

**Bihar State Electricity Board and Others**

v.

**Dharamdeo Das**

(Civil Appeal No. 6977 of 2015)

23 July 2024

**[Hima Kohli\* and Ahsanuddin Amanullah, JJ.]**

**Issue for Consideration**

Issue arose as to whether promotion ought to be reckoned from the date it is granted or from the date when a vacancy occurs on the subject post or when the post itself is created.

**Headnotes<sup>†</sup>**

**Service law – Promotion – Reckoning of – From the date promotion is granted or from the date when a vacancy occurs on the subject post or when the post itself is created:**

**Held:** Promotion is effective from the date it is granted and not from the date when a vacancy occurs on the subject post or when the post itself is created – On facts, respondent-physically challenged and belonged to the Scheduled Caste, appointed as Lower Division Assistant in 1976, thereafter given multiple promotions and finally, was granted accelerated promotion to the post of Joint Secretary vide notification of 2003 – Writ petition by the respondent seeking consideration of his case for promotion to the post of Joint Secretary with effect from 1997 and not from 2003 since the post of Joint Secretary for the reserved category candidate in the Board was vacant from 1997 and his case had not been considered for promotion from the said date, rightly dismissed by the Single Judge of the High Court, however, the Division Bench erred in allowing the same – Single Judge rightly held that merely because the respondent had completed the Kal Awadhi for promotion from the post of Under Secretary to Joint Secretary, would not necessarily entitle him for appointment from the date the post fell vacant – Not a case where the respondent was deprived of promotion to the next higher post, nor a case where the action of the Board was guided by any malafides or colourable exercise of power – There was no vacancy to the post of Joint Secretary, on the said post being reduced from six to three – Action of the Board was purely guided by administrative exigencies – Even otherwise, assuming

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that there was a vacancy to the subject posts, it would not have automatically created a valuable right in favour of the respondent for claiming retrospective promotion to the next higher post – It is only when an actual vacancy arose that the respondent was granted the benefit of accelerated promotion and that too on going through the prescribed process – Thus, the impugned order set aside and the order passed by the Single Judge restored. [Paras 18, 27-31]

### **Service Law – Promotion – Right to promotion:**

**Held:** Right to be considered for promotion has been treated not just as a statutory right but as a fundamental right, at the same time, there is no fundamental right to promotion itself – Spirit behind elevating the right for being considered for promotion to a fundamental right is enshrined in the principle of “equality of opportunity” in relation to matters of employment and appointment, subject to satisfying the eligibility criteria, as per the applicable rules – Failure to consider an employee for promotion even after satisfying the eligibility criteria would violate his/her fundamental right – However, there is a distinction between the stage of considering an employee for being promoted to taking the next step of recognizing the said right as a vested right for promotion, where line is to be drawn – Thus, right to be considered for promotion being a facet of the right to equal opportunity in employment and appointment, would have to be treated as a fundamental right guaranteed u/Arts.14 and 16(1) but such right cannot translate into a vested right of the employee for being necessarily promoted to the promotional post, unless the rules expressly provide for such a situation – Constitution of India – Art. 14 and 16(1). [Paras 18, 22]

### **Case Law Cited**

*Nirmal Chandra Sinha v. Union of India and Others* [[2008\] 5 SCR 635](#)] : (2008) 14 SCC 29; *Union of India and Another v. Manpreet Singh Poonam and Another* [[2022\] 2 SCR 764](#)] : (2022) 6 SCC 105; *Ajay Kumar Shukla v. Arvind Rai* [[2021\] 12 SCR 1178](#)] : (2022) 12 SCC 579; *Director, Lift Irrigation Corporation Ltd. v. Pravat Kiran Mohanty and Others* [[1991\] 1 SCR 341](#)] : (1991) 2 SCC 295; *Ajit Singh and Others v. State of Punjab and Others* [[1999\] Supp. 2 SCR 521](#)] : (1999) 7 SCC 209; *K.V. Subba Rao and Others v. Government of Andhra Pradesh and Others* [[1988\] 2 SCR 1118](#)] : (1988) 2 SCC 201; *Union of India and Others v. K.K. Vadera and Others* [[1989\] Supp. 1 SCR 751](#)] : (1989) Supp.

