

Reportable

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NOS. 5790-92 OF 2002

Amarjeet Singh & Ors.

.... Appellants

Versus

Devi Ratan & Ors.

.... Respondents

With SLP(C) No. 9615 of 2002.

ORDER

1. These appeals have arisen from the judgment and order dated 11.4.2002 passed by the High Court of Allahabad (Lucknow Bench) by which it has allowed the writ petitions filed by the respondents quashing the seniority list dated 12.7.2000 issued by the State Government for the Excise Inspectors.

2. The facts and circumstances giving rise to these appeals are that the appellants and respondents in these cases were appointed as Excise Inspectors under the provisions of U.P. Excise Service (Class-II) Rules,

1970 (hereinafter called as “the Rules 1970”). The parties became eligible for consideration for promotion to the post of Superintendent of Excise under the said Rules, 1970. The criteria of promotion for the post of Superintendent of Excise and for higher post of Assistant Excise Commissioner (hereinafter called “AEC”) had been **“merit”** under the provisions of U.P. Assistant Excise Commissioners Service Rules, 1992 (hereinafter called as ‘the Rules 1992’). The said rules stood amended w.e.f. 10.10.1994 and the criteria for promotion was changed from ‘**merit**’ to ‘**seniority subject to rejection of unfit.**’ The Appellant Amarjeet Singh alongwith some other Excise Inspectors filed writ petition No. 1113(SB) of 1994 before the Allahabad High Court challenging the selection process for promotion under Rules 1992. The High Court vide judgment and order dated 1.2.1995 held that the vacancies which had come into existence prior to 10.10.1994 i.e. the date of amendment, be filled up as per the unamended Rules i.e. on the basis of **“merit”** and not on the basis of **“seniority subject to rejection of unfit.”**

3. Being aggrieved, the State of U.P. preferred the Special Leave Petition before this Court and this Court vide Order dated 30.10.1995 passed an interim Order permitting the State Authorities to make promotions as per

1994 amendment Rules but it was subject to the result of the petition as this Court made it clear that if petition was dismissed, the respondents would be reverted to the lower post from which they would be promoted.

4. In view of the said interim order of this Court, 61 Excise Inspectors stood promoted, subject to the final outcome of the Special Leave Petition. This Court dismissed the said Special Leave Petition vide Order dated 19.8.1999 *in limine*. However, the State Authorities for the reasons best known to them, did not revert the promoted officers and they continued to hold the higher posts. The Departmental Promotional Committee (hereinafter called the DPC) meant for filling up the 42 vacancies, which came into existence prior to 10.10.1994, met on 19.12.1998. After scanning the service records and determining the *inter se* merit of the candidates, the Committee came to the conclusion that only 30 candidates were suitable for promotion to the posts of AEC and they were to be promoted as per the availability of yearwise vacancies. The respondents, herein, were found unsuitable for promotion in the said selection process.

5. After completing the aforesaid exercise, 12 vacancies for the post of AEC remained unfilled. Therefore, the 12 vacancies were carried forward

to enable the State Authorities to fill up the same under the amended Rules on a different criteria i.e. **“Seniority subject to rejection of unfit”**. Thus twelve officers/respondents were promoted under the amended rules by the another DPC held on 22.1.1999. The State Government issued the Order dated 15.5.1999 reverting all Excise Inspectors promoted on 6.12.1995 under the interim order of this Court and gave notional promotions with retrospective effect to appellants as well as all the reverted officers/respondents. As a consequence, a seniority list dated 12.7.2000, was issued, wherein the appellants were placed over and above the respondents. Being aggrieved, the respondents approached the High Court challenging the said seniority list dated 12.7.2000.

6. The High Court vide impugned judgment and order dated 11.4.2002 held that as the postings to both set of officers i.e. those who had been promoted by the DPC dated 19.12.1998 and another DPC dated 22.1.1999 had been made on the same day and had been given notional promotion **from one and the same date**, their inter se seniority was to be fixed as it existed in the feeding cadre of Excise Inspectors and thus quashed the seniority list dated 12.7.2000 and further directed the State to prepare a fresh

seniority list placing the appellants below the respondents. Hence these appeals.

