

BAIJ NATH SHARMA

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v.

HON'BLE RAJASTHAN HIGH COURT AT
JODHPUR AND ANR.

SEPTEMBER 2, 1998

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[DR. A.S. ANAND AND D.P. WADHWA, JJ.]

Service Law :

Promotion—Retired employee's juniors were given promotion after his retirement—Validity of—Held : Retired employee could have a grievance only if his juniors were promoted prior to his superannuation—But he cannot complain when promotions were made after his retirement.

C

Promotion—Non-grant of—Due to administrative inaction—Held, did not entitle the employee to retrospective promotion from the date vacancy arose—However, delay in filling up of vacancy deprecated—Hope expressed that in future timely promotion would be given in order to avoid disappointment to the employees—Administrative Law.

D

Judiciary—Vacancies—Held, it is not at all advisable to keep any post vacant in judiciary when courts are burdened with arrears and litigants are the ones who suffer—Further, ad hoc promotions should have been given pending regular appointment.

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Constitution of India, 1950 : Article 226.

Res judicata—Applicability of—Writ petition permitted to be withdrawn with liberty to file representation and also to file a fresh writ petition "if the occasion arose"—Held : Second writ petition not barred by principle of res judicata since the employee's representation was rejected—Code of Civil Procedure, 1908—S. 11.

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The appellant was a member of the Rajasthan Judicial Service (RJS) and retired on superannuation on 31.5.1996. The appellant filed a writ petition before the High Court claiming that his case for promotion to the Rajasthan Higher Judicial Service (RHJS) be considered from the date when the posts in RHJS fell vacant. However, the writ petition was permitted to be withdrawn with liberty to file a representation and also to file

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A a fresh writ petition "if any occasion arose".

The High Court (Administrative side), however, took a decision in its Full Court meeting on 9.2.1996 not to promote the officers from RJS cadre to RHJS cadre till direct recruitment from the Bar was made in order to prevent imbalance between the strength of promotees and direct recruits. However, it was found that no officer junior to the appellant was promoted before his superannuation. But four officers who were juniors to the appellant were promoted after the appellant had retired.

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The appellant's representation was rejected and, therefore, the appellant filed a second writ petition claiming the same relief. The High Court dismissed this petition on the ground that it was barred by the principle of *res judicata*. Hence this appeal.

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Dismissing the appeal, this Court

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HELD : 1.1. The appellant could certainly have a grievance if any of his juniors had been given promotion from a date prior to his superannuation. But this is not the case here. Four officers were promoted after the appellant had retired and not from the dates the posts fell vacant. Therefore, the appellant is not entitled for promotion from the dates the posts had fallen vacant. [313-D]

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1.2. It is regrettable that 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 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 be given due promotion in time. But here the appellant has been deprived of his promotion without any fault of his. At least for 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 of one or the other. But then service is not constituted merely for the benefit of the officers in the 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 judiciary vacant for days when the courts are burdened with arrears and litigants are the ones

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who suffer. It is expected of the High Courts to be vigilant and to fill up

the posts in 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 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. [314-E-H; 315-A-B]

Union of India v. K.K. Vadera, AIR (1990) SC 442, relied on.

2. The High Court was not right in holding that the second writ petition was barred by principle of *res judicata* since the appellant's representation was rejected. [311-G]

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 4563 of 1998.

From the Judgment and Order dated 17.9.97 of the Rajasthan High Court in C.W.P. No. 3455 of 1997.

B.D. Sharma for the Appellant.

Manoj K. Das and Aruneshwar Gupta for the Respondents.

The Judgment of the Court was delivered by

D.P. WADHWA, J. Leave granted.

The appellant, who was a member of the Rajasthan Judicial Service (for short 'RJS'), is aggrieved by the judgment dated September 17, 1997 of the Division Bench of the Rajasthan High Court dismissing his writ petition (CWP No. 3455/97), wherein he had prayed in effect that his case for promotion to the Rajasthan Higher Judicial Service (for short 'RHJS') be considered from the date when the posts in the RHJS fell vacant.

By the time the appellant filed the writ petition he had already superannuated on May 31, 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. 1544/96) in the High Court seeking his promotion. This earlier writ petition came up for admission before the High Court on May 27, 1996 and the following order was

A passed:-

"27.5.96 : Hon'ble Mr. M.G. Mukherji Actg. CJ. Hon'ble Mr. Bhagwati Prasad J.

