

(2013) 06 CAL CK 0072
In the Calcutta High Court
Case No : W.P.S.T. No. 366 of 2010

Dr. Shantabrata Moitra

APPELLANT

Vs

The State of West Bengal and Others

RESPONDENT

Date of Decision : 14-06-2013

Acts Referred:

Constitution of India, 1950 — Article 14, 16

Citation : (2013) 4 CHN 374 : (2013) 4 WBLR 556

Hon'ble Judges : Nishita Mhatre, J;Anindita Roy Saraswati, J

Bench : Division Bench

Advocate : Prasanta Kumar Mukherjee and Mr. Tapas Kumar Majumder, for the Appellant;Tapan Kumar Mukherjee and Mr. Nilotpal Chatterjee for the State, for the Respondent

Final Decision : Disposed Off

Judgement

Nishita Mhatre, J.—The petitioner has challenged the decision of the West Bengal Administrative Tribunal in O.A. no. 1592 of 2005. By the impugned order the petitioner's challenge to the order dated 28th February, 2005 issued by the Deputy Secretary of the West Bengal has been dismissed. The brief facts in the present case are as follows:

The petitioner was qualified as an MD in General Medicine in 1975. He was appointed as a Medical Officer with the Government of West Bengal on 6th April, 1977. In January, 1981, he was transferred to Barasat Sub-Divisional Hospital as Medical Officer (Physician). He underwent training for a period of three months in Nephrology in 1984. After obtaining this training on 3rd April, 1986, he was posted as Medical Officer on Supernumerary duty to work as Nephrologist, Department of Medicine, Medical College & Hospital at Calcutta. The earlier order, issued in 1985 posting him as a Research Officer in the Nephrology Unit, Department of Medicine, Institute of Post Graduate Medical Education and Research, Calcutta, was cancelled. By an order of 12th May, 1987, the petitioner was confirmed in the basic grade as Medical Officer with effect from 16th May,

1980. The petitioner continued to work as per the order issued in 1986. On 17th March, 1993, the petitioner was transferred to Rampurhat Hospital as a Physician.

2. Being aggrieved by the order transferring him as a Physician while he was working in the Nephrology Unit, the petitioner challenged his order of transfer and the provisions of the West Bengal State Health Services Act, 1990 in C.O. no. 4609(W) of 1993. Several such matters had been filed by other doctors challenging the provisions of the West Bengal State Health Services Act, 1990 as well as the rules framed thereunder. Similar matters were pending before the Supreme Court. In these circumstances, the Learned Single Judge passed an ad interim order which reads as follows:

There will be an ad interim order to this extent that the respondents will be free to transfer the petitioner who they will post him according to his status, seniority and pay and to equivalent post that he is holding, without prejudice and subject to result of the writ application.

3. It appears that soon thereafter the post of Medical Officer (Nephrologist) became vacant at Sadar Hospital, Purulia. However, no order posting the petitioner to that hospital was issued. Later in 1996 again the post of Medical Officer (Nephrologist) fell vacant in Berhampore Sadar Hospital. Again, the petitioner was not employed there. The application which was pending before this Court, being the aforesaid Civil Order, was transferred to the West Bengal Administrative Tribunal and numbered as T.A. 362 of 1997. That application was disposed of by the Tribunal in terms of the interim order passed by this Court in C.O. no. 4609(W) of 1993. This order was passed on 12th March, 2004.

4. The petitioner submitted several representations to the respondents seeking a posting in consonance with his status as he claimed that he was a Nephrologist and could not be appointed as a Physician, Nephrology being a Super Speciality and the post of Physician being a Specialist's post. The petitioner submitted several letters to the authorities seeking payment of the salary from April 19, 1993 onwards.

5. Ultimately, the petitioner joined Sambhu Nath Pandit Hospital as Medical Officer (Physician) on 30th June, 2004 as per the order dated 16th July, 2004. The petitioner retired on 1st January, 2005. He requested the authorities to treat the period from 18th March, 1993 when he was transferred to Rampurhat Hospital as a Physician till 31st December, 2004 as a period of continuous service.

