

(2023) 10 CAL CK 0032
In the Calcutta High Court
Case No : WPA No. 10297 Of 2021

Ballari Sarkar

APPELLANT

Vs

Damodar Valley Corporation & Ors.

RESPONDENT

Date of Decision : 06-10-2023

Acts Referred:

Constitution Of India, 1950 — Article 14, 226

Citation : (2023) 10 CAL CK 0032

Hon'ble Judges : Partha Sarathi Chatterjee, J

Bench : Single Bench

Advocate : Sirsanya Bandopadhyay, Arka Kumar Nag, Rahul Kumar Singh, Ranjay De, Basabjit Banerjee

Final Decision : Disposed Of

Judgement

Partha Sarathi Chatterjee, J

1. In invocation of the jurisdiction of this Court under Article 226 of the Constitution of India, the petitioner questions the defensibility of the letter vide. no. CAO/P&A/A/S-4990(BS)/DSTPS- 1104 dated 21st February, 2018 which was prepared as per the revised Fixation of Pay, being no. A/S-4990-335 dated 31st August, 2017 (Annexure-P/6 to the writ petition) and the memo. being no. CAO/P&A/A/S-4990(BS)/DSTPS-566 dated 17th September, 2018(Annexure-P/7) and prays for direction upon the respondent nos.2 to 7 to re-designate the petitioner as Deputy Director of Personnel (M-3 level) w.e.f. 23.08.1998 and as Joint Director of Personnel (M-4 level) w.e.f. 23.08.2005.

2. Sans unnecessary details, the necessitous facts as unfurled in the writ petition are that in response to an advertisement, the petitioner offered her candidature for the post of Management Trainee in Damodar Valley Corporation (hereinafter referred to as the Corporation) and participated in the selection process. The petitioner emerged to be a successful candidate in written test and hence, she was called upon to appear in the interview. Since the petitioner prosecuted one

year Post Graduate Diploma Course in Management, the interview committee referred the petitioner's case to the General Manager. The General Manager proposed for approval of her appointment with an opinion that the petitioner did not suppress the fact. Such proposal of the General Manager was approved by the Chairman, respondent no. 2 and the petitioner was offered appointment in the post.

3. Consequently, the petitioner joined in the Corporation as a Management Trainee in the Gr.-A executive scale on 7.9.1989 and after completion of training, she was appointed as Personnel Officer (M-1 level) from September, 1990. After succeeding in written test, she was promoted to the post of Assistant Director (Personnel)(M-2 Level) w.e.f. 23.08.1993.

4. On 17th July, 1996, the petitioner was served a charge-sheet on the allegation that she had misled the Corporation by not disclosing that she had completed only one year Management Diploma Course. The petitioner assailed the charge-sheet by preferring a writ petition being C.O. no. 10626(W) of 1996. During pendency of the writ petition, another promotion of the petitioner to the post of Deputy Director of Personnel (HR)(M-3 Level) fell due in 1998. The respondents decided to adopt a sealed cover procedure in respect of such promotion of the petitioner.

5. By an order dated 2nd February, 1999, the writ petition was disposed of. The charge-sheet was quashed and a direction was given to the respondents to complete the sealed cover procedure and give effect to the promotion. The respondents carried the order dated 2.2.1999 in an intra-court appeal being M.A. no. 2528 of 2005 which was dismissed by an order dated 28.07.2009.

6. The respective minimum time periods for re-designation from M-2 level to M-3 level and from M-3 level to M-4 level were 5 years and 7 years respectively. The petitioner was promoted to post of M-2 level i.e. to the post of Asst. Director of Personnel on 23.08. 1993 and hence, her re-designation to the M-3 level i.e. to the post of Deputy Director of Personnel fell due on 23.08.1998 and similarly, her re-designation to Joint Director of Personnel (M-4 level) fell due on 23.08.2005.

7. From a letter vide. no. CAO/P&A/A/S-4990(BS)/DSTPS-1104 dated 21st February, 2018, the petitioner came to learn that her re-designations from M-2 level to M-3 level and from M-3 level to M-4 level were deferred for two years i.e. from 23.9.1998 to 23.8.2000 and from 23.8.2005 to 23.8.2007 respectively. In the letter dated 21.2.2018, a reference was made to a revised Pay Authorisation Statement which was prepared as per revised fixation of pay being no. A/s-4990-335 dated 31.08.2017 and issued in terms of HRD's office order dated 27.2.2014.