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

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We direct that even though the writ petitioner retires on 31.5.96, his case is to be considered alongwith 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."

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That writ petition was withdrawn by the appellant on January 8, 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:-

"8.1.97 : Hon'ble Mr. M.G. Mukherji CJ.
Hon'ble Mr. Bhagwati Prasad J.

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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.

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The writ application dismissed as withdrawn."

Subsequent writ petition (CWP No. 3455/97) was dismissed in limine with the following order which is now impugned:-

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"17.9.97 : HON'BLE MR. M.G. MUKHERJI, C.J.
HON'BLE MR. BHAGWATI PRASAD, J.

Mr. H.N. Calla for the petitioner.

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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.

The appellant joined RJS on January 2, 1979. He was confirmed in the post of Munsif-cum-Judicial Magistrate by order dated December 31, 1980. He was promoted as Civil Judge (Senior Division)-cum-Additional Chief Judicial Magistrate on February 13, 1992 and by order dated August 17, 1993 appellant was granted selection scale w.e.f. August, 1992. He retired on May 31, 1996. After withdrawal of his writ petition (CWP No. 1544/96) the appellant represented on January 29, 1997 that his case for promotion to RHJS be considered and he be given notional promotion in view of the observations made on May 27, 1996 in writ petition. This representation did not find favour with the High Court and was rejected by resolution of the Full Court dated July 3, 1997, which was communicated to the appellant. This led the appellant to file the second writ petition (CWP No. 3455/97), which as noted above, was rejected on two grounds, namely, (1) it was barred by principle of res judicata and (2) till the appellant retired from service none of his juniors was considered for promotion or even promoted to RHJS.

We do not think that High Court was right in holding that the second writ petition (CWP No. 3455/97) was barred by principle of res judicata. Appellant made his representations on the basis of observations made by the High Court on May 27, 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 fresh writ petition could be filed only if 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 RHJS was not considered for giving him notional promotion. However, our holding that second writ petition was not barred by 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 RJS were not granted selection grade. Admittedly 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 RHJS in that quota. He was not so considered because the High Court had taken a decision by resolution of the Full Court dated February 9, 1996 not to make further promotions from RJS till recruitment from the Bar to 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 RHJS till appointments from the Bar were made. This resolution of the Full Court he certainly could not challenge in the second writ petition. High Court in its counter affidavit has given justification as to why it took decision not to make any promotion to the cadre of 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 9.2.96 resolved that no promotion shall be made till direct recruitment is made. The decision to this effect was taken by Full Court keeping in view the inequitable operation of quota 3:1 which has to be maintained between promotees and direct recruits to the R.H.J.S. which was not being done. While vacancy 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 R.H.J.S. posts. The posts in excess of 89 were being manned by temporary/ *ad hoc* promotees from R.H.J.S. 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 R.H.J.S. on the basis of Rota-quota rule. Therefore, the Full Court took the decision not to promote the officers from R.J.S. cadre to R.H.J.S. 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 9.2.96 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 R.H.J.S. to maintain the proportional representation and *inter se* seniority between direct recruits and promotees."

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 December 30, 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 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 RJS has been promoted to RHJS prior to May 31, 1996 who is junior to the appellant. Further decision by 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.

In *Union of India and Others v. K.K.Vadera and Others*, AIR (1990) SC 442 this Court with reference to 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:-

"There is no statutory provision that the promotion to the post

A of Scientist 'B' should take effect from 1st July 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 1st July, 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 Scientists '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."

E It is regrettable because of the inaction on the part of the High Court that recruitment from 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. High Court said that it might be sad state of affairs that the name of the appellant was not considered for promotion till he retired. High Court may feel anguish but it gives no comfort to the appellant. At least for 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 the one form or the other with great disadvantage of one or the other. But then service is not constituted merely for the benefit of the officers in the 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 judiciary vacant for days when the

courts are burdened with arrears and litigants are the ones who suffer. We expect the High Courts to be vigilant and to fill up the posts in 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 Bar begins and it is expected that posts for 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. A B

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

V.S.S.

Appeal dismissed.