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**2 SCC 625; Sanjay Kumar Sinha-II and Others v. State of Bihar and Others [2004] Suppl. 2 SCR 834 : (2004) 10 SCC 734; State of Uttarakhand and Others v. Dinesh Kumar Sharma [2006] Supp. 10 SCR 1 : (2007) 1 SCC 683; State of Bihar and Others v. Akhouri Sachindra Nath and Others [1991] 2 SCR 410 : (1991) Supp 1 SCC 334; Keshav Chandra Joshi and Others v. Union of India and Others [1990] Supp. 2 SCR 573 : (1992) Supp 1 SCC 272; Uttarakhand Forest Rangers' Assn. (Direct Recruit) and Others v. State of U.P. and Others [2006] Suppl. 6 SCR 609 : (2006) 10 SCC 346; Nani Sha and Others s. State of Arunachal Pradesh and Others [2007] 6 SCR 1027 : (2007) 15 SCC 406; Ganga Vishan Gujarati v. State of Rajasthan [2019] 11 SCR 444 : (2019) 16 SCC 28; Direct Recruit Class II Engg. Officers' Assn. v. State of Maharashtra [1990] 2 SCR 900 : (1990) 2 SCC 715; Pawan Pratap Singh v. Reevan Singh [2011] 2 SCR 831 : (2011) 3 SCC 267; P. Sudhakar Rao v. U. Govinda Rao [2013] 13 SCR 540 : (2013) 8 SCC 693 – referred to.**

### List of Acts

Constitution of India.

### List of Keywords

Promotion; Scheduled Caste category; Kal Awadhi; Malafides or colourable exercise of power; Administrative exigencies; Retrospective promotion to the next higher post; Arising of actual vacancy; Benefit of accelerated promotion; Right to promotion; Statutory right; Fundamental right to promotion; Principle of “equality of opportunity”; Right to equal opportunity in employment and appointment; Vested right of the employee for being promoted.

### Case Arising From

CIVIL APPELLATE JURISDICTION: Civil Appeal No.6977 of 2015  
From the Judgment and Order dated 20.10.2011 of the High Court of Patna in LPA No. 41 of 2008

### Appearances for Parties

Navin Prakash, Adv. for the Appellants.

Amit Pawan, Anand Nandan, Hassan Zubair Waris, Suchit Singh Rawaat, Ms. Shivangi, Aavarsh, Advs. for the Respondent.

**Digital Supreme Court Reports****Judgment / Order of the Supreme Court****Judgment****Hima Kohli, J**

1. The appellant – Bihar State Electricity Board<sup>1</sup> has approached this Court assailing an order dated 20<sup>th</sup> October, 2011, passed by the Division Bench of the High Court of Judicature at Patna in a Letters Patent Appeal<sup>2</sup> filed by the respondent against an order dated 3<sup>rd</sup> October, 2007, passed by the learned Single Judge in a writ petition<sup>3</sup> filed by the respondent.
2. The respondent had averred in the writ petition that though he was promoted on the post of Joint Secretary on 5<sup>th</sup> March, 2003, the said promotion ought to be reckoned from July, 1997, when the post had actually fallen vacant. This plea was turned down by the learned Single Judge. However, the respondent succeeded in the intra court appeal preferred by him and as per the impugned judgement, the appellants have been directed to promote the respondent to the post of Joint Secretary with effect from 29<sup>th</sup> July, 1997. By the time the impugned judgement was delivered, the respondent having superannuated, the appellants were directed to grant him all the benefits that would have accrued to him on such a post with retrospective effect.

**BACKGROUND**

3. The relevant facts of the case are that the respondent, who was physically challenged and belonged to the Scheduled Caste category, was appointed on a temporary basis on the post of Lower Division Assistant vide letter dated 14<sup>th</sup> May, 1976. He joined the said post on 1<sup>st</sup> June, 1976. *Vide* letter dated 9<sup>th</sup> June, 1982 issued by the Board, the respondent was promoted to the post of Upper Division Assistant on an officiating basis.
4. *Vide* Resolution dated 12<sup>th</sup> August, 1983, the Board decided that out of six sanctioned posts of Joint Secretary for the Board Secretariat, two shall be manned by members of the Engineering Service of the

1 For short "Board"

2 LPA No. 41 of 2008

3 CWJC No. 9611 of 2005

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Board, two by deputationists or Government Servants of appropriate rank and two by Ministerial Officers of the Board Secretariat.

