
(2007) 05 OHC CK 0022
In the Orissa High Court

Dr. Tapan Kumar Mohanty

APPELLANT

Vs

Chairman, Paradeep Port Trust, Paradeep and Another

RESPONDENT

Date of Decision : 15-05-2007

Acts Referred:

Constitution of India, 1950 — Article 226
Major Port Trusts Act, 1963 — Section 23, 24

Citation : (2007) 104 CLT 302 : (2007) 2 OLR 66

Hon'ble Judges : M.M. Das, J

Bench : Single Bench

Final Decision : Allowed

Judgement

M.M. Das, J.—The petitioner is a medico and while serving as a specialist in Occupational Health under the Paradeep Port Trust he retired from the said post on attaining the age of superannuation with effect from 30.4.2006 A.N. On the date of his retirement, the petitioner states to be drawing a salary at the scale of pay of Rs. 17,550/- + Rs. 4388/- N.P.A. After retirement, the petitioner was sanctioned provisional pension and retiral benefits in the scale of pay of a Medical Officer-cum-Assistant Surgeon, i.e., Rs. 14,350/- + Rs. 3588/- N.P.A. which was a lower scale than the scale of pay at which the petitioner was receiving his salary on the date of his retirement.

2. The case of the petitioner is that he was promoted to the post of specialist (Occupational Health) in the then scale of pay of Rs. 3, 350-120-5150/- as per the order of promotion dated 4.12.1992 annexed as Annexure-4 to the writ petition. From the date of the said promotion, the petitioner worked as a specialist. The petitioner states that he was confirmed in the promotional post by the office order of Paradeep Port Trust dated 29.4.1993 and he worked in the said post of specialist (Occupational Health) from the date of his promotion dated 4.12.1992 till the petitioner retired, i.e., 30.4.2006. As the petitioner was paid provisional pension at a rate which is applicable to a lower grade, i.e., Medical Officer-cum-Assistant Surgeon and was not paid in accordance with his last

drawn salary as a specialist (O.H.), the petitioner states to have made all efforts by personally approaching the authorities for making payment of his pension at the rate to which he is entitled to as a specialist. As no action has been taken, the petitioner being aggrieved has approached this Court under Article 226 of the Constitution for appropriate relief.

3. A counter affidavit has been filed on behalf of the opp. parties 1 and 2 being the authorities of the Paradeep Port Trust. A stand has been taken in the counter affidavit that as per the statutory provisions contained in Regulations 101 to 117 of Dock Workers (Safety, Health and Welfare) Regulations, 1990, the Paradeep Port Trust authorities requested the Ministry of Shipping, Government of India by their letter dated 7.9.1991 for creation of the post of specialist (Occupational Health). Several correspondences were made with the Ministry. In the meantime, before creation of the post, in order to avoid prosecution by the Dock Safety Directorate, a proposal for creation of the post of specialist (O.H.) was moved to the Board vide Agenda Item No. 47 (5)/1992-93 and the Board of Trustees by their resolution dated 27.11.1992, approved the proposal for creation of one post of specialist (O.H.). In accordance with the Board's approval, one such post was created by office memorandum No. AD/RR/39/10/92 dated 4.12.1992 and the petitioner who was working as a Medical Officer-cum-Assistant Surgeon was promoted to the post of specialist (O.H.) on ad-hoc basis for a period of six months by the order under Annexure-4 dated 4.12.1992. It is the further stand of the opp. parties that the Ministry of Shipping, Government of India by their letter dated 10.12.1992 intimated the Port that the proposal for creation of post of specialist (O.H.) cannot be agreed to. The Resident Audit Officer placed at Paradeep, constantly raised objection with regard to the promotion of the petitioner to the post of Specialist (O.H.) and the Paradeep Port Trust Authorities furnished the reply to the auditor from time to time.

4. In the year, 2006, i.e., the year of retirement of the petitioner, the Resident Audit Officer requested the Port either to regularize the promotion given to the petitioner or to recover the excess payment made to him before finalization of the retirement benefits.

