
(2018) 12 JH CK 0035
In the Jharkhand High Court
Case No : Writ Petition (S) No. 5295 Of 2018

Ajay Kumar Singh

APPELLANT

Vs

Union Of India And Ors And Ors

RESPONDENT

Date of Decision : 14-12-2018

Acts Referred:

Citation : (2018) 12 JH CK 0035

Hon'ble Judges : Pramath Patnaik, J

Bench : Single Bench

Advocate : P.S. Patwalia, Sidharth Thakur, Indrajit Sinha, Arpan Mishra, Amit Kumar Das, Rajiv Sinha, Niraj Kumar, Shreesha Sinha, Anoop Kumar Mehta

Final Decision : Dismissed

Judgement

Pramath Patnaik, J

1. In the accompanied writ application, the petitioner has inter alia prayed for:

(a).quashing order dated 16th October, 2018 (Annexure 8) issued by the Director, Department of Ministry of Coal, Government of India, whereby he has relieved the petitioner from the post of Chairman-cum-Managing Director, Bharat Coking Coal Limited, Dhanbad and repatriated him to his lien post of General Manager, Eastern Coalfields Limited;

(b).quashing order dated 16th October, 2018 issued by General Manager (Personnel), Coal India Limited whereby the petitioner has been relieved from the post of Chairman-cum-Managing Director, Bharat Coking Coal Limited and repatriated to his lien post of General Manager, Eastern Coalfields limited.

2. The factual exposition, as delineated in the writ application, in brief is that petitioner initially joined the services of Coal India Limited (hereinafter referred to as 'CIL' for the sake of brevity) as Junior Executive (Trainee) on 11.08.1983. By passage of time, his services was transferred to Eastern Coalfields Limited (hereinafter referred to as 'ECL for the sake of brevity) where he was promoted

to the post of General Manager and accordingly he gave his joining on the said post on 01.03.2009. The petitioner while posted as General Manager, Salenpur Area, ECL an advertisement was published inviting applications for appointment on the post of Director (Technical) in ECL and the petitioner being eligible applied and after due selection process, appointment letter was issued to him on 15.09.2016. While continuing as such, an advertisement was published by the Public Enterprises Selection Board (hereinafter referred to as 'PSEB' for the sake of brevity) on 03.03.2017 inviting applications from eligible executives for appointment on the post of Chairman-cum-Managing Director, Bharat Coking Coal Limited (hereinafter referred to as 'BCCL' for the sake of brevity). The petitioner after going through the selection process was declared successful and was appointed on the said post vide order dated 25.09.2017 and the detailed terms and conditions of the appointment of the petitioner was communicated vide letter dated 08.02.2018. It has been averred that in the appointment letter it has specifically been mentioned that his tenure of appointment would be from the date of assumption of charge of post till the date of his superannuation i.e. 31.03.2020, or until further order, whichever is earlier. The appointment letter further stipulates that the appointment is of contract basis and the Government will have an option to terminate his services with three months' notice or with three months' pay in lieu thereof. In the writ application, it has further been averred that in Clause 1.2 of the detailed terms and conditions, as conveyed vide letter dated 08.02.2018, it has been mentioned that after expiry of first year the performance of the petitioner shall be reviewed to enable the Government of India to take a view regarding continuance of his rest period. But, without fulfilling any of the guidelines as enumerated in appointment letter or detailed terms and conditions, as conveyed vide letter dated 08.02.2018 impugned order dated 16.10.2018 has been passed whereby petitioner has been relieved from the post of CMD, BCCL and is repatriated to his lien post of General Manager, ECL.

3. Heard Mr. P.S. Patwalia, learned senior counsel being assisted by Mr. Indrajit Sinha, learned counsel for the petitioner; Mr. Rajiv Sinha, learned A.S.G.I for the respondents-Union of India and Mr. Anoop Kumar Mehta, learned counsel for respondent no. 7.