6. After several such letters and requests were sent by the petitioner to the respondents, a notification was issued on 20th February, 2005 indicating that the leave period from 18th March, 1993 to 18th March, 1998 was regularized in terms of the West Bengal Services Rules, Part I. However, the period from 19th March, 1998 to 13th July, 2004 was directed to be treated as "Dies-non". The period from 21st June, 1994 to 18th March, 1998 which was to be treated as extra-ordinary leave, would not be considered for computation of qualifying service for payment of increments and pension.

7. Being aggrieved by that order, the petitioner challenged the same before the West Bengal Administrative Tribunal in O.A. no. 1592 of 2005. The Tribunal has dismissed the application by concluding that since there was no valid order issued cancelling the original transfer order, by which the petitioner was transferred to Rampurhat Hospital, there was no infirmity in the order issued by the Government to treat the period from 19th March, 1998 to 13th July, 2004 as "Dies-non". The Tribunal held that it was only when a Coordinate Bench of the Tribunal had passed a final order in T.A. 362 of 1997 that the original order of posting of the petitioner to Rampurhat was quashed. The Tribunal further observed that immediately thereafter the Government had posted him in Calcutta.

8. The Learned Counsel, appearing for the petitioner, has submitted that the petitioner was employed as a Nephrologist when he was transferred to Rampurhat as a Physician. He pointed out that the transfer was not to a post which was equivalent in status but to a lower post. The Learned Counsel, therefore, submitted that the petitioner was not bound to report and join at the place of posting. He submitted that this Court had given liberty to the respondents to transfer the petitioner to any place provided his status in the place of transfer was equivalent to the one conferred on him in the Medical College & Hospital, Calcutta. He pointed out that a true interpretation of the order of this Court would indicate that this Court had stayed the order of transfer and had also directed the respondents to post the petitioner only in a post which was equivalent to his status as a Nephrologist. The Learned Counsel then submitted that the petitioner cannot be deprived of the period of service during which the respondents did not think it necessary to appoint him in an equivalent post. He submitted that the respondents were well aware of the order of this Court and later of the Administrative Tribunal despite which it took no action to implement the order. The Learned Counsel then submitted that the decision of the Government to treat the period from 19th March, 1998 to 13th July, 2004 as "Dies-non" is illegal and bad in law and in fact, is a punishment for the petitioner who was always willing to join at any place, provided, the status accorded to him was the same as the one he was enjoying in the Medical College & Hospital, Calcutta. The Learned Counsel has submitted that a Co-ordinate Bench of the Tribunal ought not to have taken a different view and held that the earlier order of transfer issued in 1993 was not stayed either by this Court or by the Tribunal. Placing reliance on the judgment of the Supreme Court in the case of S.I. Rooplal and Another Vs. Lt. Governor Through Chief Secretary, Delhi and Others, , he submitted that a Co-ordinate Bench of the Tribunal cannot take a view contrary to the one of another Bench in an earlier judgment, thereby creating judicial uncertainty. The Learned Counsel has also fortified his submissions by relying on the judgment of the Supreme Court in the case of Tejshree Ghag Vs. Prakash Parashuram Patil and Others etc. etc., wherein the Court has held that transfer orders which are issued in exercise of Executive action, without following the principles of natural justice, and substantially affecting the status of an employee

and his pay, are bad in law. This is because the transfer order cannot adversely affect the status of an employee.

9. Mr. Mukherjee, Learned Counsel appearing for the Government and other respondents, has submitted that the order of transfer of 17th March, 1993 had not been stayed by any Court; nor had it been set aside. He submitted that so long as the transfer order issued on 17th March, 1993 was in force, the petitioner was expected to comply with the same. According to Mr. Mukherjee, the petitioner did not enjoy a higher status than the status of a Physician while he was working in the Medical College Hospital. Therefore, he urged that the transfer of the petitioner to Rampurhat Hospital as a Physician is valid and cannot be questioned and the petitioner ought to have joined duty as a Physician. The Learned Counsel submitted that there was no change in the status of the petitioner on his transfer to the Rampurhat Hospital. He further pointed out that after the order of the Tribunal was passed in 2004 disposing of T.A. 3862 of 1997 the petitioner accepted the posting of Medical Officer (Physician) on 14th July, 2004 in the Sambhu Nath Pandit Hospital. The Learned Counsel submitted that had the petitioner been a Nephrologist as claimed by him, he would not have accepted the post as a Physician, especially after his application had been disposed of by the Tribunal. He further submitted that no action was taken by the petitioner at any point of time before any Court of law to substantiate his claim that this Court had stayed the transfer order issued on 17th March, 1993 and had directed the respondent to post him in any other place in a post equivalent to the status of a Nephrologist. The Learned Counsel submitted that Government would have been justified in treating his entire period of absence from 18th March, 1993 till 13th July, 2004 as "Dies-non" as the petitioner did not work at all for a period of 11 years. However, according to Mr. Mukherjee the Government has condoned a certain period by adjusting that period with the leave to which the petitioner is entitled under the West Bengal Services Rules, Part I (for short WBSR). He pointed out that the WBSR do not permit the condoning or regularization of absence for more than the period already condoned by the State Government. The Learned Counsel, therefore, submitted that the Tribunal had not committed any error in dismissing the application.