5. *Vide* Office order dated 17<sup>th</sup> September, 1992, the respondent was granted promotion as an Upper Division Assistant on an officiating basis with effect from 23<sup>rd</sup> July, 1982. By the Board's Notification dated 17<sup>th</sup> September, 1992, the respondent was also granted accelerated promotion to the post of Section Officer with effect from 23<sup>rd</sup> July, 1982.
6. The Board issued a Notification dated 30<sup>th</sup> June, 1995, granting the respondent accelerated promotion on the post of Section Officer (Senior Grade) with effect from 11<sup>th</sup> December, 1986. Again, Notification dated 1<sup>st</sup> July, 1995 was issued by the Board granting him accelerated promotion for the post of Administrative Officer on a notional basis with effect from 25<sup>th</sup> July, 1989.
7. On 26<sup>th</sup> December, 1991, the Board passed a Resolution determining the *Kal Awadhi* for Scheduled Caste/Scheduled Tribe and General Category candidates for promotion from one grade to another grade for various categories of employees. The said Resolution fixed the *Kal Awadhi* for promotion from the post of Under Secretary to Joint Secretary in the General Administrative Cadre (Board Headquarter) as three years. It also stated that "*the Kal Awadhi for candidates belonging to the Scheduled Castes and Scheduled Tribes for promotion to the next higher grade will be one year less than what has been mentioned for candidates not belonging to Scheduled Caste and Scheduled Tribes*".
8. *Vide* Notification dated 9<sup>th</sup> July, 1995 the respondent was granted accelerated promotion to the post of Under Secretary and finally, he was granted accelerated promotion to the post of Joint Secretary, *vide* Notification dated 5<sup>th</sup> March, 2003.
9. On 6/8<sup>th</sup> December, 2003, the Board passed a Resolution deciding to reduce the number of sanctioned posts of Joint Secretary from six to three at its headquarters at Patna and accordingly, issued an Office Order dated 24<sup>th</sup> December, 2003 reducing the six sanctioned posts of Joint Secretary to three. One post was to be manned by an Officer from the Bihar Administrative Service of suitable rank, the second one by a Ministerial officer of the Board Secretariat Cadre and the third one by an Officer from the Engineering Cadre.

**Digital Supreme Court Reports****ENSUING LITIGATION**

10. Dissatisfied with the Notification dated 5<sup>th</sup> March, 2003 issued by the Board granting him accelerated promotion from the post of Under Secretary to Joint Secretary, the respondent filed a writ petition<sup>4</sup> before the High Court of Patna for considering his case for promotion to the post of Joint Secretary with effect from 29<sup>th</sup> July, 1997 and not from 5<sup>th</sup> March, 2003 on a plea that though the post of Joint Secretary for the reserved category candidate in the Board was vacant from 29<sup>th</sup> July, 1997, his case had not been considered for promotion from the said date.
11. Noting that a representation in this regard submitted by the respondent was pending before the Secretary of the Board, *vide* order dated 23<sup>rd</sup> September, 2004, the writ petition<sup>5</sup> was disposed of by the learned Single Judge and the Board was directed to consider the said representation and pass a reasoned order within a fixed time line.
12. The pending representation of the respondent was decided by the Board by a Resolution dated 9<sup>th</sup> June, 2005. The said Resolution noted that during his 29 years of service, the respondent was granted five promotions. In view of the bifurcation of the erstwhile State of Bihar into the present State of Bihar and Jharkhand, the Jharkhand State Electricity Board was constituted with effect from 2<sup>nd</sup> January, 2004. This had resulted in re-organization of the administrative/ministerial cadre at the Headquarters of the Board. Post re-organisation of the Administrative cadre, only three posts of Joint Secretary were fixed for the Board out of which only one post was earmarked for Officers of the Ministerial Cadre, like the respondent herein. The Board rejected the claim of the respondent for seeking promotion to the post of Joint Secretary with effect from 29<sup>th</sup> July, 1997 on a plea that he had completed the prescribed *Kal Awadhi* on the said date and the marked post of the Joint Secretary from amidst the Officers of the Ministerial Cadre was vacant at that time. It was observed that the said post was not vacant from 29<sup>th</sup> July, 1997 and that Officers from the Engineering Service of the Board and Officers of the Administrative Service of the Bihar Government were already

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4 CWJC No. 14194 of 2001

5 *ibid*

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posted as Joint Secretary. Therefore, it was not possible to grant promotion to the respondent on the post of Joint Secretary with effect from 29<sup>th</sup> July, 1997.

