
(2011) 09 CAL CK 0124
In the Calcutta High Court
Case No : W.P.S.T. No. 655 of 2010

Ramendra Nath Mukherjee

APPELLANT

Vs

The State of West Bengal and Others

RESPONDENT

Date of Decision : 28-09-2011

Acts Referred:

Civil Procedure Code, 1908 (CPC) — Order 47 Rule 5

Citation : (2012) 2 CHN 307

Hon'ble Judges : Mrinal Kanti Chaudhuri, J; Ashim Kumar Banerjee, J

Bench : Division Bench

Advocate : Murari Mohan Das, for the Appellant; Chaitali Bhattacharya, for the Respondent

Judgement

Ashim Kumar Banerjee, J.—Ramendra Nath Mukherjee, the Petitioner above named, joined the State service as Electrical Wireman with effect from January 5, 1965 in a scale of Rs. 80-105/-. He got promotion with effect from February 15, 1977 in the post of Electrician (work charge) in the scale of Rs. 230-425/-. He was confirmed in the post of Work-Charged Electrician with effect from February 17, 1981 in a scale of Rs. 300-600. He claimed benefit of a circular dated July 29, 1970 followed by a clarificatory circular dated April 22, 1971 issued by the State. From the Memo dated March 12, 1976 appearing at page 84, we find that the Special Officer & Ex-Officio Assistant Secretary to the Agriculture and C.D. Department informed the Chief Engineer (Agriculture), West Bengal that vide circular dated June 6, 1970 issued by C & I Department followed by a further letter dated April 22, 1971, the supporting technical staff under various Government Departments holding National Trade Certificate from the Industrial Training Institutes or its equivalent certificates diploma awarded after successful completion of training course for a total period of two years after passing school final examination, would be considered as equivalent to sub-overseers certificate giving right to them to claim for the fixation at the scale of Rs. 175-325/- as per ROPA 1961 and subsequently at Rs. 300-600 under ROPA 1971. Such benefit was extended to the Electricians of Agricultural Engineering

Department vide such Memo dated March 12, 1976 to be effective retrospectively from April 1, 1961. The Petitioner claimed benefit as per such Memo appearing at page 84 inter alia claiming, although he did not successfully pass out Higher Secondary Examination class XI he should be considered as class-X passed following another circular of the Government. Taking his qualification as per his ITI Certificate he should be given the benefit of the Memo dated March 12, 1976 appearing at page 84. Pertinent to note, he was working under the Department of Irrigation whereas such Memo was written to the Department of Agricultural Engineering. The learned Counsel for the Petitioner claimed that at some point of time it was the same Department until the Irrigation was separated from Agriculture. He however could not draw our attention to any such circular. The Petitioner approached the learned single Judge of this Court by filing a writ petition. The learned single Judge, vide judgment and order dated May 13, 1991 in C.O. No. 4864(W) of 1986 extended the said scale of Rs. 300-600 to the Petitioner. The State did not prefer any appeal from the said order. The Petitioners subsequently filed a modification application. Another learned Judge disposed of the modification application vide judgment and order dated December 22, 1992 appearing at page 71 of the petition. The learned single Judge modified the order by extending the scale of Rs. 175-325 as per ROPA 1961 with effect from the date of entry in service and subsequently to the scale of Rs. 300-600 with effect from February 18, 1977 when he got the post of Electrician. The learned Judge however made it clear that he would not be entitled to any monetary benefit retrospectively and actual benefit would be extended only from the date of filing of the writ petition. The Petitioner accepted the said order, so was this State. The issue thus reached finality.

2. The State complied with the direction vide Memo dated September 13, 1996 as we find from page 75-77 of the petition. We find that the post of Work-Charged Electrician was converted into the post of Electrician with effect from February 18, 1977 when he was actually promoted to the post of Electrician. The Petitioner continued to get the benefit. However, he did not get any incremental and/or CAS benefits since 1999. He subsequently retired from service with effect from October 31, 2003. The Department where he was working, sent his pension papers for appropriate concurrence from the Finance Department. He made representation for incremental and CAS benefit. His authority forwarded the same to the competent authority for consideration. Nothing materialised. He filed a petition before the Tribunal in 2003 just on the eve of his retirement inter alia, praying for the incremental and CAS benefit. The Tribunal vide judgment and order dated August 24, 2010 dismissed the application inter alia holding the same as meritless. Hence, this petition before us.

