
(1979) 05 CAL CK 0014
In the Calcutta High Court
Case No : C.R. No. 4287 (W) of 1974

Saroj Govinda Chowdhury	Vs	APPELLANT
State of West Bengal and Others		RESPONDENT

Date of Decision : 07-05-1979

Acts Referred:

Constitution of India, 1950 — Article 14, 226

Citation : 84 CWN 19

Hon'ble Judges : M.N. Ray, J

Bench : Single Bench

Advocate : Noni Coomar Chakravarti Bhagabati Prosad Banerjee, Mihir Chakravarty and Lakshmi Kumar Gupta, for the Appellant; Amar Nath Banerjee and Hafijur Rahaman, for the Respondent

Judgement

M.N. Ray, J.—The petitioner, who was not selected for the post of Joint Chief Inspector of Factories obtained this rule on 19th July, 1974. The Rule is also directed against the inaction for not communicating the adverse remarks or comments, if any, regarding his integrity made by the Chief Inspector of Factories, respondent No. 2. On or about March 1, 1949 the petitioner was appointed in the Directorate of Factories (hereinafter referred to as the said Directorate) as an Inspector. He has said that thereafter because of his satisfactory work he has worked his way up and was promoted to the post of Regional Inspector at Barrackpore in 1960, the pay scale whereof, in terms of Notification dated January 2, 1962 was enhanced to the same level as that of Deputy Chief Inspector of Factories. It is his case that while working as such Regional Inspector the petitioner during October, 1962, was selected under the Colombo Plan to undergo a specialised training in Factory inspection, industrialisation, accident prevention and safety education in Canada and on such selection, he admittedly went to Canada and had the necessary training. It has been stated by the petitioner that all throughout he has shown good performance of his work either here in this country or during his training in Canada and thus, the training authorities made arrangements for his

participation in the Masters Safety Training Institute at Toronto (Canada) and New York (U.S.A). He has stated that on completion of such training he came back to this County in 1963 and re-joined his duties as Regional Inspector of Factories at Barrackpore. It is his further case that in recognition and consideration of his service and conduct including performance. the State Government was pleased to promote him by a Notification of August 19, 1963, to the post of Deputy Chief Inspector of Factories at Calcutta with effect from August 24, 1963, and by a further Notification of December 1963, he was appointed as Deputy Chief Inspector of Factories West Bengal. It is also the case of the petitioner that by a Notification of October 6, 1967, he was given substantive appointment on probation for 1 year as Deputy Chief Inspector of Factories with retrospective effect from August 24, 1963 and he was also confirmed in that post from that day.

2. It has been stated by him that at the time of such confirmation to the post of Deputy Chief Inspector of Factories, there was one Chief Inspector of Factories and under him there were 4 Deputy Chief Inspectors of Factories, which were filled up from Regional Inspector of Factories. The petitioner has stated that by Notification of August 31, 1973, the State Government decided to create 3 new posts of Joint Chief Inspector of Factories. All such posts were just below the post of the Chief Inspector of Factories and above the post of Deputy Chief Inspector of Factories. He has also stated that by another Notification of September 17, 1973, the said 3 posts of Joint Chief Inspector of Factories were included in the Directorate of Factories, West Bengal. These posts, the petitioner has stated, were initially created for a period upto February 28, 1974, but by a letter of January 18, 1974, it was proposed that such period may be extended for a further period of 1 year with effect from March 1, 1974 and by the Notification February 28, 1974, such proposal was partly sanctioned and the duration of the 3 posts of joint Chief Inspector of Factories, was extended for 6 months from March 1, 1974.

3. The petitioner has stated that one Shri B.K. Datta, at the relevant time was the Deputy Chief Inspector of Factories and he was admittedly senior to him. But since he has retired after his promotion to the post of Joint Chief Inspector of Factories he has not been made a party respondent in this Rule. It is the categorical allegation of the petitioner that at the instance of the Chief Inspector of Factories, respondent No. 2, one S.R. Chakravartty, who is respondent No. 3 in this Rule and at the time relevant to the issue of the same, was the Deputy Chief Inspector of Factories and was also junior to him, was selected for one of the 2 remaining posts of Joint Chief Inspector of Factories, superseding the petitioner. The petitioner has also stated that the other remaining post was also filled up by Shri K.K. Ghose, respondent No. 4, a Deputy Chief Inspector of Factories who was also junior to him. Those respondents, according to the petitioner, were juniors and inferiors to him both in service and also in qualification apart from merit. The petitioner has stated that on the retirement of the said Shri B.K. Datta on and from January 31, 1974 vacancy in another post in one of the 3 posts of

Joint Chief Inspector of Factories occurred.