13. The aforesaid decision taken by the Board *vide* Resolution dated 9<sup>th</sup> June, 2005, was challenged by the respondent in a writ petition<sup>6</sup>. *Vide* judgement dated 3<sup>rd</sup> October, 2007, the learned Single Judge dismissed the said writ petition holding *inter alia* that Resolution dated 26<sup>th</sup> December, 1991 passed by the Board was only a basic guideline for determining the *Kal Awadhi* for promotion from one cadre to the other so that a person acquires minimum period of experience on the given post before he can be promoted to the next higher post and such a guideline can only be treated as directory in nature and not mandatory. The learned Single Judge concurred with the submission made by the appellants that promotion given to the respondent on 5<sup>th</sup> March, 2003, was on account of certain administrative problems that had cropped up when the State of Bihar was bifurcated into the present State of Bihar and State of Jharkhand on 15<sup>th</sup> November, 2003. It was held that merely because the respondent had completed the period contemplated under the *Kal Awadhi* for the next higher post would not be a criteria to shift his date of promotion from 5<sup>th</sup> March, 2003 to the year 1997.
14. Aggrieved by the aforesaid decision of the learned Single Judge, the respondent filed an intra court appeal. The said judgement was overturned by the Division Bench by the impugned judgement, observing that the Resolution dated 9<sup>th</sup> June, 2005 whereby the respondent's representation was rejected by the Board, was unsustainable since it did not adhere to the *Kal Awadhi* as mentioned in the Resolution dated 26<sup>th</sup> December, 1991. The respondent who had already superannuated from the post of Under Secretary, was therefore held entitled to all the benefits of such a post with retrospective effect. It is the said decision that has been challenged by the appellant Board in the present appeal.

**ARGUMENTS ADVANCED**

15. Mr. Navin Prakash, learned Counsel for the appellant Board submitted that the Division Bench has misconstrued the concept of

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*Kal Awadhi* which actually denotes qualifying service and does not mean that immediately upon completion of the period of three years for promotion from the post of Under Secretary to Joint Secretary, as contemplated in the Resolution dated 26<sup>th</sup> December, 1991, an employee ought to be compulsorily promoted. He urged that the *Kal Awadhi* prescribed for promotion from one post to another is only an eligibility criteria that has been laid down and upon completion of the said period, the incumbent employee becomes eligible for being considered for promotion to the next higher post but it is not as if there is a compulsion to promote him immediately upon completion of the period of the *Kal Awadhi*. Highlighting the facts that the respondent herein had already earned five accelerated promotions in a span of about 23 years of service, learned counsel submitted that the date on which the respondent had completed his *Kal Awadhi* for promotion from the post of Under Secretary to Joint Secretary, i.e., on 29<sup>th</sup> July, 1997, there was no vacancy on the post of Joint Secretary till the actual date of his promotion i.e., 5<sup>th</sup> March, 2003 which fact has been completely overlooked in the impugned judgement. To fortify the aforesaid submission learned counsel cited decisions of this Court in Nirmal Chandra Sinha vs. Union of India and Others<sup>7</sup> and Union of India and Another vs. Manpreet Singh Poonam and Another.<sup>8</sup>

16. *Per contra*, Mr. Amit Pawan, learned counsel for the respondent supported the impugned judgement and submitted that the respondent was rightly promoted to the post of Under Secretary with effect from 29<sup>th</sup> July, 1997 since he had already completed the *Kal Awadhi* on the said date, in terms of the Resolution dated 26<sup>th</sup> December, 1991 issued by the Board. He submitted that besides the fact that the respondent falls under the reserved category and is physically challenged, he was also the senior most member in the cadre of Under Secretary on the relevant date i.e., 29<sup>th</sup> July, 1997. Having completed the *Kal Awadhi* period as on the said date, the respondent was qualified and eligible for promotion and ought to have been immediately considered for promotion with effect from the said date. He therefore submits that the impugned judgement does not deserve interference.