7. In these appeals, as most of the appellants and respondents have already availed the benefit of promotions and retired on attaining the age of superannuation, they lost interest in the litigation. Only two appellants and two to four respondents are still in service and the said appellants feel that they would be adversely affected, if the High Court judgment is given effect to. In these matters, the learned counsel appearing for the respondents sought discharge from the cases, as their clients did not respond. In spite of the service of notices to them, they did not engage any counsel. Therefore, this Court on 26.8.2009 requested Shri Gaurav Agrawal, learned Advocate to assist the court as Amicus Curiae who was served with the paper book of the cases and appeared today for the respondents.

8. Shri Rakesh Dwivedi, learned senior counsel appearing for the appellants has submitted that the action of the State Authorities has been in flagrant violation of the orders passed by this Court as promotion of the respondents to the post of AEC had been subject to the decision of the Special Leave Petition, which stood dismissed. The said respondents ought

to have been reverted forthwith after dismissal of the said petition. The question of permitting them to continue even after dismissal of the petition by this Court was not required and thus, could not be justified. Promotions made by the DPC under the unamended Rules on the basis of “**merit**” could not be equated to the promotions made by another DPC under the amended Rules on the basis of “**Seniority subject to rejection of unfit**” held at a later stage. The High Court erred in considering both the promotions to have been made notionally **from one and the same date**. In such a fact situation, the question of interpreting the statutory rules was an unwarranted exercise. The appellants had been promoted retrospectively, given notional promotion from the date much earlier than the respondents. Therefore, direction to fix the seniority in view of their *inter se* seniority as it existed in the feeding cadre was not permissible. The appeals deserve to be allowed and the impugned judgment and order is liable to be set aside alongwith consequential seniority list dated 26.7.2002. The seniority list dated 12.7.2000 has to be upheld and remain intact.

9. On the other hand, Shri Ravi Prakash Mehrotra and Shri Gaurav Agrawal, learned counsel appearing for the respondents vehemently opposed the appeals and made full efforts to defend the judgment and order of the

High Court and subsequent seniority list dated 26.7.2002 contending that in case the posting orders have been issued on the same date, *inter se* seniority of the parties on the post of Excise Inspectors has to be given effect to. Therefore, the appeals are liable to be dismissed.

10. We have considered the rival submissions made by learned counsel for the parties and perused the records. Indisputably, the High Court has decided the case interpreting the provisions of Rule 6 of the U.P. Government Servants Seniority Rules, 1991 (hereinafter called as 'the Rules, 1991).

11. The High Court has considered the Rules elaborately giving effect to the said Rule 6 of the Rules 1991 and its proviso without examining its validity which had been under challenge before it in the connected writ petition. The High Court observed that there was no occasion for the petitioners therein to challenge the validity of Rule 6, as their seniority had already been fixed.

Rule 3(1) of the Rules 1992, the recruitment year is defined as under:

“Year of recruitment means a period of twelve months commencing from the 1st day of July of calendar year”

Therefore, we have to keep in mind that the year of recruitment is to be considered for the purpose of fixing inter se seniority of the officers taking into consideration the officers promoted within a period of 12 months from 1st day of July of the year. Therefore, if the promotions have retrospectively been given to a particular set of officers in the year 1995 and to another set of officers in the years 1997 and 1998, they cannot be treated at par and cannot be treated as equals merely because posting of all of them had been made on the same day. The High Court committed an error in recording the finding of fact that notional promotion had been given to both set of officers **from one and the same date** by virtue of notification no. 1098 dated 15.5.1999 and therefore their seniority is to be determined in accordance with the Rule 6 of the Rules 1991 irrespective of the explanation.

