
(2008) 01 GAU CK 0031
In the Gauhati High Court
Case No : Writ Petition (Civil) No. 92 of 2004

Kshitish Chandra Sarkar

APPELLANT

Vs

Tripura Small Industries Corporation Ltd.and Ors.

RESPONDENT

Date of Decision : 14-01-2008

Acts Referred:

Citation : (2008) 4 GLR 602

Hon'ble Judges : U.B.Saha, J

Bench : Single Bench

Advocate : S.Choudhury, S.Deb, S.Saha, T.D.Majumdar, Advocates appearing for Parties

Judgement

1. The petitioner by filing the instant writ petition sought for setting aside/quashing the impugned memo dated 8.10.2003 (Annexure6 to the writ petition) issued by the respondent No. 2 herein allowing the benefit of R.O.P. 1999 to the employees mentioned in the said memo and also for a direction to the respondents to give him the revised scale of pay of Deputy Manager (Commercial) from the date of his appointment in the said post.

2. Heard Mr. S. Deb, learned senior counsel, assisted by Mr. S. Chowdhury, learned counsel for the petitioner and Mr. S. Saha, learned counsel for the respondent Nos. 1 and 2 as well as Mr. T.D. Majumder, learned Addl. Govt. Advocate for the respondent Nos. 3, 4 and 5.

3. A brief note on the factual aspects required for decision is narrated hereinunder:

The petitioner was engaged as Daily Rated Worker (DRW) under the Tripura Small Industries Corporation Ltd., a Govt. of Tripura undertaking (for short hereinafter referred to as the "Corporation"), respondent No. 1 herein on 13.11.1972 and the petitioner was allocated the works of receipt, dispatch and filing of letters, etc. While he was working as such the respondent No. 1 vide order dated 24.2.1976 deputed the petitioner in the Ware House at Badharghat

Industrial Estate for the works of sale, delivery, maintenance of records etc. of spirit. He was also ordered to remain as Store incharge of the Ware House and to sign all challans and maintain registers. On 9.8.1979 the petitioner was promoted to the post of Storekeeper in the pay scale of Rs. 330580 by the respondent No. 2. The respondent No. 1 issued an office order on 5.6.1997 ordering that the petitioner and some others were deemed to have moved to the next higher post/grade with change of designation against the date mentioned against the respective names and the pay in the graded scale was ordered to be fixed under FR 22C. The said order was issued in pursuance to provisions in Part C (Schedule III) of Tripura Civil Services (Revised Pay) Rules, 1988 as adopted by the respondent No. 1. The name of the petitioner appeared at serial No. 1 in the said office order with changed designation of Senior Storekeeper in the scale of Rs. 1,4503,710. On 9.8.1997, the respondent No. 2 published the final seniority list of UD Clerk, Commercial Assistant along with Storekeeper and Accountant as on 31.12.1992. The petitioner along with others raised objection to the said final seniority list. But the objection of one Sankar Bhattachajee was only considered by the respondent No. 1. On 12.5.1997, the respondent No. 2 promoted the petitioner to the post of Deputy Manager (Commercial & MA) in the scale of Rs. 2,0004,410 and while the petitioner was working as such he was served with a notice dated 23.7.2001 conveying, inter alia, that even though the upgradation/promotion of the petitioner was made in 1997 under the scheme of restructure in respect of some posts approved by the Finance Department, the Administrative Department vide letter dated 30.1.2001 conveyed instruction to the respondent Corporation to cancel the order of upgradation/promotion made in 1997 and accordingly, as per decision of Board of Directors of the respondent Corporation, the petitioner was served with a notice to showcause as to why the order dated 12.5.1997 giving him promotion to the post of Deputy Manager (Commercial & MA) should not be treated as cancelled. The petitioner accordingly responded to the said showcause notice. Despite response to the said notice the respondent No. 2 vide impugned memo dated 8.10.2003 ordered that pursuant to the decision of the respondent No. 2, which was communicated to the Department of Industries & Commerce vide letter dated 18.9.2003, the employees mentioned in the said memo are allowed the benefit of ROP Rules, 1999 in their existing post as approved by the respondent No. 2. In the said memo the existing post of the petitioner has been shown as Storekeeper though in the said memo itself the petitioner's position has been shown as Deputy Manager (Commercial & MA) as promoted on 12.5.1997. Being aggrieved, the petitioner preferred the instant writ petition with a prayer for relief as stated (supra).