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7 [2008] 5 SCR 635 : (2008) 14 SCC 29

8 [2022] 2 SCR 764 : (2022) 6 SCC 105

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**DISCUSSION ON THE LEGAL POSITION**

17. We have perused the pleadings and the records and given our thoughtful consideration to the submissions advanced by learned counsel for the parties.
18. It is no longer *res integra* that a promotion is effective from the date it is granted and not from the date when a vacancy occurs on the subject post or when the post itself is created. No doubt, a right to be considered for promotion has been treated by courts not just as a statutory right but as a fundamental right, at the same time, there is no fundamental right to promotion itself. In this context, we may profitably cite a recent decision in *Ajay Kumar Shukla vs. Arvind Rai*<sup>9</sup> where, citing earlier precedents in *Director, Lift Irrigation Corporation Ltd. vs. Pravat Kiran Mohanty and Others*<sup>10</sup> and *Ajit Singh and Others vs. State of Punjab and Others*,<sup>11</sup> a three Judge Bench observed thus:

41. This Court, time and again, has laid emphasis on right to be considered for promotion to be a fundamental right, as was held by K. Ramaswamy, J., in *Director, Lift Irrigation Corpn. Ltd. v. Pravat Kiran Mohanty and Others*<sup>9</sup> in para 4 of the report which is reproduced below:

“4.....There is no fundamental right to promotion, but an employee has only right to be considered for promotion, when it arises, in accordance with relevant rules. From this perspective in our view the conclusion of the High Court that the gradation list prepared by the corporation is in violation of the right of respondent-writ petitioner to equality enshrined under Article 14 read with Article 16 of the Constitution, and the respondent-writ petitioner was unjustly denied of the same is obviously unjustified.”

42. A Constitution Bench in *Ajit Singh and Others v. State of Punjab and Others*,<sup>10</sup> laying emphasis on Article

9 [2021] 12 SCR 1178 : (2022) 12 SCC 579

10 [1991] 1 SCR 341 : (1991) 2 SCC 295

11 [1999] Supp. 2 SCR 521 : (1999) 7 SCC 209

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14 and Article 16(1) of the Constitution of India held that if a person who satisfies the eligibility and the criteria for promotion but still is not considered for promotion, then there will be clear violation of his/her's fundamental right. Jagannadha Rao, J. speaking for himself and Anand, C.J., Venkataswami, Pattanaik, Kurdukar, JJ., observed the same as follows in paras 22 and 27 :

"Articles 14 and 16(1) : is right to be considered for promotion a fundamental right

22. Article 14 and Article 16(1) are closely connected. They deal with individual rights of the person. Article 14 demands that the 'State shall not deny to any person equality before the law or the equal protection of the laws'. Article 16(1) issues a positive command that:

'there shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State'.

It has been held repeatedly by this Court that clause (1) of Article 16 is a facet of Article 14 and that it takes its roots from Article 14. The said clause particularises the generality in Article 14 and identifies, in a constitutional sense "equality of opportunity" in matters of employment and appointment to any office under the State. The word "employment" being wider, there is no dispute that it takes within its fold, the aspect of promotions to posts above the stage of initial level of recruitment. Article 16(1) provides to every employee otherwise eligible for promotion or who comes within the zone of consideration, a fundamental right to be "considered" for promotion. Equal opportunity here means the right to be "considered" for promotion. If a person satisfies the eligibility and zone criteria but is not considered for promotion, then there will be a clear infraction of his fundamental right to be "considered" for promotion, which is his personal right.

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“Promotion” based on equal opportunity and seniority attached to such promotion are facets of fundamental right under Article 16(1)

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27. In our opinion, the above view expressed in Ashok Kumar Gupta [*Ashok Kumar Gupta v. State of U.P.*,<sup>12</sup> and followed in Jagdish Lal [*Jagdish Lal v. State of Haryana*,<sup>13</sup> and other cases, if it is intended to lay down that the right guaranteed to employees for being “considered” for promotion according to relevant rules of recruitment by promotion (i.e. whether on the basis of seniority or merit) is only a statutory right and not a fundamental right, we cannot accept the proposition. We have already stated earlier that the right to equal opportunity in the matter of promotion in the sense of a right to be “considered” for promotion is indeed a fundamental right guaranteed under Article 16(1) and this has never been doubted in any other case before Ashok Kumar Gupta [*Ashok Kumar Gupta v. State of U.P.*<sup>11</sup>], right from 1950.”
19. A similar view has also been expressed earlier hereto in *K.V. Subba Rao and Others vs. Government of Andhra Pradesh and Others*,<sup>14</sup> *Union of India and Others vs. K.K. Vadera and Others*,<sup>15</sup> *Sanjay Kumar Sinha-II and Others vs. State of Bihar and Others*,<sup>16</sup> *State of Uttarakhand and Others vs. Dinesh Kumar Sharma*,<sup>17</sup> *Nirmal Chandra Sinha*<sup>6</sup> (supra) and recently in *Manpreet Singh Poonam*<sup>7</sup> (supra).
20. In *State of Bihar and Others vs. Akhouri Sachindra Nath and Others*,<sup>18</sup> it was held that retrospective seniority cannot be given to

