to promote the respondents with all consequential benefits from the post of Functional Manager to the post of General Manager/Deputy Director of Industries with effect from the date from which they had been working as officers-in-charge of the post of General Manager/Deputy Director (that is from 1998 and 1996 respectively, well before the bifurcation of the State of Bihar).

10. It is important to note that the State of Bihar was a respondent in the writ petition filed by the respondents in the Jharkhand High Court, but apparently did not contest it.

A 11. The writ petition came to be heard by a learned Single Judge and by an order dated 10th/15th July, 2011 the writ petition was allowed with a direction that "the concerned authority" shall look into the grievances of the respondents.

B 12. The learned Single Judge held that Section 73 of the Act¹ prohibited a change in the conditions of service as applicable to the respondents immediately before the appointed date that is 15th November, 2000. It was held that by that date the respondents had already acquired a right for promotion and therefore no action detrimental to the interests of the respondents could be taken by the State Government.

C 13. The learned Single Judge also noted that of the seven officers recommended for promotion by the DPC, four had been allocated the Bihar cadre and they were granted promotion by that State. However, since the respondents were allocated the Jharkhand cadre, they were deprived of the benefit that was given to those who were recommended for promotion along with them. It was held that the mere allocation

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E 1. Section 73. Other provisions relating to services.- Nothing in Section 72 shall be deemed to affect on or after the appointed day the operation of the provisions of Chapter I of Part XIV of the Constitution in relation to determination of the conditions of service of persons serving in connection with the affairs of the Union or any State :

F Provided that the conditions of service applicable immediately before the appointed day in the case of any person deemed to have been allocated to the State of Bihar or to the State of Jharkhand under Section 72 shall not be varied to his disadvantage except with the previous approval of the Central Government.

(2) All services period to the appointed day rendered by a person,-

G (a) If he is deemed to have been allocated to any State under Section 72, shall be deemed to have been rendered in connection with the affairs of that State;

(b) If he is deemed to have been allocated to the Union in connection with the administration of the Jharkhand shall be deemed to have been rendered in connection with the affairs of the Union, for the purposes of the rules regulating his conditions of service.

H (3) The provisions of Section 72, shall not apply in relation to members of any All India Service.

of the Jharkhand cadre to the respondents could not work to their detriment, nor could they be deprived of the rightful claim for promotion to the post of General Manager/Deputy Director. A

14. Under these circumstances the learned Single Judge directed "the concerned authority" to look into the matter and ensure that the respondents were not discriminated against. B

Proceedings before the Division Bench

15. Feeling aggrieved by the decision rendered by the learned Single Judge, the State of Jharkhand preferred a Letters Patent Appeal being LPA No.394 of 2011 in the High Court of Jharkhand. The Division Bench affirmed the order of the learned Single Judge by the judgment under appeal. C

16. The Division Bench held that a right had accrued in the favour of the respondents for being promoted and this right could not be taken away from them since it was protected by Sections 72 and 73 of the Act. It was also noted that the recommendations of the DPC had been implemented by the State of Bihar in respect of some Functional Managers similarly situate as the respondents. As such the respondents had been illegally placed in a disadvantageous position. Accordingly, the Division Bench upheld the direction of the learned Single Judge effectively promoting the respondents in accordance with the recommendations of the DPC held on 15th February, 1999. D
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Discussion

17. The State of Jharkhand is now in appeal before us challenging the order of the Division Bench. F

18. Learned counsel for the State of Jharkhand made three submissions before us and we are of the opinion that all the submissions are well founded. It was submitted: firstly, that the respondents had only a right to be considered for promotion - they did not have any right to get promoted; secondly, the H

A service conditions of the respondents had not been varied to their detriment and therefore Section 73 of the Act had no application to the facts of the case; thirdly, a promotion can only be made if there is an existing vacancy. It was submitted that there is nothing on record to suggest that there were existing vacancies in the post of General Manager/Deputy Director in the State of Jharkhand and, therefore, there is no question of promoting the respondents to that post.

19. The first issue is no longer *res integra* the matter having been put to rest long ago by a Constitution Bench of this Court which held that the mere chance of a promotion is not a condition of service. It was said in *Mohd. Shujat Ali v. Union of India*² :

"It is true that a rule which confers a right of actual promotion or a right to be considered for promotion is a rule prescribing a condition of service. This proposition can no longer be disputed in view of several pronouncements of this Court on the point and particularly the decision in *Mohammad Bhakar v. Y. Krishna Reddy*³ where this Court, speaking through Mitter, J., said: "Any rule which affects the promotion of a person relates to his condition of service". But when we speak of a right to be considered for promotion, we must not confuse it with mere chance of promotion - the latter would certainly not be a condition of service. This Court pointed out in *State of Mysore v. G.B. Purohit*⁴ that though a right to be considered for promotion is a condition of service, mere chances of promotion are not. A rule which merely affects chances of promotion cannot be regarded as varying a condition of service. What happened in *State of Mysore v. G.B. Purohit*⁴ was that the districtwise seniority of Sanitary Inspectors was changed to State wise seniority and as a result of this change, the

2. (1975) 3 SCC 76, 95.

3. 1970 SLR 768.