12. As the High Court has misdirected itself considering that both set of officers had been given notional promotion **from one and the same date**, which, in fact, is not factually correct, the interpretation of the Statutory Rules or its explanation becomes irrelevant.

This Court, in *State of U.P. & Others vs. Onkar Nath Tandon & Others*, AIR 1993 SC 1173 has held that a candidate who is rejected in a

common selection and superseded, he would not regain seniority upon being promoted subsequently. The High Court wrongly distinguished the said judgment under the presumption that both set of officers had been given notional promotions from **one and the same date**.

13. The High Court has decided the earlier writ petition observing that vacancies which occurred prior to the date of amendment of the Rules, i.e., 13.10.1994, had to be filled up as per the unamended Rules. The State Government filed a Special Leave Petition, challenging the said order. This Court on 30.10.1995 passed the following order :

“During the pendency of the Special Leave Petition appointments may be made as per the existing Rules, but all the appointees will be informed that appointments are subject of the result of the petition and if the court rules that the revised rule has no application insofar on the respondents claimants are concerned, they will be liable to be reverted to the present post from which they would be promoted.”

In view of the above, the respondents had been promoted and allowed to continue. This Court, ultimately dismissed the said petition vide Order dated 19.8.1998 by the following order :

“ We have heard Shri A.B. Rohtagi, the learned Senior Counsel appearing for the petitioners in support of the special leave petition and Shri G.L. Sanghi, the learned Senior Counsel appearing for respondent no. 5 and Shri Parag P. Tripathi, the learned counsel appearing for respondent nos. 1 to 4 and 6 and

we have perused the impugned judgment of the High Court as well as the record. Having regard to the facts of this case, we do not think that a case is made out for interference by this court under Article 136 of the Constitution of India. The Special Leave Petition is, therefore, dismissed.”

14. In view of the above, the State Government ought to have reverted the respondents as their promotions were subject to the decisions of the said petition. In view of the fact that the respondents continued on a higher post under the orders of this Court for years together and even after dismissal of the petition filed by the State, and the exercise for making promotions was not undertaken by the State Authorities, the appellants should not suffer for no fault of theirs. It has fairly been conceded by learned counsel appearing for the respondents that had the exercise of making promotions been undertaken immediately after the order of this Court dated 19.8.1998, the appellants could have been promoted much earlier and they could have been senior to the respondents. Thus the question does arise as to whether appellants should be asked to suffer for the interim order passed by this Court in a case having no merits at all.

15. No litigant can derive any benefit from mere pendency of case in a Court of Law, as the interim order always merges in the final order to be passed in the case and if the writ petition is ultimately dismissed, the interim

order stands nullified automatically. A party cannot be allowed to take any benefit of his own wrongs by getting interim order and thereafter blame the Court. The fact that the writ is found, ultimately, devoid of any merit, shows that a frivolous writ petition had been filed. The maxim "*Actus Curiae neminem gravabit*", which means that the act of the Court shall prejudice no-one, becomes applicable in such a case. In such a fact situation the Court is under an obligation to undo the wrong done to a party by the act of the Court. Thus, any undeserved or unfair advantage gained by a party invoking the jurisdiction of the Court must be neutralised, as institution of litigation cannot be permitted to confer any advantage on a suitor from delayed action by the act of the Court. (Vide Shiv Shankar & Ors. Vs. Board of Directors, Uttar Pradesh State Road Transport Corporation & Anr., 1995 Suppl. (2) SCC 726; M/s. GTC Industries Ltd. Vs. Union of India & Ors., AIR 1998 SC 1566; and Jaipur Municipal Corporation Vs. C.L. Mishra, (2005) 8 SCC 423).