3. Perusal of this said judgment and order of the Tribunal impugned in this petition reveals as follows:

i) The Petitioner's claim was based upon the result of the earlier litigation that gave him fixation at a scale of Rs. 300-600/- with effect from February 18, 1977.

He contended that in terms of Career Advancement Scheme (CAS) he was entitled to the benefit as he did not get any promotion for twenty-six years. Moreover, he was entitled to the incremental benefit with effect from 1999 as per ROPA 1998.

ii) The State took a stand before the Tribunal that his fixation appearing at page 75-77 was erroneous.

iii) According to State, the Petitioner misled and practised fraud on Court as he was not entitled to the benefit of the Circular dated March 12, 1996. The Petitioner was posted under the Department of Irrigation and his case should be guided by the departmental guideline and not the Memo pertaining to Agriculture Department.

iv) As per departmental guideline the minimum qualification for the post of Electrician under Irrigation Department was class-VIII pass having three years' experience for installation and maintenance of medium overhead voltage line, domestic installation of medium and low voltage pumps having workmen's permit issued by the State. His pay was fixed subject to the approval of the higher authority which never came. The Executive Engineer erroneously gave him the scale.

v) He was given the scale of Electrician without any sanctioned post.

vi) He received all retiral benefit.

vii) He got the promotion in 1977 in the post of Electrician and got the subsequent higher scale in terms of the Court's order. Hence, he was not entitled to any CAS benefit.

viii) He was not entitled to the scale, which was granted to him in April 1989, and accordingly his corresponding enjoyment of higher scale was erroneous.

ix) With regard to incremental benefit, the Tribunal found from his Service Book that he got incremental benefit from 1999 to 2003 and he could not produce any evidence to the contrary.

4. Appearing for the Petitioner, Mr. Murari Mohan Das, learned senior counsel argued before us that the State, if aggrieved, could have filed appeal before the Division Bench as against the order dated May 13, 1991 and/or December 22, 1992. Having accepted the said order and complied with the same it was too late in the day to contend that such order was nullity in the eye of law and could not have been implemented. Mr. Das contended that the entire argument of the State that found favour before the Tribunal, was based upon a challenge thrown to the High Court order that attained finality long before. Hence, the State was not entitled to question the fitment made in terms of the Court's order, appearing at page 75-77 of the petition.

5. In support of his argument Mr. Das cited the Apex Court decision in the case of S.D.S. Shipping Pvt. Ltd. Vs. Jay Container Services Co. Pvt. Ltd. and Others,

6. Opposing the application Ms. Chaitali Bhattacharyya, learned Counsel appearing for the State strenuously argued that the order dated May 21, 1991 as modified subsequently vide order dated December 22, 1992 was a nullity as it was obtained by practicing fraud upon Court. According to her, the Court was thoroughly misled by the Petitioner. She contended that the circular appearing at page 84 did not have any relevance in case of the employees under the Irrigation Department. Moreover, the post of Electrician where he was regularized, was not a sanctioned post at all. Purported compliance appearing at page 75-77 was of no consequence as it was without having any sanction from the Finance Department. According to Ms. Bhattacharya, the order of the High Court was never served upon the Department as would appear from the affidavit filed by the State. The departmental Memo of the Agriculture Department could not have been applied in case of Irrigation as each and every Department had its own guideline to be followed in case of departmental employees. Finance Department was never consulted while extending such benefit to the Petitioner. While dealing with the contention of the Petitioner that the affidavit was not properly verified, she contended that the entire record was consulted while preparation of the affidavit. It was not possible for the deponent who was not in service at the relevant time to make statement true to his knowledge. Hence, he was to rely on the information derived from the record. Accordingly paragraph 3 of the said affidavit was verified giving details of the incident chronologically as would appear from the record. She contended that knowledge also could be gathered from the record based on information on the factual matrix apparent from the record.