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12 (1997) 5 SCC 201

13 (1997) 6 SCC 538

14 [1988] 2 SCR 1118 : (1988) 2 SCC 201

15 [1989] Supp. 1 SCR 751 : (1989) Supp. 2 SCC 625

16 [2004] Suppl. 2 SCR 834 : (2004) 10 SCC 734

17 [2006] Supp. 10 SCR 1 : (2007) 1 SCC 683

18 [1991] 2 SCR 410 : 1991 Supp (1) SCC 334

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an employee from a date when he was not even borne in the cadre, nor can seniority be given with retrospective effect as that might adversely affect others. The same view was reiterated in *Keshav Chandra Joshi and Others vs. Union of India and Others*,<sup>19</sup> where it was held that when a quota is provided for, then the seniority of the employee would be reckoned from the date when the vacancy arises in the quota and not from any anterior date of promotion or subsequent date of confirmation. The said view was restated in *Uttaranchal Forest Rangers' Assn. (Direct Recruit) and Others vs. State of U.P. and Others*,<sup>20</sup> in the following words :

“37. We are also of the view that no retrospective promotion or seniority can be granted from a date when an employee has not even been borne in the cadre so as to adversely affect the direct recruits appointed validly in the meantime, as decided by this Court in *Keshav Chandra Joshi and Others v. Union of India and Other*<sup>18</sup> held that when promotion is outside the quota, seniority would be reckoned from the date of the vacancy within the quota rendering the previous service fortuitous. The previous promotion would be regular only from the date of the vacancy within the quota and seniority shall be counted from that date and not from the date of his earlier promotion or subsequent confirmation. In order to do justice to the promotees, it would not be proper to do injustice to the direct recruits.....

38. This Court has consistently held that no retrospective promotion can be granted nor can any seniority be given on retrospective basis from a date when an employee has not even been borne in the cadre particularly when this would adversely affect the direct recruits who have been appointed validly in the meantime.”

(emphasis added)

21. In *Nani Sha and Others vs. State of Arunachal Pradesh and Others*,<sup>21</sup> it was observed that mere existence of a vacancy is not

19 [1990] Supp. 2 SCR 573 : 1992 Supp (1) SCC 272

20 [2006] Suppl. 6 SCR 609 : (2006) 10 SCC 346

21 [2007] 6 SCR 1027 : (2007) 15 SCC 406

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sufficient for an employee to claim seniority and the date of actual appointment has to be in accordance with the prescribed procedure. In Dinesh Kumar Sharma<sup>16</sup> (supra), the following pertinent observations were made :

“34. Another issue that deserves consideration is whether the year in which the vacancy accrues can have any relevance for the purpose of determining the seniority irrespective of the fact when the persons are recruited. Here the respondent’s contention is that since the vacancy arose in 1995-1996, he should be given promotion and seniority from that year and not from 1999, when his actual appointment letter was issued by the appellant. This cannot be allowed as no retrospective effect can be given to the order of appointment order under the Rules nor is such contention reasonable to normal parlance. This was the view taken by this Court in **Jagdish Ch. Patnaik v. State of Orissa.**”<sup>22</sup>

22. The spirit behind elevating the right for being considered for promotion to a fundamental right is enshrined in the principle of “equality of opportunity” in relation to matters of employment and appointment to a position under the State. Once employed, the employees are entitled for being considered for promotion to the next higher post subject to their satisfying the eligibility criteria, as per the applicable rules. Failure to consider an employee for promotion even after satisfying the eligibility criteria would violate her fundamental right. However, a clear distinction has been drawn between the stage of considering an employee for being promoted to taking the next step of recognizing the said right as a vested right for promotion. That is where the line has to be drawn. Stated differently, a right to be considered for promotion being a facet of the right to equal opportunity in employment and appointment, would have to be treated as a fundamental right guaranteed under Articles 14 and 16(1) of the Constitution of India but such a right cannot translate into a vested right of the employee for being necessarily promoted to the promotional post, unless the rules expressly provide for such a situation.