16. In Ram Krishna Verma & Ors. Vs. State of U.P. & Ors., AIR 1992 SC 1888 this Court examined the similar issue while placing reliance upon its earlier judgment in Grindlays Bank Limited Vs. Income Tax Officer, Calcutta & Ors., AIR 1980 SC 656 and held that no person can suffer from

the act of the Court and in case an interim order has been passed and petitioner takes advantage thereof and ultimately the petition is found to be without any merit and is dismissed, the interest of justice requires that any undeserved or unfair advantage gained by a party invoking the jurisdiction of the Court must be neutralized.

17. In Mahadeo Savlaram Sheke & Ors. Vs. Pune Municipal Corporation & Anr., (1995) 3 SCC 33, this Court observed that while granting the interim relief, the Court in exercise of its discretionary power should also adopt the procedure of calling upon the plaintiff to file a bond to the satisfaction of the Court that in the event of his failing in the suit to obtain the relief asked for in the plaint, he would adequately compensate the defendant for the loss ensued due to the order of injunction granted in favour of the plaintiff. Even otherwise the Court while exercising its equity jurisdiction in granting injunction is also competent to grant adequate compensation to mitigate the damages caused to the defendant by grant of injunction. The pecuniary award of damages is consequential to the adjudication of the dispute and the result therein is incidental to the determination of the case by the Court. The Court can do so in exercise of its inherent jurisdiction in doing *ex debito justitiae* mitigating the damage

suffered by the defendant by the act of the Court in granting injunction restraining the defendant from proceeding with the action complained of in the suit. Such a procedure is necessary as a check on abuse of the process of the Court and adequately compensate the damages or injury suffered by the defendant by act of the Court at the behest of the plaintiff.

18. In *South Eastern Coalfields Ltd. Vs. State of M.P. & Ors.*, AIR 2003 SC 4482, this Court examined this issue in detail and held that no one shall suffer by an act of the Court. The factor attracting applicability of restitution is not the act of the court being wrongful or a mistake or error committed by the court; the test is whether on account of an act of the party persuading the court to pass an order held at the end as not sustainable, has resulted in one party gaining an advantage it would not have otherwise earned, or the other party has suffered an impoverishment which it would not have suffered but for the order of the court and the act of such party. There is nothing wrong in the parties demanding being placed in the same position in which they would have been had the court not intervened by its interim order when at the end of the proceedings the court pronounces its judicial verdict which does not match with and countenance its own interim verdict. The injury, if any, caused by the act of the court shall be undone and the gain which the

party would have earned unless it was interdicted by the order of the court would be restored to or conferred on the party by suitably commanding the party liable to do so. Any opinion to the contrary would lead to unjust if not disastrous consequences. The Court further held :

“.....Litigation may turn into a fruitful industry. Though litigation is not gambling yet there is an element of chance in every litigation. Unscrupulous litigants may feel encouraged to approach the courts, persuading the court to pass interlocutory orders favourable to them by making out a prima facie case when the issues are earlier to be heard and determined on merits and if the concept of restitution is excluded from application to interim orders, then the litigant would stand to gain by swallowing the benefits yielding out of the interim order even though the battle has been lost at the end. This cannot be countenanced. We are, therefore, of the opinion that the successful party finally held entitled to a relief assessable in terms of money at the end of the litigation, is entitled to be compensated.....”

Similarly in *Karnataka Rare Earth & Anr. Vs. Senior Geologist, Department of Mines & Geology & Anr.*, (2004) 2 SCC 783, a similar view has been reiterated by this Court observing that the party who succeeds ultimately is to be placed in the same position in which they would have been if the Court would not have passed an interim order.

19 In *Dr. A.R. Sircar Vs. State of U.P. & Ors.*, (1993) Supp. 2 SCC 734, the dispute arose regarding the seniority of direct recruits and promotees on the post of Professor of Medicine in a medical college. The appellant

therein faced the selection process for direct appointment along with the respondents who had been working on the said post on ad hoc basis. The appellant was duly selected, however, the private respondents could not succeed. The respondents filed the writ petition before the High Court and precluded the appointment of appellant pursuant to his selection, by obtaining the interim order and on the other hand they got their ad hoc promotion to the post regularized under the rules. The appellant could succeed in obtaining the appointment only after dismissal of the writ petition against him after several years of his selection. This Court held that in addition to the relief under the statutory provisions the appellant was entitled in equity to get the seniority over the respondents as they succeed in precluding his appointment to the post by obtaining an interim order in a case having no merits whatsoever.