5. It appears from the counter affidavit that Paradeep Port kept on corresponding with the Ministry to amend its order by which the proposal of the Board for creation of the post of Specialist (O.H.) was turned down by regularizing the said post, to avoid further audit objection. As no communication was received from the Ministry regarding regularization of promotion, the Port decided to pay provisional pension to the petitioner and till date, the petitioner has not accepted the provisional pension though he has been informed. Another stand has been taken by the opp. parties that an allegation from Paradeep Jagran Samiti dated 18.11.2005 addressed to the Chief Vigilance Officer, Ministry of Shipping, Government of India, was made, on which the Ministry by its letter dated 23/27.11.2006 intimated that the Director (PHRD) and Director (Finance) of the Port will enquire the matter and submit a report within a period of one month

with a view to identify the officers (whether serving or retired) and to fix up responsibility and suggest the amount to be recovered from the concerned person.

6. An additional affidavit has been filed by the opp. parties stating, inter alia, that in view of the stringent direction of the Ministry of Shipping, Government of India, which is to accord approval for creation and continuance of the post, the opp. parties had no option but to release the provisional pension in the scale of Medical Officer-cum-Asst. Surgeon in which the petitioner is continuing prior to his promotion to the post of Specialist (Occupational Health). It is further stated in the said additional affidavit that the matter of regularization of the post of Specialist (O.H.) which is under consideration of the Ministry was well within the knowledge of the petitioner. It has been contended in the said additional affidavit that as per the provisions of Sections 23 and 24 of Major Port Trusts Act, 1963, it is mandatory on the part of Paradeep Port to seek approval from the Central Government for regularization of service of the petitioner in the post of Specialist (Occupational Health)."

7. The petitioner has filed an affidavit in reply to the additional affidavit filed by the opp. parties stating, inter alia, that while he was working as Medical Officer-cum-Asst. Surgeon, he was officially deputed to undergo Post Graduate Diploma Course required for Specialist (O.H.) at the cost of the Paradeep Port and the petitioner successfully qualified in the said examination. On due consideration of the same, the petitioner was promoted as a Specialist by order dated 4.12.1992 and by the office order dated 29.4.1993 annexed as Annexure-5 to the said affidavit, the petitioner was regularized in the post of Specialist (O.H.). It has been further stated that as per the provisions of Major Port Trusts Act, 1963 and Recruitment Seniority and Promotion Regulations, the Chairman is the appointing and disciplinary authority in respect of all posts including the post to which the petitioner was promoted, except the posts covered u/s 24(1) of the Act. The further case of the petitioner is that he was appointed, promoted, regularized and made to retire by the Chairman, Paradeep Port Trust. Further, the Government of India has duly approved the post, by accepting the Annual Administration Report submitted by the Paradeep Port to the Ministry of Surface Transport wherein the petitioner was shown as a Specialist (O.H.):

Admitted case of the parties:

1. The petitioner was working as Medical Officer-cum Asst. Surgeon under the Paradeep Port Trust.
2. By office order dated 4,12.1992, the petitioner was promoted to the post of Specialist (O.H.) on ad hoc basis for a period of six months.
3. By office order dated 29.4.1993, the petitioner's promotion was regularized.
4. On attaining the age of superannuation, the petitioner was made to retire from service of Paradeep Port Trust with effect from 30.4.2006.

5. By office order dated 23.6.2006, the Chief Medical Officer intimated the petitioner that he is entitled to the retiral benefits like gratuity, commutation of pension, residuary pension and pension on superannuation (provisional).

6. The petitioner admits to have received all dues except refusing to receive pension (provisional) which has been calculated by taking the scale of pay of the post of Medical Officer-Asst. Surgeon.

8. The order dated 23.11.2006 of the Government of India in its Ministry of Shipping, Road Transport and Highways is relevant for deciding the case which has been annexed to the counter affidavit as Annexure-A/1. The same reads as follows:

ORDER

Subject :PPT- Illegal creation of post of (Occupational Health) and promotion of Dr. Tapan Kumar Mohanty regarding.