4. The respondent Nos. 1 and 2 resisted the case of the petitioner by way of filing detailed counteraffidavit wherein it is stated, inter alia, that the petitioner was admittedly promoted to the post of Deputy Manager (Commercial) without obtaining approval of the Administrative Department, i.e., the Industry Department and the Finance Department, Govt. of Tripura and the post in which

the petitioner was appointed that was a newly created post for which no sanction and approval was taken from the aforesaid Administrative Department of the Corporation, which is mandatory under Article 90(h) of Memorandum of Association and Articles of Association of the Corporation, which is a Govt. Company as the post carries the initial or ultimate salary of and above Rs. 2,250 and the instant appointment/ promotion was made as a part of restructuring of Corporation and the said restructuring was also not approved by the authority. It is also contended that the scale of pay of the post of Deputy Manager (Commercial) in which the petitioner was appointed was Rs. 2,0004,410. It is further contended that the respondent Corporation after issuance of the promotion order as stated above sought approval of the Administrative Department as well as the Finance Department of the Govt. of Tripura as required for creation and sanction of the post including appointment made and also revised pay scale for the post of Deputy Manager (Commercial). But the Finance Department, Govt. of Tripura did not approve the creation of the post as well as appointment/promotion. Apart from the aforesaid contention, the respondent Nos. 1 and 2 also stated in their counteraffidavit that the petitioner accepted the benefit of revised pay scale for the post he was holding prior to his promotion and received all the benefits arose out of ROP Rules, 1999 for which he also submitted his option on 5.11.2003 and now he cannot raise his voice for allowing him the revised pay scale benefit contrary to the pay scale for which he opted. Similar question was raised by other employees of the Corporation before this court in Civil Rule No. 351 of 1998, W.P.(C) Nos. 259/2000, 260/2000 and 261/2000, who were also appointed like the petitioner in other different posts due to restructuring of the staff pattern of the Corporation in 1997, wherein this court at the time of dismissing the aforesaid writ petitions observed as follows :

"15. Before parting, it is expected that the Finance Department, Govt. of Tripura would reconsider the matter of according approval/concurrence on being approached by the TSIC afresh having regard to the needs of the work."

This court also quashed the entire DPC proceeding by which the petitioner and other employees were recommended for promotion as the Corporation did not follow the procedural standard while holding the DPC on 12.5.1997 for selection of person for promotion and accordingly, the petitioner was reverted to the post of Senior Store Keeper, which he was holding before his promotion to the post of Deputy Manager (Commercial).

5. The State respondents also filed their counteraffidavit wherein it is specifically stated, inter alia, that in 1997 the petitioner was promoted to the upgraded post of Deputy Manager (Commercial), which was not agreed to by the Administrative Department of the Corporation and no prior approval of the Administrative Department or Finance Department was taken and not only that while the Pay Commission was in session in 1997, the concerned authority did not bring the fact of upgradation to the notice of the Pay Commission during deliberation, rather it showed the posts and pay scale available during the period and

accordingly, the Pay Commission recommended the revised pay scale on the basis of the pay scale attached to the post before 1.1.1996. It is also contended that the Administrative Department was also not agreed to the upgradation of some of the 215 posts occupied by the employees in the disguise of restructuring, which cannot be made without the approval of the competent authority, i.e., the Administrative Department and Finance Department, Govt. of Tripura and since the upgradation was made in May, 1999 without prior approval as required in respect of the post held by the petitioner the same was required to be cancelled and accordingly, the department communicated to the respondent Nos. 1 and 2 for cancellation of the same and as such the respondent Nos. 1 and 2 have taken the task for cancellation of the appointment and promotion of the petitioner. It is further contended that the decision to allow benefit of ROP Rules, 1999 in their existing post is of respondent No. 2. Communication thereof to the Department of Industry and Commerce vide letter dated 18.9.2003 is of no consequence because before granting benefit of ROP Rules, 1999 to the nonexistent posts, approval of the administrative department was not obtained and the action, which was taken by the respondent Nos. 1 and 2, i.e., the Corporation and its Managing Director was without any authority of law.