10. The submission of Mr. Mukherjee, the Learned Counsel for the State, that the transfer order issued on 17th March, 1993 had not been stayed by this Court or by the Tribunal, is unsustainable. The first prayer of the petitioner in the application filed by him before this Court was for a declaration that the provisions of the West Bengal State Health Service Act, 1990, the West Bengal Medical Education Service (Option) Rules, 1990, the West Bengal Health Service Rules, 1993, and the West Bengal Health Service (Pay and Allowance, Age of Superannuation and Pension) Rules, 1993, were ultra vires Articles 14 and 16 of the Constitution of India. The other prayer was for a writ of mandamus directing the respondents to cancel or revoke the transfer order issued to him on 17th March, 1993. This Court, while dealing with this petition, had granted the ad interim order directing that the petitioner could only be transferred to a post

commensurate with his status, seniority and pay. This obviously means that the Court was of the view, *prima facie*, that the order of transfer dated 17th March, 1993 was not one by which the petitioner was transferred to a post commensurate with his status or equivalent to the post he was holding, namely, that of a Nephrologist. The grievance of the petitioner was not that he had been transferred to a place outside Calcutta, but that he was directed to work in a post which according to him was inferior in status. The order was issued to the petitioner when he was working as a Medical Officer on Supernumerary duty after being trained as a Nephrologist. Although the petitioner had only undergone training in Nephrology for three months, the State in its wisdom posted him as a Nephrologist, which for all practical purposes is Super Speciality post. In these circumstances, it could not be said that the State had directed him to work in a post of equivalent status by posting him as a Physician. Despite the order of this Court, which was later continued by the Administrative Tribunal, the State did not think it necessary to either challenge the order or to post the petitioner in an equivalent post. In these circumstances, the submission on behalf of the petitioner that he had been kept out of service for no fault of his must be accepted.

11. However, both the petitioner and the State have been very casual in their approach to the posting of the petitioner. After the order of this Court dated 2nd April, 1993, the petitioner took no steps to ensure that the order was implemented both in letter and spirit. He only submitted representations on 25th July, 1995, 15th February, 1996, 18th August, 1998 and 30th January, 2001 calling upon the State to release his salary and to give him a suitable posting.

12. In our opinion this was not sufficient. The petitioner had several legal remedies which he could have availed of to ensure that the order of this Court was implemented. However, he preferred to ignore those remedies and write letters every year, calling upon the respondents to implement the order of this Court. In such circumstances, we are not convinced that the petitioner is entitled to salary for the period that the Government has denied it to him.

13. However, it is equally clear that the State has been remiss in implementing the order of this Court which was continued by the Tribunal. In these circumstances, the treatment of the period from 19th March, 1998 to 13th July, 2004 as "Dies-non" is unacceptable. It was the State's duty to implement the order of this Court both in letter and spirit. By wrongly claiming that there was no stay of the order of transfer dated 17th March, 1993, the State had not implemented the order and neither had it challenged the same. The interpretation placed by the State on the order of this Court is erroneous. We, therefore, direct that the State must treat the entire period from 18th March, 1993 to 13th July, 2004 as period spent on duty, a part of which has already been adjusted toward leave which the petitioner is entitled to under the WBSR. However the petitioner will be considered to be notionally in continuous service during this period, only for the purposes of payment of pension and other retrieval

benefits. The petitioner is not entitled to salary and consequential benefits for this period. The impugned order of the Tribunal is set aside and the petition is disposed of as above. The arrears of pension and other retrial benefits will be paid to the petitioner within four months from today.

Anindita Roy Saraswati, J.

I agree.