4. (1967) 1 SLR 753.

respondents went down in seniority and became very junior. This, it was urged, affected their chances of promotion which were protected under the proviso to Section 115 sub-section (7) [of the States Reorganization Act, 1956]. This contention was negatived and Wanchoo, J. as he then was, speaking on behalf of this Court observed: "It is said on behalf of the respondents that as their chances of promotion have been affected their conditions of service have been changed to their disadvantage. We see no force in this argument because chances of promotion are not conditions of service". Now, here in the present case, all that happened as a result of the application of the Andhra Rules and the enactment of the Andhra Pradesh Rules was that the number of posts of Assistant Engineers available to non-graduate Supervisors from the erstwhile Hyderabad State for promotion, was reduced: originally it was fifty per cent, then it became thirty-three and one-third per cent, then one in eighteen and ultimately one in twenty-four. The right to be considered for promotion was not affected but the chances of promotion were severely reduced. This did not constitute variation in the condition of service applicable immediately prior to November 1, 1956 and the proviso to Section 115 sub-section (7) was not attracted. This view is completely supported by the decision of a Constitution Bench of this Court in *Ramchandra Shankar Deodhar v. The State of Maharashtra*⁵."

20. As far as the second issue is concerned, learned counsel for the respondents was not able to point out any service condition that had been varied to the disadvantage of the respondents. All that was submitted (for the first time and that too orally) is that the reservation percentage as it existed in the State of Bihar for scheduled caste and scheduled tribe candidates had been varied in the State of Jharkhand, thereby reducing the possibility of their promotion. Even this issue is

5. (1974) 1 SCC 317.

A relatable to the chances of promotion as noted in the second part of the passage cited above from *Mohd. Shujat Ali* and therefore cannot form a legitimate basis for challenging the actions of the State of Jharkhand.

B 21. The third issue also need not detain us for long and must be decided in favour of the State of Jharkhand. It is trite that a vacancy can be filled up only if it exists. If there is no vacant post for the appointment of a direct recruit or for the promotion of an employee, a promotion or recruitment cannot be made. This was pithily stated in *Madan Lal v. State of J&K*⁶ and also quite recently in *Debabrata Dash v. Jatindra Prasad Das*⁷ in the following words:

D "Thus, in the absence of any vacancy in the Senior Branch Cadre of Superior Judicial Service to be filled up by promotion, no appointment to the Senior Branch of service by way of promotion can be made. It is as fundamental as this."

E 22. We may finally refer to *State of Uttarakhand v. Umakant Joshi*⁸ in which a situation somewhat similar to the present case had arisen.

F 23. While he was an employee of the State of Uttar Pradesh, Joshi was subjected to departmental inquiries which resulted in the award of a punishment to him. He represented against the punishment and also filed a writ petition challenging the punishment in the Allahabad High Court. He was also given adverse entries in his annual confidential reports for several years. He represented the adverse entries as well.

G 24. Pending the consideration of his representations and the writ petition, the State of Uttar Pradesh was bifurcated into Uttar Pradesh and Uttarakhand by the Uttar Pradesh Reorganization Act, 2000 with effect from 9th November, 2000.

6. (1995) 3 SCC 486

7. (2013) 3 SCC 658

H 8. (2012) 11 SCC 164

Joshi's services were then allocated to the State of Uttarakhand. A

25. Joshi's representations against the punishment awarded to him and his representations against the adverse entries in his annual confidential reports were then considered by the State of Uttarakhand and decided in his favour. As a result, Joshi represented to the State of Uttar Pradesh to grant him his due promotion from a retrospective date when his juniors were promoted, namely with effect from 16th November, 1989. The representation was transferred by the State of Uttar Pradesh to the State of Uttarakhand, which partly accepted his representation and gave him his promotion with effect from 11th October, 2006. B C

26. Joshi then approached the Uttarakhand High Court with a prayer that the State of Uttarakhand be directed to promote him with effect from 16th November, 1989. This prayer was granted and the State of Uttarakhand then challenged that order and direction in this Court. D

27. This Court considered the provisions of Sections 73 and 74 of the Uttar Pradesh Reorganization Act, 2000, which are in pari materia with the provisions of Sections 72 and 73 of the Bihar Reorganization Act. While dealing with these provisions, this Court concluded that the High Court of Uttarakhand, which came into existence on 9th November, 2000 when the State of Uttarakhand was formed by the Uttar Pradesh Reorganization Act did not have the jurisdiction to entertain Joshi's writ petition to promote him with effect from a date prior to the constitution of the State of Uttarakhand. The exercise of promoting Joshi from a date prior to the formation of the State of Uttarakhand could only be undertaken by the State of Uttar Pradesh. That apart, it was also noted that direction given by the Uttarakhand High Court could not have been given without hearing the State of Uttar Pradesh which was bifurcated with effect from 9th November, 2000 resulting in the carving out of the State of Uttarakhand from the State of Uttar Pradesh. E F G H

A 28. This Court then allowed the appeal of the State of Uttarakhand holding as follows:

B "In view of the above, we hold that the writ petition filed by Respondent 1 [Joshi] in 2008 in the Uttarakhand High Court claiming retrospective promotion to Class I post with effect from 16-11-1989 was misconceived and the High Court committed jurisdictional error by issuing direction for his promotion to the post of General Manager with effect from 16-11-1989 and for consideration of his case for promotion to the higher posts with effect from the date of promotion of his so-called juniors."

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29. As can be seen, there is a great deal of similarity in the facts of Joshi's case and the present appeal. For the additional reasons mentioned in Joshi's case, we hold that the D Jharkhand High Court could not have directed implementation of the recommendations of the DPC held on 15th February, 1999 that is from a date anterior to the date of the constitution of the Jharkhand High Court and the State of Jharkhand and the exercise of accepting the recommendation of the DPC from a date prior to the date of formation of the State of Jharkhand could have been taken only by the State of Bihar and not by the State of Jharkhand.

E

Conclusion

F 30. The appeal of the State of Jharkhand deserves to be allowed which we do. The order of the High Court is set aside, but without any order as to costs.

G 31. However, this will not preclude the respondents from taking any other action permissible in law.