

Baij Nath Sharma

Vs

Hon'ble Rajasthan High Court at Jodhpur and Another

Civil Appeal No. 4563 of 1998

(Dr. A. S. Anand, D. P. Wadhwa JJ)

02.09.1998

JUDGMENT

D. P. WADHWA, J.

1. Leave granted.

2. The appellant, who was a member of the Rajasthan Judicial Service (for short "the RJS"), is aggrieved by the judgment dated 17-9-1997 of the Division Bench of the Rajasthan High Court dismissing his writ petition (CWP No. 3455 of 1997) wherein he had prayed in effect that his case for promotion to the Rajasthan Higher Judicial Service (for short "the RHJS") be considered from the date when the posts in the RHJS fell vacant.

3. By the time the appellant filed the writ petition he had already superannuated on 31-5-1996. Prior to his retirement, posts in the RHJS were available in the promotional quota for promotion of the appellant. He had earlier filed writ petition (CWP No. 1544 of 1996) in the High Court seeking his promotion. This earlier writ petition came up for admission before the High Court on 27-5-1996 and the following order was passed :

"27-5-1996 : Hon'ble Mr. M. G. Mukherji, Acting C.J. Hon'ble Mr. Bhagwati Prasad, J.

Issue notice, returnable four weeks after the summer holidays. Notice be given 'dasti' to the learned advocate.

We direct that even though the writ petitioner retires on 31-5-1996, his case is to be considered along with the other officers for the purpose of promotion to the Rajasthan Higher Judicial Service, and in case such a promotion is accorded to him notionally, his case would be sympathetically considered with appropriate directions, as may be deemed fit and proper."

That writ petition was withdrawn by the appellant on 8-1-1997. Liberty was, however, granted to him to file a fresh writ petition if any occasion arose. The order dismissing the writ petition as withdrawn is as under :

"8-1-1997 : Hon'ble Mr. M. G. Mukherji, C.J. Hon'ble Mr. Bhagwati Prasad, J.

The petitioner expresses desire to withdraw the writ petition application with liberty to file representation in the administrative forum.

He is granted liberty to file fresh writ application if occasion arises.

The writ application dismissed as withdrawn."

Subsequent writ petition (CWP No. 3455 of 1997) was dismissed in limine with the following order which is now impugned :

"17-9-1997 : Hon'ble Mr. M. G. Mukherji, C.J. Hon'ble Mr. Bhagwati Prasad, J.

Mr. H. N. Calla for the petitioner.

We are of the opinion that the present writ application is barred by the principles of res judicata. The representation as submitted by the writ petitioner was considered by the Full Court and the Full Court in its wisdom rejected the same. It is further contended that the Full Court did not pass a speaking order on his representation. We are constrained to hold that the matter was discussed in the Full Court and the ultimate decision was communicated to the writ petitioner. We do not think that there is any force in this writ application. Till such time the petitioner retired, none of his juniors was considered for promotion or was given promotion to the Rajasthan Higher Judicial Service. It may be a very sad state of affairs that he was not considered for promotion till he retired but that does not make out any case for interference.

The writ application stands dismissed."

This order is being challenged by the appellant in this appeal.

4. The appellant joined the RJS on 2-1-1979. He was confirmed in the post of Munsif-cum-Judicial Magistrate by order dated 31-12-1980. He was promoted as Civil Judge (Senior Division)-cum-Additional Chief Judicial Magistrate on 13-2-1992 and by order dated 17-8-1993, the appellant was granted selection scale w.e.f. August 1992. He retired on 31-5-1996. After withdrawal of his writ petition (CWP No. 1544 of 1996), the appellant represented on 29-1-1997 that his case for promotion to the RHJS be considered and he be given notional promotion in view of the observations made on 27-5-1996 in the writ petition. This representation did not find favour with the High Court and was rejected by a resolution of the Full Court dated 3-7-1997, which was communicated to the appellant. This led the appellant to file the second writ petition (CWP No. 3455 of 1997), which as noted above, was rejected on two grounds, namely, (1) it was barred by the principle of res judicata, and (2) till the appellant retired from service, none of his juniors was considered for promotion or even promoted to the RHJS.

5. We do not think that the High Court was right in holding that the second writ petition (CWP No. 3455 of 1997) was barred by the principle of res judicata. The appellant made his representations on the basis of observations made by the High Court on 27-5-1996 in his earlier writ petition. When this writ petition came up for hearing again, the appellant had retired. He, therefore, withdrew the writ petition. Liberty was granted to him to file another writ petition, "if occasion arises". This certainly does not mean that a fresh writ petition could be filed only if a fresh cause of action arose. In any case, a fresh cause of action did arise when representations of the appellant were rejected by the High Court and his case for promotion to the RHJS was not considered for giving him notional promotion. However, our holding that the second writ petition was not barred by the principle of res judicata does not help the appellant as his writ petition was also dismissed on merit. There is some

controversy if grant of selection grade to the appellant would give him seniority over those officers who though senior in the seniority list of the RJS were not granted selection grade. Admittedly the seniority list was never under challenge. This controversy is, however, not material for our purposes inasmuch as it is not disputed that on the date when the appellant retired from service, posts in the promotional quota were available and the appellant could have been considered for promotion to the RHJS in that quota. He was not so considered because the High Court had taken a decision by a resolution of the Full Court dated 9-2-1996 not to make further promotions from the RJS till recruitment from the Bar to the RHJS was made. The appellant in his first writ petition had challenged the resolution of the Full Court not to make promotions to the cadre of the RHJS a till appointments from the Bar were made. This resolution of the Full Court he certainly could not challenge in the second writ petition. The High Court in its counter-affidavit has given justification as to why it took the decision not to make any promotion to the cadre of the RHJS though at the relevant time 21 posts of Additional District and Sessions Judges were vacant to be filled in by promotion and direct recruitment in the ratio of 3 : 1 as per Rule 9(2) of the Rajasthan Higher Judicial Service Rules, 1969. This is how the High Court justified its decision :