8. By making a communication dated 21.6.2018, the petitioner requested the concerned respondent to rectify the error but in vain. On 17.9.2018, she received one memo. vide. no. CAO/P&A/A/S-4990(BS)/DSTPS-566 dated 17th September, 2018 wherein it was alleged that the petitioner was drawing excess pay and

allowances to the tune of Rs. 1,72,319/- and Rs. 2,27,253/- from 1.10.2013 to 31.5.2017 and also from 1.1.2007 to 30.9.2013 respectively. By a further communication dated 18.9.2018, the petitioner ventilated her grievance regarding the receipt of reduced salary and by the same communication she renewed her prayer for rectification of the errors crept in due to erroneous re-designations but to no avail.

9. By a memo. vide. dated 25.10.2018, the petitioner was informed that her re-designation was in order and hence, by giving two representations dated 31.10.2018 and 5.1.2019, she sought for clarification for her delayed re-designation. Lastly, from a communication made by respondent no. 6 vide. dated 16.10.2019, the petitioner came to learn that her re-designations were deferred for the reason that her final grading in Annual Performance Appraisal Reports (in short, APAR) for the years 1995-96 and 1996-97 were "Satisfactory" i.e. below the benchmark of "Good" since as per clause 11 of the Office Memo.(OM) on UCP dated 9.8.2007, re-designation period would be deferred by an equivalent period for which ACRs were adverse and since as per the OM vide. no. PI-Con/22-CR-1735 dated 31.8.2006, only the adverse entries were required to be communicated to an assessee, such final grading had not been brought to the notice of the petitioner. By a further communication dated 7.12.2019, the petitioner gave a reminder to the respondent no.4 that 2 ACRs during the relevant period were expunged by the then Secretary of the Corporation and by the same communication, she raised objection against the application of the OM dated 31.8.2006 retrospectively but till date, the respondents did not response to the communication dated 7.12.2019.

10. The Corporation passed an order dated 22.4.2013 to hinder the seniority of the petitioner and other identically circumstanced employees which adversely affected their pay and hence, the order dated 22.4.2013 was challenged by one R.P.Singh and some other employees in a writ petition being W.P. no. 23066(W) of 2014 which is awaiting for final adjudication.

11. After rendering service to the Corporation for almost 32 years without any blemish, the petitioner was due to retire in May, 2021. According to the petitioner, she was deprived of her promotion to the post of M-5 and even M-6 level and she claimed that she was a victim of bias and her re-designations were deferred arbitrarily. The grading made and/or given in her APAR were not communicated with a mala fide attitude. She has been forced to draw reduced salary and even, she has been asked to pay certain amounts claimed to have been overdrawn by her. In such chronological events, the petitioner has been constrained to prefer the instant writ petition. The parties exchanged their affidavits, as directed.

12. Mr. Bandyopadhyay, learned advocate representing the petitioner submits that during pendency of the writ petition, the petitioner has retired from service. He contends that the petitioner's re-designations from M-2 level to M-3 level and from M-3 level to M-4 were deferred for two years i.e. from 23.8.1998 to

23.8.2000 and from 23.8.2005 to 23.8.2007 respectively on the ground that her final grading in APAR for the years 1995-96 and 1996-97 were "Satisfactory" i.e. below the benchmark of "Good". He contends that the cause behind such deferment of re-designation was informed to the petitioner by respondent no. 6 through a communication dated 16.10.2019.

13. Mr. Bandyopadhyay further submits that in the affidavit-in-opposition the respondents took the plea that as per OM dated 31.8.2006, the respondents were required to inform only the adverse entry to the employee and not the final grading. The performances of the petitioner for those two years was finally graded as "Satisfactory" and hence, such final grading had not been communicated. He vociferously contends that the respondents cannot give retrospective effect to the OM dated 31.8.2006. According to him, the final grading had adverse effect on the service career of the petitioner and hence, the respondents were bound to communicate such grading to the petitioner.

14. Drawing my attention to the APAR for the years 1995-96 and 1996-97 (pages 108 and 117 to the affidavit-in-opposition), he contends that in the first APAR, the Reporting officer and the Reviewing Officer awarded 5 and 6 respectively whereas in the second APAR, the Reporting officer and the Reviewing Officer awarded 6 and 5 respectively. He strenuously contends that in the first case, assessment of Reporting Officer and in the second case, assessment of Reviewing officer had been accepted and hence, a different yardstick was applied in two cases which speaks about bias mind of the respondents.