20. In *Committee of Management, Arya Nagar Inter College & Anr. Vs. Sree Kumar Tiwari & Anr.*, AIR 1997 SC 3071, the services of the respondent therein were terminated, however, he continued to be in service on the basis of interim order passed by the High Court in the writ petition filed by him. During the pendency of the writ petition, the rules for regularization of ad hoc appointees were amended and in pursuance thereof

his services also stood regularized. Ultimately, the writ petition filed by the respondent was dismissed. This Court held that his continuity in service and regularization had to be understood as it was subject to the result of the writ petition. As the writ petition was dismissed the order of regularising of his services, passed during the pendency of the writ petition, became inoperative.

21. In view of the above, the appellants are entitled for the relief purely on equitable grounds without going into any other legal issue and appeals deserve to be allowed and the seniority list quashed by the High Court has to be restored.

22. There is another aspect of the matter. The appellants and the respondents have been considered by the DPC held on 19.12.1998 to fill up 42 vacancies under the unamended rules. However, at the cost of repetition, it may be pertinent to mention here that only 30 candidates/appellants were found suitable by the DPC held on 19.12.1998 and had been promoted, under the unamended Rules on the criterion of “**merit**”. The respondents had been promoted under the amended rules by carrying forward 12 vacancies, by another DPC held subsequently on 22.1.1999 on different

criterion, i.e., **“Seniority subject to rejection being unfit”**. Indisputably, these 12 officers/respondents were found unsuitable for promotion under the unamended rules by the DPC held on 19.12.1998. Subsequent thereto, both set of officers had been promoted notionally from the back dates. The appellants had been given promotions as AEC against the vacancies for the year 1994-95 while the respondents were given notional promotions against the vacancies for the years 1996 and 1997. The seniority list dated 12.7.2000 was prepared accordingly. As the appellants had been given notional promotion w.e.f. 6.12.1995 and the respondents w.e.f. 28.2.1997 and 13.8.1997, their inter se seniority had rightly been determined while issuing seniority list dated 12.7.2000. The law permits promotion with retrospective effect only in exceptional circumstances when there has been some legal impediment in making the promotions, like an intervention by the Court.

23. An officer cannot be granted seniority prior to his birth in the cadre adversely affecting the seniority of other officer who had been appointed prior to him. “The late comers to the regular stream cannot steal a march over the early arrivals in the regular queue” (vide Dr. S.P. Kapoor vs. State of Himachal Pradesh AIR 1981 SC 2181; Shitala Prasad Shukla vs. State of

U.P. & Ors., AIR 1986 SC 1859; and Uttaranchal Forest Rangers' Assn. (Direct Recruit) & Ors. vs. State of U.P. & Ors., (2006) 10 SCC 346).

24. In the instant case, promotions had been made by two different DPC's held on 19.12.1998 and 22.1.1999. Both the DPC's had made promotions under different rules on different criterion and their promotions had been made with retrospective effect with different dates notionally. In the writ petition before the High Court, the promotion of the appellants had not been under challenge. The seniority which is consequential to the promotions could not be challenged without challenging the promotions.

25. Challenging the consequential order without challenging the basic order is not permissible. (vide Chithranja Menon & Ors. Vs. A. Balakrishnan & Ors., AIR 1977 SC 1720).

26. In Roshan Lal & ors. Vs. International Airport Authority of India & ors., AIR 1981 SC 597, the petitions were primarily confined to the seniority list and this Court held that challenge to appointment orders could not be entertained because of inordinate delay and in absence of the same, validity of consequential, seniority could not be examined. In such a case, a

party is under a legal obligation to challenge the basic order and if and only if the same is found to be wrong, consequential orders may be examined.