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23. The view that seniority can neither be reckoned from the date when a vacancy arises, nor can it be granted retrospectively unless the service rules specifically provide for such a situation, is fortified by the decision of this Court in K.K. Vadera<sup>14</sup> (supra) which has emphasised in no uncertain terms the settled position in law that promotion to a post should only be granted from the date of the promotion and not from the date on which a vacancy may have arisen. In Ganga Vishan Gujarati vs State of Rajasthan,<sup>23</sup> this Court had reiterated the principle that retrospective seniority cannot be granted to an employee from the date when she was not even borne on the cadre. This principle has been built upon by a line of precedents starting with the decision of the Constitution Bench of this Court in Direct Recruit Class II Engg. Officers' Assn. v. State of Maharashtra,<sup>24</sup> followed in Akhouri Sachindra Nath<sup>17</sup> (supra), Dinesh Kumar Sharma<sup>16</sup> (supra) and several other cases.
24. In Pawan Pratap Singh vs. Reevan Singh,<sup>25</sup> this Court had taken note of the earlier decision in Pravat Kiran Mohanty<sup>9</sup> (supra) and summarised the position in the following words :
45. A consistent line of precedent of this Court follows the principle that retrospective seniority cannot be granted to an employee from a date when the employee was not borne on a cadre. Seniority amongst members of the same grade has to be counted from the date of initial entry into the grade. This principle emerges from the decision of the Constitution Bench of this Court in Direct Recruit Class II Engg. Officers' Assn. v. State of Maharashtra [Direct Recruit Class II Engg. Officers' Assn. v. State of Maharashtra.<sup>23</sup> The principle was reiterated by this Court in State of Bihar v. Akhouri Sachindra Nath<sup>17</sup> and State of Uttarakhand v. Dinesh Kumar Sharma.<sup>16</sup> In Pawan Pratap Singh v. Reevan Singh,<sup>24</sup> this Court revisited the precedents on the subject and observed :
- '45. ... (i) The effective date of selection has to be understood in the context of the service rules under

23 [2019] 11 SCR 444 : (2019) 16 SCC 28

24 [1990] 2 SCR 900 : (1990) 2 SCC 715

25 [2011] 2 SCR 831 : (2011) 3 SCC 267

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which the appointment is made. It may mean the date on which the process of selection starts with the issuance of advertisement or the factum of preparation of the select list, as the case may be.

(ii) Inter se seniority in a particular service has to be determined as per the service rules. The date of entry in a particular service or the date of substantive appointment is the safest criterion for fixing seniority inter se between one officer or the other or between one group of officers and the other recruited from different sources. Any departure therefrom in the statutory rules, executive instructions or otherwise must be consistent with the requirements of Articles 14 and 16 of the Constitution.

(iii) Ordinarily, notional seniority may not be granted from the backdate and if it is done, it must be based on objective considerations and on a valid classification and must be traceable to the statutory rules.

(iv) **The seniority cannot be reckoned from the date of occurrence of the vacancy and cannot be given retrospectively unless it is so expressly provided by the relevant service rules. It is so because seniority cannot be given on retrospective basis when an employee has not even been borne in the cadre and by doing so it may adversely affect the employees who have been appointed validly in the meantime.'**

This view has been re-affirmed by a Bench of three Judges of this Court in *P. Sudhakar Rao v. U. Govinda Rao*.<sup>26</sup>

(emphasis added)

[Also refer : *P. Sudhakar Rao v. U. Govinda Rao*<sup>25</sup> and *Union of India and Another v. Manpreet Singh Poonam and Another*<sup>7</sup>]

#### **APPLICATION OF THE LAW TO THE FACTS OF THE CASE**

25. Coming back to the facts of the instance case, there is no dispute that the respondent who started his career as a Lower Division Assistant on 1<sup>st</sup> June, 1976, was promoted to the post of Upper

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Division Assistant on an officiating basis with effect from 23<sup>rd</sup> July, 1980, was granted the first accelerated promotion to the post of Section Officer with effect from 23<sup>rd</sup> July, 1982, a second accelerated promotion on the post of Section Officer (Senior Grade) with effect from 11<sup>th</sup> December, 1986, a third accelerated promotion to the post of Administrative Officer with effect from 25<sup>th</sup> July, 1989, a fourth accelerated promotion to the post of Under Secretary on 9<sup>th</sup> July, 1995 and finally, a fifth accelerated promotion on the post of Joint Secretary on 5<sup>th</sup> March, 2003. This goes to show that within a span of ten years five months (from 23<sup>rd</sup> July, 1982 to 5<sup>th</sup> March, 2003) the respondent was granted five promotions by the appellant-Board.