15. He contends that had the adverse grading been communicated to the petitioner, she could have made representations in due time and the petitioner might get her grievances redressed. By suppressing such grading, the respondents tried to render the petitioner remediless. He submits that the rights which had accrued to the petitioner cannot be taken away by giving retrospective effect to any Office Memorandum (OM). According to him, grading must be communicated to the employee by a model employer and if not communicated, the employer shall be debarred from giving effect to such grading. He submits that such final grading should be declared void and direction may be given to re-fix the dates of petitioner's re-designations and further direction may be given to re-fix the pay of the petitioner and recall the orders by which the petitioner was asked to deposit certain amounts of money. To invigorate his submission, he places reliance upon the judgments delivered in cases of Dev Dutt -vs- Union of India & Ors. ,reported in (2008) 8 SCC 725, Abhijit Ghosh Dastidar -vs- Union of India & Ors. ,reported in (2009) 16 SCC 146, Sukhdev Singh -vs- Union of India & Ors. ,reported in (2013) 9 SCC 566 & Bank of Baroda & Anr. -vs- G.Palani & Ors. ,reported in (2022) 5 SCC 612.

16. In response, Mr. Bose, learned advocate appearing for the Corporation submits that after enjoying a lump sum salary for years, just few days before her retirement, the petitioner has preferred this writ petition. Final grading in APAR

for the years 1995-96 and 1996-97 were communicated to the petitioner in 2019 but the petitioner has instituted this writ petition only in 2021 and the delay in preferring the writ petition has not been explained. He submits that if at this stage, such final grading is disturbed, seniority of many employees will be disturbed and pay of many employees are to be re-fixed and hence, in such case, the court would be slow in interfering in the matter of like nature.

17. Mr. Bose contends that it was the policy decision of the corporation that only adverse entry would be communicated to its employees and not the final grading. According to him, the writ court should not interfere with such policy decision and the writ court cannot direct the Corporation to act contrary to its policies. In his view, the Corporation cannot be asked to act contrary to its own office orders, circulars, rules and regulations. He submits that writ court cannot re-assess the performance of the petitioner.

18. He submits that as per the Office Memo. of 2006, only the adverse entry and/or remarks were required to be communicated to the employees and drawing my attention to the APARs, he contends that "Satisfactory" was final grading and there were no adverse remarks and/or entry in the APAR and hence, the Corporation did not commit any error in not communicating such final grading to the petitioner.

19. He distinguished the judgment of Dev Dutt(supra) saying that ratiocination of the such judgment was applicable for the public servant only and not for the employees of the Corporation. Drawing my attention to the relevant extract of R.Ramanatha Aiyar's Advance Law Lexicon, he submits that the expression "Public Service", as defined in the Law lexicon, means anything done for the service of the public in any part of the country in relation to the affairs of the Union or the State. In elaboration of his submission, he contends that by reason of a fact that a commercial undertaking is owned and ran by the State, it does not ipso facto become a "public service". He contends that the Corporation is a profit-making body and hence, its employees cannot be stated to be the public servant. To lend support to his such contention, he places reliance upon a judgment delivered in case of Satya Narain Singh -vs- District Engineer, PWD Ballia & Anr., reported in AIR 1962 SC 1161. He further submits that the employees of the Corporation can also not be treated to be a public servant within the meaning of S.21 of Indian Penal Code and S. 197 of the Code of Criminal Procedure, 1973. He submits that judgments pronounced basing upon the ratio of Dev Dutt(supra), as referred by Mr. Bandyopadhyay, shall not come in aid of the petitioner. He cites a decision rendered in case of Commissioner of Central Excise, Bangalore -vs- Srikumar Agencies and Ors., reported in (2009)1 SCC 469 for the proposition that the disposal of cases by blindly placing reliance on a decision is not proper. He submits that one additional or different fact may make a world difference between two cases and even a single significant detail may alter the entire aspect. He contends that the petitioner has failed to make out a case that she was prejudiced due to non-communication of her final

grading. He submits that mere plea of violation of natural justice is enough, the person claiming such violation is to show that he/she has been prejudiced due to such violation and in support of his such contention, he places reliance upon the judgment delivered in case of State of U.P. –vs- Sudhir Kumar Singh & Ors., reported in 2020 SCC online SC 847. He submits that the court cannot direct that final grading of the petitioner would be done afresh and he contends that the petitioner cannot get any relief on this writ petition. To embolden his submission, he places reliance upon the judgments delivered in cases of Punjab State Warehousing Corporation – vs- Bhushan Chander and Anr. reported in (2016) 13 SCC 44 and Rachna & Ors. –vs- Union of India & Ors. reported in (2021) 5 SCC 638.

