

(2001) 09 GAU CK 0034
In the Gauhati High Court
Case No : Writ Petition (C) No. 4832 of 2000

Bandana Dey

APPELLANT

Vs

Mallika Bardhan

RESPONDENT

Date of Decision : 24-09-2001

Acts Referred:

Assam Administrative Tribunal Act, 1977 — Section 5, 9
Constitution of India, 1950 — Article 226

Citation : (2001) 3 GLT 58

Hon'ble Judges : D. Biswas, J

Bench : Single Bench

Advocate : B.R. Dey and D. Choudhury, for the Appellant; B. Banerjee and S.C. Biswas, for the Respondent

Judgement

D. Biswas, J.—This petition under Article 226 of the Constitution has been directed against the Judgment and Order dated 17.8.2000 passed by Learned Administrative Tribunal in Appeal Case No. 82 ATA/ 1998 whereby the promotion of the writ petitioner to the post of Subordinate Engineer Grade-I (Draftsman Grade-II) has been quashed.

2. I have heard Mr. B. R. Dey, Learned Counsel for the petitioner and Mr. B. Banerjee, Learned Counsel for the, respondents and also perused the impugned Judgment or the Learned Tribunal, and the pleadings and documents on record.

3. The controversy in this petition relates to fixation of seniority vis-a-vis promotion of the Respondent No. 1. The question to be answered in this case is whether the services rendered by the writ petitioner as a Work Charged Trader could be taken into consideration for computing the seniority.

4. The writ petitioner was initially appointed as Work Charged Tracer on 11.2.1969 in the office of the Executive Engineer. Flood Control, Silchar and she continued in that post till 5.6.1977. As per direction of the Additional chief Engineer she was appointed as regular L.D.A. In the same establishment and she

joined the post on 6.6.1977 without any protest. Thereafter, on 22.8.1977 she filed a representation to the Additional Chief Engineer for her transfer to the Technical Branch where she was working as Work Charged Tracer. The representation reads as follows:

" TO

The Addl. Chief Engineer. S.D.O. (TC) Cachar & Hills F.C. Silchar & H.A. Through proper channel.

Sub : Prayer for transfer to Technical Branch of Silchar FC. Divisional Office.

Ref: CEFC(E) 41/Pt.IV/22. Dt. 27.5.77.

Sir,

Most humbly and respectfully I have the honour to lay before you the following facts for favour of your perusal and sympathetic consideration.

That Sir, I have been transferred and posted on Promotion as L.D.A. in General Branch of Silchar F.C. Divisional Office as per your order under reference. Before my Joining as L.D.A. I was working as W/C tracer in Technical Branch of Silchar F.C. Division since Feb/69 and thus I have gathered requisite experience in Tracing work due to my long 8 (eight) years of service in Technical Branch. After my long period of service as Technical Branch, my promotion as L.D.A. will produce no benefit to me as I cannot expect further promotion in my service career then if I work as Draftsman, if your honour kindly allow me to avail the chance and for this I shall ever pray.

Yours faithfully, Bandana Dey, 22.8.77 Advance copy submitted to the Addl. Chief Engineer, Cachar. Hills F.C. Deptt., Silchar."

5. The Additional Chief Engineer issued the following letter on consideration of her representation :

"In returning herewith memo quoted above, I am to say that Smt. Bandana Dey, L.D.A. may be posted as regular Tracer if she was senior most. W/C tracer prior to appointment as L.D.A and to fill up the resultant vacancy of L.D.A. as per this office circular letter No. CEFC/28/pt-I/4 dt. 24.9.77."

6. Thereafter, the Executive Engineer vide letter dated 13.10.1977 appointed the petitioner as Tracer. The appointment order reads as follows:-

"OFFICE ORDER No. 209 of 77-78

In pursuance of Addl-Chief Engineer's letter No. CEFC(E) 41/ PTN/99 dt.20.9.77. Srimati Bandana Dey, L.D.A. is hereby appointed as Tracer under regular establishment in the scale of pay of Rs. 240-5-265(EB)-7-335(EB)-9-380 and other allowances as admissible under rule and posted in Technical Branch under Silchar F.C. Division with immediate effect."

7. In pursuance of the aforesaid order issued by the Executive Engineer, the petitioner joined the post of Regular Tracer on 8.12.1977. It would appear from the initial appointment order as work Charged Tracer that on such appointment she was posted to the Technical Branch of the Divisional Office. The appointment order dated 13.10.1977 issued by the Executive Engineer and quoted above, also mentions of her posting in the Technical Branch. It is therefore, clear that the post of Tracer is technical in nature and the incumbents of the Technical Branch stand on a different footing from the employees of the regular establishment (Non-Technical). Even the representation submitted by the writ petitioner on 22.8.1977 and quoted above clearly shows that she wanted to come back to the Technical Branch since future prospect of promotion in the cadre of Lower Division Assistant was bleak. Although the post of Tracer and the Section Assistant carry equal pay, yet there is a demarcation between the two. No doubt can be raised that the posts of Tracer pertain to the Technical Branch and the posts of L.D.A. pertain to the General Branch. The gradation lists issued from time to time and annexed with the original petition before the Learned Tribunal also show that separate gradation list for the Tracers are also being maintained all along. The gradation list produced are not combined seniority lists of Tracers and Lower Division Assistants and therefore, it can safely be concluded that the post of Lower Division Assistant constitute a different cadre, and the incumbent of both the cadres are not interchangeable. This view is also plausible from the appointment orders issued by the Executive Engineer because of mention of posting in the technical Branch.