4. Learned senior counsel for the petitioner throwing light on the process of appointment of 'Director' and 'Chairman-cum-Managing Director' of various Public Undertakings submitted that such appointments are made by Government of India through Public Enterprises Selection Board which has been entrusted with the responsibility of making recommendation and based on such recommendation, the Appointment Committee of the Cabinet (hereinafter referred to as 'ACC' for the sake of brevity) makes the appointment. Learned senior counsel for the petitioner submitted that with regard to vacancies, confirmation of appointees, extension of tenure etc. relating to Board Level Appointments in PSUs, the ACC issued direction vide letter dated 31.03.2011, which was circulated vide letter dated 13.05.2011 and subsequently, the Department of Personnel & Training notified the same vide memo dated

18.03.2014. Referring to Clause 2 of the said direction/instruction dated 31.03.2011, which relates to 'Confirmation of Board level appointees', learned senior counsel for the petitioner submitted that as per said clause, the services of the 'Board Level Appointees' may not be confirmed mainly on two grounds; (a). Performance ground; or (b). Grounds other than performance as vigilance issue etc. It has been submitted that in the case at hand, even as per the averments made in the counter affidavit, there is admittance by the respondents-Union of India that the performance of the petitioner was not the ground for his non-confirmation for the post of CMD, BCCL. Thus, the only ground left on which the petitioner's services could not be confirmed is vigilance issue. Referring to vigilance profile of the petitioner dated 18.09.2018, as disclosed in the counter affidavit, learned senior counsel for the petitioner submitted that altogether five complaints were pending against the petitioner, out of which, till date no response has been received from the Chief Vigilance Officer, CIL by the Ministry in relation to four complaints and even the veracity of allegations have not been prima facie established. So far rest one complaint is concerned, it was made on 28.07.2014 in respect of contract awarded to one Mahalaxmi Infra Contract Pvt. Ltd in lieu of work awarded by the BCCL, in which CVC vide letter 31.08.2018 has advised to issue major penalty and charge-sheet was issued on 26.09.2018. But, admittedly on the date of issuance of impugned order i.e. 16.10.2018, there was no adverse order against the petitioner, which could have form the basis of his non-confirmation nor the same relates to the period in which the petitioner was holding the post of CMD, BCCL rather the same is of the year 2014. Hence, repatriation of the petitioner to the post of General Manager, Eastern Coalfields Limited is punitive in nature as the ground made out by the respondents for non-confirmation is above referred vigilance case. Learned counsel for the petitioner submitted that admittedly the services of the petitioner was not confirmed because vigilance report/pending enquiry but before passing the impugned order the petitioner has neither been afforded with the opportunity of hearing nor any show cause notice was issued; hence the impugned orders are liable to be quashed and set aside on the cardinal principles of natural justice; in the light of law laid down by Hon'ble Apex Court in the case of State Bank of India & Ors Vs. Palak Modi as reported in (2013) 3 SCC 607.

5. Learned senior counsel for the petitioner further submitted that the Hon'ble Apex Court in the case of T.P. Senkumar, IPS Vs. The Union of India & Ors as reported in (2017) 6 SCC 801, has held that displacement of a senior officer from tenure based post requires serious consideration on the basis of verifiable materials on objective and not subjective satisfaction, contrarily in the case at hand the case of the petitioner was not considered objectively on the basis of any verifiable materials rather the authorities concerned satisfied themselves subjectively and thereby committed error of jurisdiction. Learned senior counsel for the petitioner further submitted that even a tenure post cannot be curtailed in an arbitrary and capricious manner, as has been done in the case at hand, and some rationale has to be followed. In support of his submission, learned senior

counsel for the petitioner referred to the decision rendered in the case of Union of India Vs. S.N. Maiti as reported in (2015) 4 SCC 164 .

6. Learned senior counsel for the petitioner further submitted that even otherwise also as per the extant guidelines dated 11.03.2011, when an incumbent's services are not confirmed on the issue other than performance such as vigilance issue then the matter has to be referred by the Ministry concerned to the ACC directly at least 30 days in advance of the expiry of the 'schedule tenure', but the respondents authority has made wrong interpretation of term 'schedule tenure' stating it to be tenure beyond the period of one year which is totally nugatory and absurd. In the case at hand, admittedly nothing has been brought on record to show that the Ministry of Coal had submitted a proposal regarding non-confirmation of the petitioner's services to the post of CMD, BCCL prior to 24.08.2018; thus the Ministry as well as ACC had no jurisdiction to pass impugned order.

7. Learned senior counsel for the petitioner further submitted that the impugned order, which is punitive in nature, has caused irreversible damage and irretrievable injury to the petitioner and his reputation has been put at stake by sliding down him to grades to the post of General Manager, ECL resulting the persons, who were subordinate/junior to the petitioner are now holding the higher posts. On the count of discrimination, learned senior counsel for the petitioner submitted that no other employees who have been charge-sheeted in the similar matter pursuant to the recommendation made by the Central Vigilance Commission on 31.08.2018 have suffered any kind of immediate injury upon issuance of charge-sheet except the petitioner.