20. In reply, Mr. Bandyopadhyay submits that no period of limitation has been prescribed for preferring a writ petition. By placing reliance upon a judgment delivered in case of State of Rajasthan –vs- O.P.Gupta reported in 2022 SCC OnLine SC 1248, he submits that writ court can refuse to entertain the writ petition where there is gross delay on the part of the writ petitioner and where the relief, if granted, would unsettle the things, which are already settled. He contends that the fact of final grading was communicated to the petitioner in 2019 and due of Covid-19, normal function of the court was disrupted in between 2020 and 2021 yet the petitioner has filed the writ petition in 2021 and hence, here, it cannot be claimed that there was gross delay. Drawing my attention to the judgment of Dev Dutt (supra), he asserts that this judgment applies to the employees of the Corporation and he asserts that as per the judgment of Abhijit Ghosh Dostidar(supra), case of retrospective promotion of the petitioner can be directed to be considered.

21. Admittedly, there is no time-frame provided under the Constitution of India within which a writ petition ought to be filed in the High Court. However, the party aggrieved must move the court at the earliest possible time and explain satisfactorily all semblance of delay. The High Courts generally refuse to invoke its extraordinary powers if there is inordinate, unreasonable and unexplained delay on the part of the applicant in approaching the writ court. Now, an important question arises is what is the reasonable time for filing writ petition. On principle, the court cannot lay down any outer period of limitation, because that is a legislative and not a judicial function. Basically, so far as the question of delay is concerned, no hard and fast rule can be laid down and it will depend on the facts of each case. Generally, in addition to taking into consideration of the other related factors the court shall see as to whether by reason of delay such a position has been created that exercise of discretion would unsettle the long-standing settled matters which cause prejudice to other party.

22. In the case at hand, admittedly, only in 2019, the petitioner was informed about the cause behind deferment of her re-designation and she has approached the writ court in 2021. In 2020, normal function of the court was disrupted due to covid-19 pandemic. The Hon^{ble} Supreme Court was pleased to direct that the

period commencing from 15th March, 2020 to 28th February, 2022 shall be excluded for the purpose of limitation. So, it cannot be held that the petitioner caused inordinate delay in approaching the court and the delay caused up to 2019 cannot be attributed to the petitioner.

23. From the letter vide.no. PL-Misc./Con-1093 dated 16.10.2019 (Annexure-P/12 to the writ petition), it transpired that as per Office Memorandum(OM) being no. PL-Con/22-CR-1735 dated 31.08.2006, final grading given in the APAR of 1995-96 and 1996-97 were not informed to the petitioner since, according to the respondent no.1, those final grading were not adverse entry and/or remark.

24. So, it is clear as day that the respondent no. 1 has given retrospective effect to the OM dated 31.08.2006. Mr. Bose argues that this was policy decision of the Corporation but even it is assumed that such decision is policy of the Corporation yet it is not clear as to how such policy decision can be adopted retrospectively. Actually, the Corporation desperately tried to defend its omission to communicate the final grading taking recourse to the OM dated 31.08.2006.

25. In the judgment of Dev Dutt (supra), the Hon"ble Supreme Court was pleased to hold as follows:-

" .. even though there may no rule/G.O. requiring communication of the entry, or even if there is a rule/G.O. prohibiting it, because the principle of non-arbitrariness in State action as envisaged by Article 14 of the Constitution in our opinion requires such communication. Article 14 will override all rules or government order.

.... When the entry is communicated to him the public servant should have a right to make a representation against the entry to the authority concerned, and the authority concerned must decide the representation in a fair manner and within a reasonable period."

26. In the judgment of Dev Dutt (supra), it was further held that direction for communication of all entries in annual confidential report will apply to employees of statutory authorities, public sector corporations and other instrumentalities of the State(in addition to government servants).