8. The petitioner was initially appointed as a Work Charged Tracer on condition that the appointment is purely temporary and liable to be terminated at any time without notice. Before her regularisation in the post of Tracer, she was appointed as L.D.A. which she accepted without any protest. The period of service as a Work Charged Tracer cannot be said to be against any substantive appointment/post. Consequently, it has to be held that on her joining as Lower Division Assistant in the Non-Technical Branch, her connection with the post of Work Charged Tracer was finally snapped. The order shows that it was not a case of deputation, but a regular appointment against a substantive post of L.D.A. Provisions of FR 14A clearly show that her departure from the post of Work. Charged Tracer as in cessation of all rights whatever she had to that post. Therefore, in this case seniority will have to be computed only from the date of joining the Technical Branch as regular Tracer i.e. 8.12.1977. The period spent by her as Work charge Employee and thereafter as L.D.A. cannot be taken into consideration. The Respondent No. 1 was regularly appointed as a Tracer with effect from 7.1.1972. The petitioner might. Have joined the post of Work Charged Tracer earlier, but the fact remains that the respondent No. 1 joined the post, of Tracer on regular appointment. This makes her position invulnerable, That apart, the intervening events, petitioner's appointment as L.D.A. clearly settle that under no circumstances the writ petitioner be treated as senior to the Respondent No. 1 in the Cadre of Regular Tracers. In my considered opinion, the

decision of the Learned Tribunal that the Respondent No. 1 is senior to the writ petitioner is in conformity with the provisions of law.

9. A number of decisions have been placed before me by the Learned counsel for both the parties in support of their respective contention. But the law with regard to computation of seniority is well settled. Services rendered earlier in a different cadre may be included for computation of seniority if the incumbent is repatriated to the earlier post to which she has a lien. As already stated above, the appointment of the writ petitioner as L.D.A. was not on deputation. It was a regular appointment in cessation of all her connection with the post of Work Charged Tracer and therefore, on her reappointment, she is not entitled to get the benefits of her earlier service for computation of her seniority. Before coming to this conclusion, I have also taken care of the judgments of the Hon'ble Supreme Court referred to by the Learned Counsel for the parties in *K. Madhavan and Anr. v. Union of India and Ors.* (1987) 4 SCC 556 : *The Direct Recruit Class-II Engineering Officers' Association and others Vs. State of Maharashtra and others*, , *R. Hariharan and Others Vs. K. Balachandran Nair and Others*,

10. The writ petitioner was promoted temporarily to officiate as Subordinate Engineer Grade-I by an order dated 30th December 1992 Shri B. R. Dey, Learned Counsel argued that the respondent challenged the promotion of the writ petitioner after six years of promotion. Her petition u/s 5 of the Assam Administrative Tribunal Act, 1977 for condonation of delay was allowed by the Learned Tribunal erroneously. According to him, the Respondent No. 1 is guilty of laches and, therefore, the Tribunal ought not to have condoned the delay in preferring the Appeal. The Learned Counsel in support of this contention, relied upon a decision of this Court in *Shri Santi Ram Bora v. The State of Assam and Ors.* (1985) 1 GLR 510 and the decision of the Supreme Court in *Collector, Collector, Land Acquisition, Anantnag and Another Vs. Mst. Katiji and Others*, But it appears that the Learned Tribunal condoned the delay by an order passed on 3.2.1999. The order was passed in the absence of the writ petitioner. The writ petitioner appeared before the Tribunal after receipt of the notice and by a petition submitted on 31.3.1999 prayed for six week's time for filing her reply. The order dated 3.2.1999 was not controverted. No petition under Article 226 of the Constitution was also filed assailing the order of condonation, in view of that, the matter relating to Limitation was finally settled. It cannot be reopened now. The decision in *Shri Santi Ram Bora* (supra) was rendered in a petition filed challenging the order passed by the Tribunal rejecting the appeal on the ground of Limitation for insufficiency of cause. This decision is in no way of any assistance to the writ petitioner. I have also taken care of the decision in *A. J. Fernandis v. Divisional Manager, South Central Railway and Ors.* 2001 SCC 217 and *Government of Andhra Pradesh and Ors. v. A. P. Jaiswal and Ors.* 2001 SCC 316. The Learned Tribunal condoned the delay in exercise of its statutory powers conferred u/s 5 of the Assam Administrative Tribunal Act. 1977. Once the Delay is condoned in exercise of statutory power and not assailed before any superior

Court, the order attains finality u/s 9 of the Act. Therefore, with its inherent limitations under Article 226, this Court cannot interfere with such an order.