8. So far the decisions - Samsher Singh vs. State of Punjab [(1974) 2 SCC 831 and Rajesh Kumar Srivastava Vs. State of Jharkhand & Ors [(2011) 4 SCC 447] referred by the counsel for the respondents are concerned, was considered in the case of SBI Vs. Palak Modi (supra) and thereafter, it was held that even a probationer cannot be discharged from service on the ground of any alleged misconduct unless and until the procedure established by law has been followed.

9. As against this, learned A.S.G.I appearing for the respondents-Union of India referring to confirmation clause - Clause (2) (b) of instruction issued vide letter dated 31.03.2011, which relates to confirmation of Board Level Appointees, submitted that the said clause specifically says that within a stipulated period of one year and thirty days i.e. 13 months, officer would be deemed to have been confirmed and the Ministry shall issue necessary order for confirmation, if the Ministry fails to send a proposal to the contrary, to the PSEB. Further, clause (2) (d) says that if the Ministry is not inclined to confirm the appointee, for reasons other than performance, such as vigilance issues etc., then such proposal shall be submitted to the ACC directly at least 30 days in advance of the expiry of the scheduled tenure of the incumbent. It has further been submitted that the petitioner completed one year on the post of CMD, BCCL on 25.09.2018 where after memo of charge was issued on 26.09.2018 pursuant to the

recommendation made by Central Vigilance Commission on 26.09.2018. Accordingly, the Government on 28.09.2018 sent the proposal for non-confirmation directly to the ACC through DoPT for approval. The ACC gave its approval on 15.10.2018, where after, the impugned order was passed. Learned counsel for the respondents-Union of India submitted with vehemence that all the process which culminated to issuance of impugned order related to non-confirmation of the petitioner was completed within stipulated period of 13 months.

10. So far contention of the petitioner that the impugned orders are stigmatic one, learned counsel for the respondents-Union of India submitted that it is simply a order of relieving and repatriation of the petitioner is simpliciter one as allegation of misconduct was never considered by the Ministry rather the same was considered by the CVC, which resulted into issuance of charge-sheet and the moment CVC recommended for major penalty, it became a vigilance issue, i.e. the ground on which confirmation can be denied as per the circular issued in this regard.

11. Referring to the decision rendered in the case of Shamsheer Singh Vs. State of Punjab as reported in (1974) 2 SCC 831, learned counsel for the respondents submitted that before a probationer is confirmed the authority concerned is under an obligation to consider whether the work of the petitioner is satisfactory or not and whether he is suitable for the post or not. Further, it has been held that the authority may in those cases not hold an inquiry and may simply discharge the probationer with a view to give him a chance to make good in other walks of life without stigma at the time of termination of probationer.

12. So far contention of the petitioner that his repatriation on the line post of General Manager, ECL is bad in law and ought to have been repatriated on the post of Director (Technical), is concerned, the petitioner assumed charge on the post of Director (Technical), ECL on 15.09.2016 and before completion of 13 months, the stipulated period for confirmation on the post in question, he was appointed on the post of CMD, BCCL on 25.09.2017, therefore, the question of confirmation on the post of Director (Technical) does not arise and furthermore, the said post has been filled up by another person. As such, the petitioner's repatriation for the remaining period of his lien post as General Manager is valid and legal.

13. Learned counsel appearing for respondent no. 7 did not add more to the submission advanced by learned counsel for the respondent-Union of India.

14. After bestowing my anxious consideration to the pleadings available on record and on close scrutiny of the materials available on record, I am of the considered view that the petitioner has failed to persuade this Court to get reliefs, as sought for, for the following facts, reasons and judicial pronouncements:

(i).The petitioner initially joined the services of Coal India Limited on 11.08.1983

and by passage of time, his services was transferred to Eastern Coalfields Limited where he was given regular promotion to the post of General Manager on 01.03.2009. It would be pertinent to note here that it was the substantive post on which the petitioner was working. However, while working as such, an advertisement was published for appointment on the post of Director (Technical) in Eastern Coalfields Ltd, for which, the petitioner was selected on 15.09.2016, as evident from Annexure 2. From plain reading of appointment letter dated 15.09.2016, it appears that the appointment of the petitioner was purely on contract basis and the services of the petitioner could have been terminated with three months' notice or with three months' pay in lieu thereof. In general condition, the tenure of his appointment is from the date of assumption of charge on the said post till date of his superannuation i.e. 31.03.2020 or until further order.