6. Mr. Deb, learned senior counsel appearing for the petitioner submits that the petitioner in the instant case challenged the order of his reversion from the post of Deputy Manager (Commercial) to the post of Senior Storekeeper as the said order of reversion (Annexure 6 to the writ petition) was issued without any reason and before reverting the petitioner the authority also did not follow the principles of natural justice, which is the sine qua non. The petitioner was promoted to the aforesaid post of Deputy Manager (Commercial) after proper recommendation of the DPC. He further contended that promotion by way of restructuring does not come within the purview of appointment and hence the approval of the Administrative Department under article 90(h) of the Memorandum of Association and Articles of Association of the Corporation was not required and denial of the benefit of revision of pay scale for the post of Deputy Manager (Commercial) to the petitioner and allowing him the benefit of ROP Rules, 1999 in his existing post as approved by the Finance Department are wholly illegal and liable to be set aside. Mr. Deb further submits that the petitioner was not a party in the cases decided by this court in W.P.(C) No. 2597/2000 and others and as such this decision is not binding on him and in those cases the question arose for decision by the court was restructuring of the posts by the Corporation and not the approval, which required to be obtained from the Administrative Department as well as the Finance Department. Therefore, the decision in those cases has no application in the instant case and the Corporation also nowhere in their counteraffidavit, stated that promotion post of the petitioner namely, Deputy Manager (Commercial) is also within the 215 posts, which was created by way of restructuring of the posts without approval of the Administrative Department and Finance Department.

7. Mr. Saha, learned counsel appearing for the respondent Corporation submits

that even if the petitioner is appointed on the basis of the recommendation of a validly constituted DPC then also that cannot be treated as a valid appointment unless the same is issued with prior approval of the Administrative Department, namely the Industry Department and the Finance Department as per the provision of article 90(h) of the Memorandum of Association and Articles of Association of the Corporation/Govt. Company. He further contended that the DPC in which meeting recommended the case of the petitioner for promotion to the post of Deputy Manager (Commercial) also recommended other 21 persons including the petitioner for different posts and some of the employees of the Corporation were deprived of and being aggrieved by the issuance of appointment to those posts, they approached this Court by filing Civil Rule No. 351 of 1998, W.P.(C) Nos. 259/2000, 260/2000 and 261/2000 and this Court ultimately after hearing the respective parties held that those appointments were not good in law and were null and void in the eye of law and not only that this court quashed the entire DPC proceeding by which the name of the petitioner was also recommended, meaning thereby the subsequent action of recommendation also lost its force and rightly the respondent Corporation reverted the petitioner along with others and the said fact has also been stated by the Corporation in its counteraffidavit, particularly Annexures B and 3 to the counteraffidavit. The petitioner did not challenge the aforesaid decision of this Court as well as the Corporation and the same being remained unchallenged reached its finality, which cannot be reopened by this court and on that count alone the writ petition is liable to be dismissed. He also submits that the petitioner by exercising his option also accepted the pay scale for his existing post of Senior Storekeeper and hence he is estopped by his own action from raising question about the validity of Memorandum dated 8.10.2003 (Annexure 6 to the writ petition). He finally submits that appointment letter issued de hors to the provisions of article 90(h) of the Memorandum of Association and Articles of Association of the Corporation is not valid, rather nullity in the eye of law and the appointment of the petitioner in the post of Deputy Manager (Commercial) being nullity in the eye of law, he is not entitled to be continued in the said post as illegal order does not create any right and as such the petitioner is not entitled to get the benefit of revised pay scale meant for the post of Deputy Manager (Commercial) as sought for.

8. Mr. T.D. Majumder, learned Addl. Govt. advocate appearing for the State respondents while resisting the submission of Mr. Deb, learned senior counsel for the petitioner submits that the Corporation has/had no authority to appoint any person including the petitioner without prior approval of the State Government, particularly the Administrative Department, i.e. Industry Department and Finance Department and in the instant case it is admitted by the Corporation that no approval was obtained from the aforesaid authorities while they went on for restructuring the posts for promoting the petitioner as Deputy Manager (Commercial) along with others. He further contended that the provisions of memorandum of association and articles of association of the Corporation do

not vest any right to the Corporation to issue any appointment letter without approval of the Finance Department and the Administrative Department, Govt. of Tripura and the appointment issued in violation of the said provisions is no appointment in the eye of law, rather illegal and nullity, which does not create any right to the appointee for continuation in the post illegally created post like the present one. Hence, the question of affording any opportunity to the petitioner following the principles of natural justice does not arise at all. Showing paragraph 3 of the writ petition, Mr. Majumder contended that to give promotion to an employee there must be a post and that has to be also a vacant one and the petitioner himself in his writ petition stated that there were some irregularities committed by the respondent Corporation in the matter of promotion and according to Mr. Majumder, those irregularities are fatal in nature and not curable and Government cannot put its seal on such irregular exercise particularly when it relates to huge financial involvement. Therefore, the petitioner cannot be entitled to get the benefit of revised pay scale provided for Deputy Manager (Commercial) as sought for. He also endorsed the contention made by Mr. Saha, learned counsel for the Corporation so far option of the petitioner by which the petitioner accepted the revised pay scale of Senior Storekeeper.