27. So, the submission of Mr. Bose that judgment of Dev Dutta (supra) does not apply to the employees of the Corporation cannot be accepted. Placing reliance upon the judgment of State of UP -vs- Sudhir Kumar Singh & Ors.(supra) Mr. Bose submits that infraction of principle of natural justice will not invalidate the order of the Corporation since no prejudice was caused to the petitioner.

28. Indisputably, due to final grading in APAR of 1995-96 and 1996-97, the petitioner"s re-designations were deferred. The bench mark for such re-designation was "Good" but the entries of "Satisfactory" in APARs were not communicated to the petitioner and admittedly, for such final grading the petitioner did not get promotion in due time and in consequence, she drew reduced salary and lost other benefits and hence, the corporation cannot be

permitted to take the plea that the petitioner has not been prejudiced. As per the judgment of Dev Dutt (supra) such non-communication is arbitrary and as such, violative of Article 14 of the Constitution of India.

29. Now, the primal question is despite of such arbitrary action of the respondents, whether the Court shall restrain itself from passing appropriate orders considering that it may unsettle some settled things! Settled principle is that the writ court shall stretch its long arm to reach the injustice wherever it is found. Article 226 of the Constitution confers extraordinary jurisdiction on the High Court to issue prerogative writs for enforcement or fundamental rights or for any other purposes. The jurisdiction, though is to be based on discretion and equitable considerations, is wide and expansive with no fetters having been placed on the exercise of this extraordinary jurisdiction. The High Court in exercise jurisdiction under Article 226 can even mould the relief or reliefs to meet the peculiar and complicated requirements of the country.

30. Since following the ratiocination of the judgement of Dev Dutt (supra), it has been held that fundamental rights of the petitioner enshrined under Article 14 have been violated, it would be unjust for the Court to restrain itself from exercise its powers to grant equitable relief to the petitioner on a consideration that it can unsettle some settled things. As the final grading of APARs for the years 1995-96 and 1996-97 had not been communicated to the petitioner, the petitioner had been deprived of her right of making representation against such grading and hence, it would not be apposite to permit the respondents to give effect to such final grading. Consequently, the deferment of re-designations from M-2 level to M-3 level and from M-3 level to M-4 level basing upon such grading cannot be sustained.

31. There is no scintilla of doubt regarding binding effects of the propositions of law laid down in the judgments relied upon by Mr. Bose but those are distinguishable on facts.

32. In case of Abhijit Ghosh Dostidar (supra), the appellant had retired for service and hence, he had not been allowed to enjoy any pay or allowances for the period for which he had not worked in the Higher Administrative Grade Group-A but his promotion was directed to be considered for the purpose of re-fixation of his pension and other benefits.

33. In such sequence of facts and enunciation of law, it is held that the deferment of the petitioner's re-designations from M-2 level to M-3 level and from M-3 level to M-4 level are bad in law and cannot be allowed to stand. The petitioner shall not be entitled to any pay or allowances for the period for which she had not worked in M-3 level and in M-4 level but she shall be treated to have been re-designated to M-3 level and M-4 level on 23.08.1993 and 23.08.2005 respectively for the benefits of re-fixation of her pension and other retiral benefits as per rules. Such re-fixation must be made within 3(three) months from the date of receipt of a copy of this order. The Memo. vide. no. CAO/P&A/A/

S-4990(BS)/DSTPS- 1104 dated 21st February, 2018 which was prepared as per the revised Fixation of Pay, being no. A/S-4990-335 dated 31st August, 2017 (Annexure-P/6 to the writ petition) and the Memo. being no. CAO/P&A/A/S-4990(BS)/DSTPS-566 dated 17th September, 2018(Annexure-P/7) are set aside.

34. The respondent nos.2 to 7 shall calculate as to whether after re-fixation of the petitioner's retiral benefits in term of this order, there shall be any amount to be recovered from the petitioner. It is further clarified that after such re-fixation of petitioner's retiral benefits, if any amount is found to be still recoverable, the respondents shall take necessary steps to recover the same in accordance with law but if it is found that any amount is required to be disbursed in favour of the petitioner, the respondent nos. 2 to 7 shall release such amount in favour of the petitioner within 2(two) months from the date of such re-fixation.

35. With these observation and order, the writ petition being WPA 10297 of 2021 is, thus, disposed of, however, without any order as to the costs.

36. Parties shall be entitled to act on the basis of a server copy of this Judgement and Order placed on the official website of the Court.

37. Urgent Xerox certified photocopies of this judgment, if applied for, be given to the parties upon compliance of the requisite formalities.