(ii).The petitioner after assuming the charge of Director (Technical) applied for and was selected on the post of Chairman-cum-Managing Director, BCCL, on 25.09.2017, for which detailed terms and conditions was communicated vide letter dated 08.02.2018. The relevant portion of appointment letter and 'detailed terms and conditions of appointment' is quoted herein below:

"Relevant portion of appointment letter dated 25.09.2017:

"In pursuance of Articles of Association of Bharat Coking Coal Limited (BCCL), I am directed to convey the approval of the President to the appointment of Shri Ajay Kumar Singh, Director (Technical), Eastern Coalfields Ltd. (ECL) as Chairman and Managing Director, Bharat Coking Coal Ltd. (BCCL) in Schedule 'B' of the CPSE, in the scale of pay of Rs. 75,000-90,000/- from the date of his assumption of charge of the post and till the date of his superannuation i.e. 31.03.2020, or until further orders, whichever is earlier.

2.His appointment to the said post will be effective from the date on which Shri A. K. Singh takes over charge of the said post. However, his appointment as Chairman and Managing Director, Bharat Coking Coal Limited (BCCL) for the said period is made on contract basis and the Government will have the option to terminate his services with three months' notice or with three months' pay in lie thereof.

3.xxx xxxx xxx

4.Detailed terms and conditions of appointment of Shri A. K. Singh as Chairman and Managing Director, Bharat Coking Coal Limited (BCCL) will be issued in due course of time after receipt of his Last Pay Certificate (LPC).

(Emphasis Supplied)

Relevant portion of terms and conditions dated 8 th February, 2018

1.1.Period: His appointment will be for a period with effect from 25.09.2017 (afternoon) and upto 31.03.2020 i.e. the date of his superannuation or until

further orders, whichever event occurs earlier and in accordance with the provisions of the Companies Act, 1956 as amended. The appointment may, however, be terminated even during this period by either side on 3 months notice or on payment of three months salary in lieu thereof.

1.2 After the expiry of the first year the performance of Shri Ajay Kumar Singh will be reviewed to enable the Government to take a view regarding continuance or otherwise for the balance period of tenure."

(iii). So far confirmation of the petitioner on the post in question is concerned, as per the pleadings available on record, it is governed by Circular dated 13th May, 2011, wherein it has been mentioned that the Public Enterprises Selection Board (PESB) has been entrusted with the responsibility of making recommendations for Board level appointments in Central Public Sector Enterprises and has issued guidelines in this regard from time to time in addition to the guidelines issued by the Appointments Committee of the Cabinet and the Department of Public Enterprises. For proper adjudication of the matter, the relevant confirmation clause is quoted herein below:

"Confirmation of Board level appointees:

Now Ministries are required to send proposals to PESB only in cases of non-confirmation on performance grounds i.e. in cases where the score on the SPR is less than 37.5 A CMD/ MD/Functional Director would be deemed to be confirmed unless the Ministry/Department sends a proposal to the PESB, to the contrary, within 30 days after the expiry of one year.

Within this stipulated period of one year and thirty days, the officer would be deemed to have been confirmed and the Ministry shall issue necessary order for confirmation, if the Ministry fails to send a proposal to the contrary, to the PSEB.

The PSEB shall hold a Joint Appraisal on receipt of the proposal for non-confirmation, after which the proposal shall be sent to the Ministry for placing before the ACC for orders. Therefore, Ministry must ensure that proposals reach with complete documents to avoid delay.

If the Ministry/Department is not inclined to confirm the appointee for reasons other than performance such as vigilance issues etc., then such proposal shall be submitted to the ACC directly at least 30 days in advance of the expiry of the scheduled tenure of the incumbent.

The EO shall monitor all cases of confirmation every month and send a report for information of the ACC. Ministry is requested to send a monthly report in this regard to PESB for information."

On conjoint reading of Clause 1.2 of the terms and conditions appointment of the petitioner as communicated vide letter dated 8th February, 2018, wherein it has specifically been mentioned that performance of the incumbent shall be reviewed after expiry of one year to enable the Government to take a view regarding

continuance. Meaning thereby decision of continuance/confirmation has to be taken after one year. Further in confirmation clause of circular dated 31.03.2011, it has been mentioned that if the Ministry/Department is not inclined to confirm the appointee for reasons other than performance such as vigilance issues etc., then such proposal shall be submitted to the ACC directly at least 30 days in advance of the expiry of the scheduled tenure of the incumbent. The discussions made herein above clearly establish the fact that scheduled period for taking decision upon the continuance/confirmation has to be taken within 13 months. In the case at hand, the petitioner joined on the post of CMD, BCCL on 25.09.2017. thereafter, memo of charge was served upon him 26.09.2018 by the Ministry, pursuant to the recommendation made by Central Vigilance Commission vide Office Memorandum dated 31.08.2018 advising to impose major penalty upon the petitioner. Consequent thereupon, on 28.09.2018 after cropping the issue of vigilance, the Government sent the proposal for non-confirmation directly to the ACC for approval, which resulted in passing of impugned orders dated 16.10.2018 i.e. within the stipulated period/scheduled tenure of 13 months. Therefore, there is no question of deemed confirmation as there was neither any procedural irregularity nor it lacks jurisdiction.