7. Ms. Bhattacharjee relied on the following decisions mostly to support her proposition that the order of the Court based on fraud and misrepresentation was a nullity in the eye of law and could be challenged in any co-lateral proceeding:

- i) All India Reporter 1963 Supreme Court Page-1909 [Shivdeo Singh and Ors. v. State of Punjab and Ors.]
- ii) AIR 1968 Ker 76 [A.M. Mani v. Kerala State Electricity Board represented by its Secretary, Trivandrum and Ors.]
- iii) 1988 II SCC 602 [A.R. Antulay v. R.S. Nayak and Anr.]
- iv) 1993 SCC 10 (Rattan Lal Sharma v. Managing Committee, Dr. Hari Ram (Co-Education) Higher Secondary School and Ors.
- v) 2009 IV CLT 301 (HC) [Smt. Diblu Naskar v. State of West Bengal and Ors.
- vi) Parents Association of Students Vs. M.A. Khan and Another,

8. We would have accepted each and every contention of the State had they approached us contemporaneously against the order of this Court dated May 13, 1991 so modified vide subsequent order dated December 22, 1992. In our considered view, State missed the bus by not challenging the said order contemporaneously. The issue pertains to an incident happened two decades

ago. It would be too late in the day to examine whether such an order was rightly passed or not, particularly when the Petitioner enjoyed the benefit of the said order for last twenty-six years. He is no more a State servant, it would be difficult to rope him to recall such benefit.

9. With due respect to Ms. Bhattacharya, we are not impressed with her argument that the Petitioner misled this Court or practised fraud upon it. If we look back we would find a litigant believing that he was entitled to the benefit of the circular dated March 12, 1976. He approached the learned single Judge by filing a writ petition making a claim. He disclosed the said circular and contended that he was entitled to such benefit. Hence, it was for the Court to decide whether his claim was lawful or not. It is not a case where the Petitioner deliberately annexed a wrong circular or a fake circular and based his claim on that. If we carefully examine the said circular we would find that the Assistant Secretary mentioned that identical benefit was extended to other departmental employees similarly circumstanced.

10. The State in their affidavit, never claimed that no notice was served upon them. The affidavit was carefully made. It was contended by the State that the order was not served as we find from paragraph 3(b) thereof. When a petition was moved upon notice to the State, State was obliged to appear before the Court and assist the Court by placing the facts correctly so that the Court could appropriately decide the issue in question. From both the orders referred to above, we would find that the State was conspicuously absent. We fail to understand as to how the Petitioner could be blamed if he was successful in getting his contention upheld by the Court of law. When the Respondent was absent before the Court and their version was not available, the Court could only decide the issue on the factual matrix and the documents available in the pleadings filed by and on behalf of the Petitioner. The Petitioner based his claim on the Memo dated March 12, 1976. The Court considered the same and held that the benefit of the said circular was available to him. How the State could now say after about fifteen years that they erroneously extended the benefit vide Memo dated September 13, 1996 appearing at page 75-77 of the petition? We are unable to hold the said order a nullity. The challenge to the said order is also not permissible at this juncture as the same reached finality long before.

11. We fully agree with her when Ms. Bhattacharya contended that an order nonest in the eye of law was of no consequence and could be challenged at any stage in any proceeding. Per se, it is correct. Would this analogy apply in our case? We unhesitatingly answer, No. The claim and the rival claim were a factual controversy. As we have already observed, State missed the bus.

12. Had the said orders been appealed contemporaneously we do not know what would have been the result. However, the High Court's order must be given its due honour, otherwise the concept of finality would be given a complete go-bye.