"The Full Court in its meeting held on 9-2-1996 resolved that no promotion shall be made till direct recruitment is made. The decision to this effect was taken by the Full Court keeping in view the inequitable operation of quota 3 : 1 which has to be maintained between promotees and direct recruits to the RHJS which was not being done. While vacancies in the direct recruit quota were being determined on the basis of sanctioned strength of the cadre, the promotional quota was being operated on the basis of the recruitment. There were 89 sanctioned posts but factually, more than 200 officers were working on the RHJS posts. The posts in excess of 89 were being manned by temporary/ad hoc promotees from RHJS only and therefore factually, the proportion of direct recruits has gone down abysmally. The embargo on promotions was, therefore, imposed by the Full Court to stop further inequality and imbalance in the proportions between the two quotas which created problems in determining inter se seniority in the RHJS on the basis of rota-quota rule. Therefore, the Full Court took the decision not to promote the officers from the RJS cadre to the RHJS cadre till the direct recruitment is made keeping in view the inequitable operation of rota-quota rule. The resolution passed by the Full Court in its meeting held on 9-2-1996 did not require any interference of His Excellency the Governor. Therefore it is wrong to contend that the Full Court has no authority to stop the promotions by way of recruitment to the RHJS to maintain the proportional representation and inter se seniority between direct recruits and promotees."

6. The appellant could certainly have a grievance if any of his juniors had been given promotion from a date prior to his superannuation. It is not the case here. From the promotional quota, four promotions were made only on 30-12-1996, i.e., after the appellant had retired. Those promoted were given promotions from the dates the orders of their promotions were issued and not from the dates the posts had fallen vacant. It is also the contention of the High Court that these four officers, who were promoted to the RHJS, were senior to the appellant as per the seniority list. The question which falls for consideration is very narrow and that is, if under the rules applicable to the appellant promotion was to be given to him from the date the post fell vacant or from the date when order for promotion is made. We have not been shown any rule which could help the appellant. No officer in the RJS has been promoted to the RHJS prior to 31-5-1996 who is junior to the appellant. Further decision by the Rajasthan High Court has been taken to restore the imbalance between the direct recruits and the promotees which, of course, as noted above, is beyond challenge.

7. In *Union of India v. K. K. Vadera* (1989 Supp (2) SCC 625 : 1990 SCC (L&S) 127 : AIR 1990 SC 442) this Court with reference to the Defence Research and Development Service Rules, 1970, held that) promotion would be effective from the date of the order and not from the date when promotional posts were created. Rule 8 of those Rules did not specify any date from which the promotion would be effective. This Court said as under : (SCC pp. 626-27, para 5)

"5. There is no statutory provision that the promotion to the post of Scientist 'B' should take effect from July 1 of the year in which the promotion is granted. It may be that rightly or wrongly, for some reason or the other, the promotions were granted from July 1, but we do not find any justifying reason for the direction given by the Tribunal that the promotions of the respondents to the posts of Scientist 'B' should be with effect from the date of the creation of these promotional posts. We do not know of any law or any rule under which a promotion is to be effective from the date of creation of the promotional post. After a post falls vacant for any reason whatsoever, a promotion to that post should be from the date the promotion is granted and not from the date on which such post falls vacant. In the same way when additional posts are created, promotions to those posts can be granted only after the Assessment Board has met and made its recommendations for promotions being granted. If on the contrary, promotions are directed to become effective from the date of the creation of additional posts, then it would have the effect of giving promotions even before the Assessment Board has met and assessed the suitability of the candidates for promotion. In the circumstances, it is difficult to sustain the judgment of the Tribunal."

8. It is regrettable because of the inaction on the part of the High Court that recruitment from the Bar could not be made in time which created an imbalance in the service and ultimately it were the appellant and officers similarly placed who suffered. After having put in long years of service, it is the seniority and promotion which an officer looks forward to. He expects he is given due promotion in time. Non-promotion may be an incidence of any service. But here the appellant has been deprived of his promotion without any fault of his. The High Court said that it might be a sad state of affairs that the name of the appellant was not considered for promotion till he retired. The High Court may feel anguished but it gives no comfort to the appellant. At least for the future, such an unfortunate thing should not happen to any other officer similarly situated. This malaise which abysmally afflicts any service when there is recruitment from different sources crops up in one form or the other with great disadvantage to one or the other. But then the service is not constituted merely for the benefit of the officers in the a service but with a certain purpose in view and in the present case, for dispensing justice to the public at large. It is not at all advisable to keep any post in the judiciary vacant for days when the courts are burdened with arrears and the litigants are the ones who suffer. We expect the High Courts to be vigilant and to fill up the posts in the direct quota in time and if the Bar quota cannot be filled for any reason for no fault of the promotee officers, their case for promotion should not be kept pending till some of them even superannuate. When the process for recruitment from the Bar begins and it is expected that posts for the direct quota will be filled up soon, during the intervening period, the officers in the subordinate service can be given ad hoc promotions without their right to claim seniority over direct recruits, who may join later. Functioning of the courts must not stop.

9. With these observations, we would dismiss the appeal and leave the parties to bear their own costs.