11. A Writ of Certiorari can be issued for correcting error of jurisdiction committed by the Tribunal. It is primarily confined to the cases where orders are passed without jurisdiction or in excess of jurisdiction. An omission to exercise such Jurisdiction resulting in injustice will also pave the way for exercise of extraordinary jurisdiction. The law has been settled in *Syed Yakoob Vs. K.S. Radhakrishnan and Others*, The decision of the Supreme Court relevant for the case at hand is quoted below:

"(7) The question about the limits of the Jurisdiction of High Courts in issuing a writ of certiorari under Article 226 has been frequently considered by this Court and the true legal position in that behalf is no longer in doubt. A writ of certiorari can be issued for correcting errors of Jurisdiction committed by inferior courts or tribunals : these are cases where orders are passed by inferior courts or tribunals without Jurisdiction, or is in excess of it, or as a result, of failure to exercise jurisdiction. A writ can similarly be issued where in exercise of Jurisdiction conferred on it, the Court or Tribunal acts illegally or improperly, as for instance, it decides a question without giving an opportunity to be heard to the party affected by the order, or where the procedure adopted in dealing with the dispute is opposed to principles of natural justice. There is, however, no doubt that the jurisdiction to issue a writ of certiorari is a supervisory jurisdiction and the Court exercising it is not entitled to act as an appellate Court. This limitation necessarily means that findings of facts reached by the inferior Court or Tribunal as result of the appreciation of evidence cannot be reopened or questioned in writ proceedings. An error of law which is apparent on the face of the record can be corrected by a writ, but not an error of fact, however, grave it may appear to be. In regard to a finding of fact recorded by the Tribunal, a writ of certiorari can be issued if it is shown that in recording the said finding, the Tribunal had erroneously refused to admit admissible and material evidence, or had erroneously admitted inadmissible evidence which has influenced the impugned finding. Similarly, if a finding of fact is based on no evidence, that would be regarded as an error of law which can be corrected by a writ of certiorari. In dealing with this category of cases, however, we must always bear in mind that a finding of fact recorded by the Tribunal cannot be challenged in proceedings for a writ of certiorari on the ground that the relevant and material evidence adduced before the Tribunal was insufficient or inadequate to sustain the impugned finding. The adequacy or sufficiency of evidence led on a point and the inference of fact to be drawn from the said finding are within the exclusive jurisdiction of the Tribunal, and the said points cannot be agitated before a writ court. It is within these limits that the jurisdiction conferred on the High Courts under Article 226 to issue a writ of certiorari can be legitimately exercised (vide *Hari Vishnu Kamath Vs. Syed Ahmad Ishaque and Others*, *Nagendra Nath Bora and Another Vs. The Commissioner of Hills Division and Appeals, Assam and Others*, and *Kaushalya Devi and Others Vs. Bachittar Singh and Others*,

12. Condonation of delay in preferring the appeal, however, does not mean condonation of laches and lapses on the part of the Respondent No. 1. In appropriate cases the Court may not grant relief where in all probability such orders are likely to unsettle the things already settled. In the Instant case. I do not find that the reversion of the writ petitioner as per direction of the Learned Tribunal will create any administrative problem and unsettle the things already settled. The petitioner was promoted temporarily to officiate as Subordinate Engineer Grade-1 by an order passed in December 1992 although she was not the seniormost Regular Tracer. An order of promotion passed erroneously has to be corrected unless it ushers in administrative problem. This is a case where equitable relief has to be granted to the person deprived of promotion wrongfully.

13. In the instant case. I do not find any error in appreciation of evidence. There is also nothing on record to show that the Learned Tribunal acted beyond its jurisdiction or failed to exercise its jurisdiction. It is a Court of first instance and passed the order on evaluation of fact. The decision regarding seniority is not in conflict with the principles of law. That being so, I think it would be impermissible to interfere with the order passed by the Learned Tribunal except the direction given in paras (5) and (6) of the operative part of the Judgment. The direction in paras (5) and (6) are for reversion of the writ petitioner and deemed promotion of the Respondent No. 1. The Tribunal has no jurisdiction to pass such orders. The order of reversion has to be passed by the authority concerned in compliance with the judgment of the Learned Tribunal and, thereafter, the post falling vacant is to be filled up by promotion from among the eligible Regular Tracers in accordance with the provisions of law. Since the promotion has to be on the basis of merit-cum-seniority, it is for the authority to take a decision in the matter. The directions given by the Tribunal in para (5) and (6) stand reversed.

14. The writ petition is disposed of subject to the observations and directions given above.