13. The decisions cited at the bar the on the issue would not be in conflict with

the view expressed by us hereinbefore. The learned single Judge of our Court in the case of Smt. Diblu Naskar (Supra), discussed the issue in detail considering the earlier Apex Court decisions cited at the bar and referred to above. After considering all the decisions of the Apex Court as also our Court, the learned Judge ultimately held, "when a writ Court has plenary powers to review an order passed in writ jurisdiction affecting substantive rights of parties, the procedure laid down in Rule 5 would not stand in the way". Such observation was made when the writ petition was resisted on the ground of Order 47 Rule 5 of the Code of Civil Procedure. The learned Judge also observed that even a writ Court could consider another order of a Co-ordinate Bench applying plenary power for ends of justice to prevent abuse of process of law. In the case before us, earlier orders were passed by the learned Judge sitting singly. Hence, we are otherwise competent to consider the legality of the said order being a superior forum. However, the concept of finality would prevent us from doing so. Otherwise there would be no sanctity to the Court's order. We thus reject the contention of the State on a challenge to the orders of this Court passed in earlier litigation.

14. Question thus remains, whether the Petitioner could have any further grievance as of date. The Petitioner claimed incremental benefit from 1999. The Tribunal, being a fact finding body, categorically observed that service book would depict otherwise. No successful challenge could be made by the Petitioner on such definite finding of the Tribunal. We do not find any scope of interference on that score.

15. On the issue of CAS benefit we however join issue. The Tribunal rejected the claim on the ground that he was erroneously given a higher scale as held by us hereinbefore. Such contention was not permissible to be raised on behalf of the State at this belated stage. The Petitioner claimed he was erroneously fixed at a lower scale. He claimed a higher scale considering his placement. He rather questioned his fitment accordingly. High Court asked the State to extend such benefit. If we accept the contention of the State for argument sake that High Court order was not within their knowledge, it would logically follow that his fitment made through Memo dated March 12, 1996 was a unilateral act on the part of the State. Hence, it could not be said to be an upliftment and could not be treated as a substitute for promotion debarring him to get the CAS benefit. The Tribunal however denied him the claim on the ground that his advancement was due to judicial order. Such a decision was not correct. The Court of law could not grant promotion to an employee who is otherwise not entitled to. In any event his writ petition in the earlier case was not for promotion but for appropriate fitment. Hence, the order of the Court could not be treated as an advancement in service being a substitute for promotion.

16. The claim for CAS benefit was also rejected on the ground that such benefit was extended with effect from April 1, 1989. We are unable to appreciate. The CAS benefit was being extended to the Government employees in deference to the desire of the observation of the Apex Court made in umpteen number of

judgments long prior to the said date. It is immaterial when the State framed a particular policy to extend such benefit. The Apex Court deprecated the practice of stagnation by observing that service was not a job for which an employee would not be entitled to advance and develop his career. The Apex Court observed that each and every employee is entitled to advance his service career by developing it and the employer must make avenue for the same. When an employee is stagnated in a post for decades he is deprived of the benefit of advancement in his career. The employer is also deprived of the benefit of utilization of his field service that would not be available due to frustration of the employee caused due to stagnation in the post for decades. In the case in hand, the Petitioner was promoted in the post of Electrician in 1977. He retired in 2003. He stagnated in the post for twenty-six years. He must be entitled to appropriate CAS benefits. The State must extend the same to him as per his entitlement. While doing so, the State would ignore the cut off date being April 1, 1989 and would extend such benefit in deference to the observation of the Apex Court referred to above. The State would also keep it in mind that their challenge to the High court order and the consequential fitment appearing at page 75-77 was specifically rejected and turned down by us by the foregoing judgment.

17. The Petitioner has retired. He may not be extended the actual financial benefit. Such benefit is denied to him as he failed to approach the Tribunal contemporaneously. He must be given notional benefit in stead of CAS benefit appropriately in terms of the judgment and appropriate fitment of his pension, which would otherwise be available to him with effect from the day, when he retired from service. In short, he would be given the benefit of this judgment only for the purpose of his pension and not for any other purpose.

18. The application succeeds in part.

19. The order of the Tribunal impugned herein is set aside.

20. W.P.S.T. No. 655 of 2010 is disposed of accordingly without any order as to costs.

21. Urgent Photostat copy will be given to the parties, if applied for.

Dr. Mrinal Kanti Chaudhuri, J.

I agree.