27. In H.V. Pardasani etc. Vs. Union of India & ors., AIR 1985 SC 781, this Court observed that if "petitioners are not able to establish that the determination of their seniority is wrong and they have been prejudiced by such adverse determination, their ultimate claim to promotion would, indeed, not succeed."

28. A similar view had been reiterated by this Court in Government of Maharashtra & ors. Vs. Deokar's Distillery, (2003) 5 SCC 669.

These appeals are squarely covered by the aforesaid judgments. We are of the considered opinion that in absence of challenge to the promotion of the appellants, relief of quashing the consequential seniority list could not have been granted.

29. **Sum up:**

Admittedly, the respondents were over and above the appellants in the seniority list of Excise Inspectors. The rules of 1992 were amended in the

year 1994, changing the criterion for promotion from “**merit**” to “**seniority subject to rejection of unfit**”. Forty two posts of AEC were to be filled up from the Excise Inspectors, as no Excise Superintendent was available for being considered for promotion to the post of AEC. The State Government wanted to fill up the said vacancies by applying the amended rules. On being challenged by some of the appellants, the High Court held that the vacancies which occurred prior to the amendment of 1992 Rules, namely, 10.10.1994 had to be filled up according to the unamended rules. The operation of the judgment and order of the High Court was stayed by this Court making it crystal clear that promotions so made under the amended rules would be subject to the decision in special leave petition. Accordingly, 61 Officers/respondents were promoted. Subsequently, this Court dismissed the SLP vide order dated 18.8.1998 *in limine*. The officers/ respondents so promoted were not reverted. The DPC was held on 19.12.1998 to fill up said 42 vacancies, but only 30 candidates/appellants were found eligible to be promoted to the post of AEC. The respondents were found unsuitable. In order to give the said respondents a second chance, the State Government carried forward the remaining 12 vacancies and directed to fill up the same under the amended Rules, and for that purpose another DPC was convened on 22.1.1999 and they were promoted on the basis of different criterion.

Promotions were made with retrospective effect determining the yearwise vacancies. Appellants had been given promotion notionally against the vacancies, occurred in the recruitment year 1995 while the respondents were promoted notionally against the vacancies of the recruitment years 1996 and 1997. Thus, the High Court committed an error while recording the finding of fact that both set of officers had been promoted notionally **from one and the same date**. Admittedly, promotions were not made with effect from one and the same date. Appellants and respondents were promoted against the vacancies which had occurred in different recruitment years under different Rules and on different criterion. Thus, the respondents would rank below the appellants in seniority.

Therefore, there could be no justification to hold that their inter se seniority in the feeding cadre would be relevant for determining the seniority of AECs. More so, had the interim order not been passed by this Court, the appellants could have been promoted under the unamended rules much earlier. Thus, they are entitled for equitable relief, as the effect of the interim order of this Court was required to be neutralised. The appellants had been promoted with an earlier date, thus, are bound to be senior than respondents who had been promoted with respect from a later date. No employee can claim seniority prior to the date of his birth in the cadre.

30. In view of the above, appeals succeed and are allowed. The impugned judgment and order dated 11.4.2002 is set aside. The Seniority List dated 12.7.2000 is directed to prevail and fresh Seniority List of 26.7.2002 is hereby quashed. No orders as to cost.

Before parting with these cases, we would record our appreciation to the services rendered by Shri Gaurav Agrawal, Amicus Curiae.

SLP(C) No. 9615 of 2002 :

This petition could not be dismissed by the High Court at the threshold without examining the case on merit. However, no order is required in this case in view of the order of this date passed in the connected appeal nos.5790-5792/2002. It is accordingly disposed of.

.....J.
(HARJIT SINGH BEDI)

.....J.

.....
(Dr. B.S. CHAUHAN)

New Delhi,

November 18, 2009