26. Much emphasis has been laid by learned counsel for the respondent on the Resolution dated 26<sup>th</sup> December, 1991 to contend that once the respondent had completed the required period of three years mentioned as *Kal Awadhi* for promotion from the post of Under Secretary to Joint Secretary, he was automatically entitled for promotion to the next higher post. The said submission is however found to be devoid of merits.
27. Resolution dated 26<sup>th</sup> December, 1991 prescribed a minimum qualifying service before considering the case of an employee for promotion from one grade to another. The underlying aim of the said resolution is to ensure that an employee gathers sufficient experience as may be required before he can be considered for promotion to the next higher post. But that is not to state that on completion of the duration of *Kal Awadhi* for promotion, an employee would automatically be entitled for promotion to the next higher post. No employee can lay a claim for being promoted to the next higher post merely on completing the minimum qualifying service. Such an interpretation of the resolution would be fallacious and virtually result in nullifying the settled law of a right inhering in an employee for being considered for promotion being a fundamental right. By no stretch of imagination can a right for being appointed to the promotional post be treated as a vested right.
28. We do not find any error in the stand taken by the appellant-Board in terms of its Resolution dated 9<sup>th</sup> June, 2005, whereby the respondent's plea for shifting his date of promotion to the post of Joint Secretary from 5<sup>th</sup> March, 2003 to 29<sup>th</sup> July, 1997 was rejected for the reason that there was no vacant post of Joint Secretary during the period

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between 29<sup>th</sup> July, 1997 to 5<sup>th</sup> March, 2003 on account of the fact that after the bifurcation of the erstwhile State of Bihar into the present State of Bihar and Jharkhand, *vide* Resolution dated 6/8<sup>th</sup> December, 2003 the appellant-Board had taken a calibrated decision to slash the number of sanctioned posts of Joint Secretary from six to three at the headquarters at Patna. The subsequently issued Office Order dated 24<sup>th</sup> December, 2003 gave effect to such an intention and declared that from out of the reduced posts of Joint Secretary, one would be manned by an Officer of suitable rank from the Bihar Administrative Service, one from the Ministerial Officer of the Board Secretariat Cadre and the third from the Engineering Cadre.

29. In the instant case, records reveal that there was no vacancy to the post of Under Secretary in the appellant-Board on the said post being reduced from six to three. This step was taken by the Board due to administrative exigencies. We do not find any infirmity in the said decision. Even otherwise, assuming that there was a vacancy to the subject posts, it would not have automatically created a valuable right in favour of the respondent for claiming retrospective promotion to the next higher post. It is only when an actual vacancy arose that the respondent was granted the benefit of accelerated promotion and that too on going through the prescribed process.

**CONCLUSION**

30. Given the above legal position, in our view, the Division Bench of the High Court ought to have refrained from interfering with the findings returned by the learned Single Judge who has rightly held that merely because the respondent had completed the *Kal Awadhi* for promotion from the post of Under Secretary to Joint Secretary, would not necessarily entitle him for appointment from the date the post fell vacant. This is not a case where the respondent has been deprived of promotion to the next higher post, nor is it a case where the action of the Board was guided by any *mala fides* or colourable exercise of power. As noted above, the action of the Board was purely guided by administrative exigencies. The Resolution of the Board dated 26<sup>th</sup> December, 1991 for fixing the *Kal Awadhi* was only directory in nature and cannot be treated as statutory for the respondent to have claimed an entitlement to promotion reckoned from 29<sup>th</sup> July, 1997, instead of 5<sup>th</sup> March, 2003. Such a view is in consonance with the settled legal position and cannot be faulted.

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31. Accordingly, the present appeal succeeds. For the reasons stated aforesaid, the impugned order dated 20<sup>th</sup> October 2011 is set aside and the order dated 3<sup>rd</sup> October, 2007 passed by the learned Single Judge is restored. Parties are left to bear their own expenses.

*Result of the case:* Appeal allowed.

<sup>†</sup>*Headnotes prepared by:* Nidhi jain