(iv).Hence, the moot question that falls for consideration is whether in the facts and circumstances of case, the impugned order is punitive/stigmatic so as to warrant interference by this Court on these count, in the teeth of extant guidelines, as mentioned in preceding paragraphs.

(v).For non-confirmation of the post in question, mainly two grounds are attributable: (a).Performance (b).other than performance such as vigilance issue etc. In the case at hand, his performance has not been questioned rather after cropping up of the vigilance issue, his confirmation has been denied within the stipulated period. Admittedly, the petitioner was working on the post of CMD, BCCL on contract basis which as per the terms and conditions, as stipulated in the extant guidelines, can be terminated for the grounds, as mentioned above.

(vi).From plain reading of the impugned order, it appears that it is termination simpliciter of contract and not stigmatic one as the contract between the parties rescinded only after cropping up of vigilance issue. The authority did not delve into the merit of vigilance issue; rather they simply after cropping up of vigilance ended the contract within the stipulated period. It is therefore, a termination simpliciter and not removal from service on the ground of indiscipline or misconduct so as to entail regular departmental procedure or in such circumstance, the question of observance of principles of natural justice would not arise and the benefit of cardinal principles of natural justice cannot be stretched too long. The underlying principle will apply proprio vigore to the present case, resultantly there was no necessity to afford opportunity to the respondents before issuance of impugned orders.

(vii).View of this Court gets fortified by the decision rendered in the case of Rajesh Kumar Srivastava Vs. State of Jharkhand & Ors as reported in (2011) 4

SCC 447, wherein the Hon'ble Apex Court at paragraph 10 held as under:

"10.The aforesaid decision to release him from service was taken by the respondents considering his overall performance, conduct and suitability for the job. While taking a decision in this regard neither is any notice required to be given to the appellant nor is he required to be given any opportunity of hearing. Strictly speaking, it is not a case of removal as sought to be made out by the appellant, but was a case of simple discharge from service. It is, therefore, only a termination simplicitor and not removal from service on the grounds of indiscipline or misconduct. While adjudging his performance, conduct and overall suitability, his performance record as also the report from the higher authorities were called for and they were looked into before any decision was taken as to whether the officer concerned should be continued in service or not."

(viii).So far repatriation of the petitioner on the post of General Manager, Eastern Coalfields Limited is concerned, it would be pertinent to note here that it was the substantive post on which the petitioner was working and the post of Director (ECL) was not his substantive post rather appointment on post of Director (ECL) was also on contract basis which stood automatically terminated after joining of the petitioner on the post of CMD, BCCL and serving for more than one year. So far submission of the petitioner that alleged repatriation the persons subordinate/junior to the petitioner are now holding the higher posts is concerned, at this juncture, it would be pertinent to note here that the petitioner on his own volition joined the post of Director (Technical) and CMD, BCCL and furthermore, nothing has been brought on record to show that persons working on substantive posts has been made senior to him. hence, this Court does not find any illegality in repatriation of the petitioner on the post of General Manager, Eastern Coalfields Limited. ECL.

(ix).The Hon'ble Apex Court has elaborately dealt with the issue aforesaid i.e the matter of lien in the case of State of M.P. Vs. Sandhya Tomar as reported in (2013) 11 SCC 357, the relevant paragraph 10 is quoted herein below:

10."Lien" connotes the civil right of a government servant to hold the post "to which he is appointed substantively". The necessary corollary to the aforesaid right is that such appointment must be in accordance with law. A person can be said to have acquired lien as regards a particular post only when his appointment has been confirmed, and when he was been made permanent to the said post. "the word 'lien' is a generic term and, standing alone, it includes lien acquired by way of contract, or by operation of law." Whether a person has lien, depends upon wheter he has been appointed in accordance with law, in substantive capacity and whether he has been made permanent or has been confirmed to the said post."

(x).So far the judgments referred by learned counsel for the petitioner is concerned, the same is not applicable in the facts and circumstances of the case and for the reasons cited above.

15. As a logical sequitur to the aforesaid facts, reasons and judicial pronouncements, no relief can be granted to the petitioner. Accordingly, the writ application being devoid of any merit is dismissed.