9. From the contentions of the rival parties in their pleadings as well from the submissions of the learned counsel questions arise for examination for proper decision in this case are as to whether the order of promotion of the petitioner to the post of Deputy Manager (Commercial) without following the necessary procedure as enumerated in article 90(h) of the memorandum of association and articles of association of the Corporation is valid and if not whether the action of the respondent Corporation providing the petitioner with the revised pay scale of Senior Storekeeper as prescribed in ROP Rules, 1999 vide Annexure 6 to the writ petition was illegal and liable to be quashed and if so whether the petitioner is entitled to the revised pay scale prescribed for the post of Deputy Manager (Commercial) under the aforesaid ROP Rules, 1999 and what should be the effect of the promotion of the petitioner to the post of Deputy Manager (Commercial) when this court in earlier decision in Civil Rule No. 351 of 1998 (Smt. Sandhya Rani Das v. The Tripura Small Industries Corporation Ltd. and Others) had quashed the entire DPC proceeding on the basis of which the petitioner and others were recommended for promotion.

10. It would not be improper for this court to reproduce the provisions of article 90(h) of the memorandum of association and articles of association of the Corporation and the relevant portion, i.e., para 9 of the decision of this court in Smt. Sandhya Rani Das (supra). Accordingly, same are reproduced below :

"90(h) Appointment of any official shall not be made without approval of Finance Dept."

"9. Considering all these facts and circumstances of the case and the observations as highlighted above, this court has no alternative but to declare

the said DPC held on 12.5.1997 particularly the selection of respondent No. 5 and on the basis of which the respondent No. 5 got promotion as null and void and accordingly, the entire proceedings of the said DPC and the impugned appointment order dated 12.5.1997 as in Annexure 8 to the writ petition, are hereby quashed."

11. It is the admitted position that the respondent Corporation did not obtain any approval either from the administrative department, i.e. the Industry Department or from the Finance Department of the Govt. of Tripura when the petitioner was promoted to the post of Deputy Manager (Commercial) as required under article 90(h) of the Memorandum of Association and Articles of Association of the Corporation as a Govt. company and it appears from the record that the petitioner himself accepted the revised pay scale meant for the existing post of Stnior Storekeeper, which was substantially held by him by way of exercising his option for such scale. For better appreciation, the option exercised by the petitioner is quoted herein under:

"SCHEDULE I

FORM OF OPTION FOR COMING OVER TO REVISED SCALE

1 Shri/Smt. Kshitish Ch. Sarkar hereby elect for the revised scale of pay of Rs..... of my substantive/officiating/temporary post with effect from the First Day of January, 1996.

1. Shri/Smt. Kshitish Ch. Sarkar hereby elect to continue in the existing pay of Rs. 1,4503,710 of my substantive/officiating/temporary post mentioned below till the end of 30.6.1996 (but not later than 31.12.1996) and to come over to the revised scale of pay of Rs. 5,00010,300 with effect from 1.9.1996.

1. Shri/Smt. Kshitish Ch. Sarkar hereby elect to come to revised scale of Rs.....corresponding to existing scale of substantive post..... on revision to the substantive post with effect from 1996 (not later than 31.12.1996).

DECLARATION

"I do hereby undertake to receive pay and allowances on the basis of the provisional fixation of my pay on the condition that I shall refund the amount of overdraw, if any, which may be detected subsequently."

Station: Agartala So

Dated : 5.11.2003 Signature (KSHITISH CH. SARKAR) Name (inn block letters)
Designation : Sr. Storekeeper Office: TSIC, Agartala Ware House, Badarghat. For the Tripura Small Industries Corporation Ltd.

Sd/Signature of Head of Office with Office Seal.

*Only for those employee who held a post on an officiating or temporary capacity on 1.1.1996."