Paradip Jagaran Samiti, Paradip in a letter dated 18.11.2005 addressed to the CVO, Deptt. of Shipping made a number of complaints against one Dr. T.K. Mohanty of PPT. One of the allegations is creation of the post of Specialist (Occupational Health) and promotion of Dr. Mohanty to that post. It is observed that PPT had sent a proposal to the Ministry during September, 1991 for creation of a number of posts including a post of Specialist (Occupational Health) on the ground that the post was required to improve statutory obligations of the Port. The matter was examined in the Ministry and the proposal was rejected and position intimated to the port trust vide letter A-11013/53/91 -FE-II dated 31.8.92. PPT approached the Ministry again during September, 1992 suggesting for reconsideration of the proposal/upgradation of the post of Medical Officer to that of Specialist. This proposal was also rejected and position intimated to PPT vide letter No. A-11013/53/91-PE-II dated 10.12.1992. However, PPT created the post with approval of the Board during November, 1992 and appointed Dr. Mohanty against this post on ad-hoc basis w.e.f. 4.12.92 and on regular basis w.e.f. 29.4.1993. They did not obtain the approval of the Govt. for creation of this post. It is noted that there was a ban on creation of the post and hence the PPT did not have the powers to create or upgrade the post. It seems the Board was misled to create the post without Govt. approval in order to give undue favour to Dr. Mohanty. It has therefore been decided to look into the matter and identify the officers (whether serving or retired) with, a view to fix responsibility and suggest the amount to be recovered from the concerned persons.

2. Secretary (S) has directed that Dir (PHRD) and Director (Finance) will enquire into the matter and submit their Report within a period of one month. Accordingly Dir (PHRD) and Director (Finance) are requested to look into the matter and submit their report within stipulated time.

9. From the above order, it appears that the Ministry passed the said order on receiving the letter dated 18.11.2005 from Paradeep Jagaran Samiti and in the

said letter, the Ministry has accepted the position that the petitioner was promoted to the post of Specialist (O.H.) on "ad hoc basis with effect from 4.12.1992 and on regular basis with effect from 29.4.1993.

10. Learned Counsel for the petitioner contended that the Chairman being the authority to appoint the petitioner and also to give promotion to the petitioner and such promotion having been given as per the decision taken by the Board of Trustees of Paradeep Port Trust and the petitioner having discharged the duties in the promotional post of Specialist (O.H.) till the date of his retirement, his promotion being regularized by the Chairman, the petitioner cannot be denied to receive pension on the basis of the scale of pay of a Specialist (O.H.) in which scale, the petitioner was drawing his salary on the date of his retirement. He further contended that after utilizing the service of the petitioner as a Specialist (O.H.) from the date of his promotion in the year, 1992 till the date of superannuation, denying to pay pension to the petitioner on the basis of his last drawn salary at the scale of pay of such Specialist (O.H.) which was being paid to him till his retirement, amounts to treating the petitioner in a lower rank than in which he was working and as a consequence, would amount to reduction in rank. The petitioner having been regularized in his promotional post could not be treated to be an employee in any post which is lower to the post in which the petitioner was working on the date of retirement, in the absence of any proceeding initiated against him.

11. Considering the above questions raised by the learned Counsel for the petitioner, this Court is of the opinion that it would be necessary to decide as to whether the post of Specialist (O.H.) was required to be created with prior approval of the Government of India u/s 23 of the Act or the petitioner was entitled to be promoted to the said post by the Chairman of the Paradeep Port which is admittedly the appointing and disciplinary authority of the petitioner. For the above purpose, it is necessary to refer to Sections 23 and 24 of the Act which is quoted hereunder:

23. Schedule of Board's staff - A Board shall, from time to time, prepare and sanction a Schedule of the employees of the Board whom it deems necessary and proper to maintain for the purposes of this Act and such Schedule shall indicate therein the designation and grades of employees and the salaries, fees and allowances which are proposed to be paid to them.

Provided that the previous sanction of the Central Government shall be obtained for the inclusion in the said Schedule of those designation and grades of employees and the salaries, fees and allowances payable to them which the Central Government may, by order, specify, and where no such order is made, of such posts (including the salaries and allowances attached thereto) which are required to be created by the Central Government, or for the creation of which the previous sanction of the Central Government is required, under this Act.