12. After perusal of the option of the petitioner again a question arises whether the petitioner is estopped from claiming the benefit of revised pay scale meant for the post of Deputy Manager (Commercial) as prescribed in ROP Rules, 1999. On perusal of article 90(h) (supra) this court is of the considered opinion that the appointment of the petitioner to the post of Deputy Manager (Commercial) by way of restructuring was not in accordance with the prescription of law as the Corporation did not obtain any approval from the Finance Department as required under the said article, which is mandatory in nature. Any decision taken by the Corporation violating the provisions of its Memorandum of Association and Articles of Association is unfair and an unfair decision is always unreasonable and an unreasonable decision cannot be said to be a lawful one and in the instant case, it also appears from the record that the post of Deputy Manager (Commercial) in which the petitioner was promoted was created by way of restructuring of the posts and was within the 215 posts, which were created by the Corporation without the approval of the administrative department as well as the Finance department and as a result, the said appointment of the petitioner cannot be treated as a valid appointment. More so, it also appears from the aforequoted paragraph 9 of the judgment of this court in Smt. Sandhya Rani Das (supra) that this court quashed the promotion of one Shri Ratan Ch. Sarkar, respondent No. 5 in the aforesaid writ petition, who was promoted to the post of Upper Division Clerk due to restructuring of the posts and also quashed the entire proceeding of the DPC held on 12.5.1997 (Annexure 8 to the said writ petition). It further appears from record that the petitioner of the instant case was also recommended by the said DPC held on 12.5.1997 meaning thereby the recommendation for promotion of the petitioner was also quashed and consequent thereto the appointment issued to the petitioner for the post of Deputy Manager (Commercial) was also null and void. Even if this court do not rely or take assistance from the aforesaid judgment of Smt. Sandhya Rani Das (supra) then also fact remains that the order of appointment of the petitioner to the post of Deputy Manager (Commercial) was admittedly issued by the Managing Director of the Corporation, respondent No. 2 herein vide Annexure 4 to the writ petition without prior approval of the administrative department as well as the Finance Department of Govt. of Tripura violating the provisions of article 90(h) of the Memorandum of Association and Articles of Association of the Corporation and it is a settled position that if any appointment order is issued de hors to the prescription of law then the same cannot be treated as a valid appointment in the eye of law rather that should be treated as illegal and nullity and the said appointment also does not create any right to the appointee for continuation in the post illegally created like the post of the Deputy Manager (Commercial) herein. Also this court takes note of the fact that a private limited company like the Corporation herein cannot exceed the powers conferred on it under its Memorandum of Association, which in the instant case the Corporation did and consequent thereupon the order of promotion of the petitioner to the post of Deputy Manager (Commercial) is bad in law.

13. This court is unable to accept the submission of Mr. Deb that the petitioner was never reverted to the post of Senior Storekeeper from the post of Deputy Manager (Commercial) by way of a specific order as according to this court no specific order of reversion is required while the authority vide its memo dated 8.10.2003 (Annexure 6 to the writ petition) as impugned in this case allowed the petitioner the benefit of ROP Rules, 1999 in his existing post of Senior Storekeeper in place of Deputy Manager (Comm. & M.A.) as approved by the Finance Department. Even if no specific order of reversion is there then also the petitioner is not entitled to claim the revised pay scale as prayed for being his appointment itself is nullity for nonobtaining the approval of the Finance Department by the Corporation being a private limited company as required under article 90(h) of the Memorandum of Association and Articles of Association of the Corporation and more so, in view of the order dated 8.10.2003 (supra) the appointment of the petitioner to the post of Deputy Manager (Commercial) should be treated as not in force being nullity. As the order of nullity does not create any right over the post, it is not necessary to follow the principle of natural justice. Principle of natural justice has no straight jacket formula. Said principle can only be required to be followed when the accrued right of a person is going to be taken away by the employer or any other authority from its employee. In the instant case, no such accrued right of the petitioner had been taken away by the authority. Hence, the application of principle of natural justice does not arise.

14. For argument sake even if it is considered that the order of appointment is not nullity for nonobtaining the approval under clause (h) of article 90 of the Memorandum of Association and Articles of Association of the Corporation then also the petitioner is not entitled to the revised pay scale as prescribed under ROP Rules, 1999 for the post of Deputy Manager (Commercial) as the petitioner himself by exercising option voluntarily relinquished/abandoned and/or waived his claim so far the revised pay scale of Deputy Manager (Commercial) is concerned and sought for.

15. In view of the aforesaid discussions, this writ petition fails being devoid of any merit and accordingly the same is dismissed without any order as to cost.