24. Power to make appointments.- (1) Subject to the provisions of the Schedule

for the time being in force sanctioned by a Board u/s 23, the power of appointing any person to any post, whether temporary or permanent, shall

(a) in the case of a post

(i) the incumbent of which is to be regarded as the Head of a department; or

(ii) to which such incumbent is to be appointed; or

(iii) the maximum of the pay scale of which (exclusive of allowances) exceeds such amount as the Central Government may, by notification in the Official Gazettee, fix)

be exercisable by the Central Government after consultation with the Chairman.

(b) in the case of any other post, be exercisable by the Chairman or by such authority as may be prescribed by regulations:

Provided that no person shall be appointed as a pilot at any port, who is not for the time being authorized by the Central Government under the provisions of the Indian Ports Act to pilot vessels (at that or any other port)

(2) The Central Government may, by order, specify any post the incumbent of which shall, for the purposes of this Act, be regarded as the Head of a department.

12. On applying Section 23 of the Act to the facts of the case, it appears that the Paradeep Port has not disputed the assertion of the petitioner that it has prepared a schedule of the employees as per Section 23 of the Act, indicating therein the designation and grades of the employees and their salary, fees and allowances and such schedule has been submitted to the Government of India wherein the petitioner has been shown as a Specialist (O.H.). The opp. parties have not made out a case that the Central Government has specified by any order that sanction of the Central Government shall be obtained for inclusion of the post of Specialist (O.H.) under the Paradeep Port as per the proviso to Section 23 of the Act. Section 24(1) (a) of the Act specifies the post to which appointment can only be made by the Central Government after consultation with the Chairman. The post of Specialist (O.H.) does not come u/s 24(1)(a) of the Act. The opp. parties have not made out a case that the post of Specialist (O.H.) is the head of the Department.

It is, therefore, clear that as per Clause-24 (1) (b) of the Act, the Chairman is the authority to appoint/promote the person to the post of Specialist (O.H.).

13. The Dock Workers (Safety, Health and Welfare) Regulations, 1990, Regulation-7 prescribes the responsibilities and duties of the Port Authority to comply with certain regulations mentioned therein and it includes compliance of Regulations-115 (1) which prescribes that in every Port there shall be either a special medical service or an Occupational Health service available at all times and it shall have the functions as enumerated therein. Regulation-115 (3)

prescribes that the medical service shall be headed by a Doctor specialized in Occupation Health. Regulation 6 prescribes that whoever being a person responsible to comply with any of the regulations commits a breach of such regulations shall be guilty of an offence and punishable with imprisonment for a term which may extend to six months or with fine which may extend to Rs. 5,000/- or with both.

14. It is, therefore, clear that in order to avoid such penalty as prescribed under Regulation-6, the opp. parties deputed the petitioner for a Specialist Course and after completion of the said course in accordance with the Regulation-115, promoted the petitioner to the post of Specialist (O.H.) with effect from 4.12.1992, regularized him in the said post with effect from 29.4.1993 and the petitioner retired from the said post with effect from 30.4.2006. Admittedly, the petitioner was being paid salary at the scale of pay prescribed for a Specialist (O.H.). Thus, the claim of the petitioner is to be accepted as this Court finds that the petitioner will be entitled to pension to be calculated on his last drawn salary on the date of his retirement. The decision of the Port to pay pension @ Rs. 7231/- to the petitioner under Annexure-1 to the writ petition cannot be sustained and the said decision is accordingly quashed. The opp. parties are directed to calculate the entitlement of the petitioner with regard to his monthly pension by taking his last drawn salary which is admittedly in the scale of pay of a Specialist (O.H.) and pay the arrear pension from the date of his retirement, at such rate to the petitioner, within a period of thirty days from the date of communication of this order. The opp. parties are further directed to pay current pension at such rate as would be calculated, regularly, to the petitioner.

15. The writ petition is accordingly allowed, but in the circumstances without costs.