4. The petitioner has stated that being aggrieved by such wrongful and illegal act whereby lie was superseded by 2 junior officers, he made a representation to the Secretary to the Government of West Bengal on January 13, 1974. But such representation has not been replied to. It is his allegation that sometime in June 1968. the petitioner came to know that there were some foreign assignments for the post of General Safety Engineer in International Labour Organisation (I.L.O.), for which it had requested the Union of India, which is not a party in the Rule, for sending candidates for filling up such assignments from different States. The petitioner being desirous for being considered for such assignment, made an application in June 1969 through proper channel viz., through the Chief Inspector of Factories, respondent No. 2. He has alleged that the said Chief Inspector of Factories, made a comment on the application to the Government of West Bengal that the petitioner could not be spared for such assignment and that would be detrimental to the interest of the Directorate. The petitioner has stated that on coming to know of such comments, he went and personally saw the Secretary to the Labour Department, Government of West Bengal, for necessary consideration and under his advice the Chief Inspector of Factories, respondent No. 2 revised his comments and forwarded his application to the proper authorities for necessary consideration. He has also stated that he came to know from the letter dated 9th October, 1968 in Annexure "M" to the petition that his candidature for the said assignment under the International Labour Organisation had been short listed along with the other candidates for the post of General Safety Engineer. U.A.R. and it has been mentioned there that in case he is selected as a primary candidate, he will be contacted at once. Thereafter, it appears, from the statements in the petition and the annexure to the same being Annexure "N", his letter dated May 31, 1971 that the Deputy Director, International Labour Organisation wanted to know whether the petitioner was interested in the assignment as referred hereinbefore in Ceylon and by another letter of August 31, 1971, being in Annexure "O" the said Deputy Director informed that the post for which the petitioner had applied had already been filled up and his application was kept in the waiting list.

5. The petitioner has alleged that on or about October 13, 1973, the Chief Inspector of Factories, respondent No. 2 informed him orally that as he. had annoyed him in the past, so he as made an adverse comment and remarks relating to his integrity in the Confidential Character Roll. Being surprised by such attitude and remark, the petitioner on November 12, 1973 appears to have made a representation to the Chief Inspector of Factories concerned, for a copy of the alleged remarks, so that he could have an opportunity to submit an explanation. It is the further allegation of the petitioner that on the body of the concerned representation, which is in Annexure "P" to the petition, the said Chief Inspector of Factories gave a reply stating that it was for the Government to decide whether the adverse remarks against the petitioner would be communicated to him or not. The reply, purported to have been given by the Chief Inspector of

Factories, respondent No. 2, has been annexed by the petitioner as Annexure "Q" to the petition. He has also stated that there are two memoranda of the Government of West Bengal being No. 14(12) A/C dated January 31, 1942 and No. 573-GAC dated May 24, 1973 dealing with assessment of integrity in annual Confidential Reports. It is his case that from a reference to those Memoranda it would be abundantly clear that if an adverse remark is made about the integrity of a Government servant in the Annual Confidential Report, the same should be communicated to him. As mentioned earlier, the petitioners categorical assertion is that such remarks were never communicated or intimated to him. The petitioner has further stated that on January 7, 1914, he made a representation to the Secretary, Labour Department, Government of West Bengal with regard to his earlier representation dated November 29, 1973 and also regarding his promotion to the post of Joint Chief Inspector of Factories. The petitioner has further stated that in the facts of the case, it was apparent that the relevant authorities, who are respondents herein, would not do justice in his case and that too for the improper use and exercise of power by the Chief Inspector of Factories for the purpose of giving vent to his earlier grudge against the petitioner and that too for the reasons as mentioned above. In short, the petitioner has stated that the said Chief Inspector of Factories has displayed malafide against his future prospect particularly in view of his excellent service record as would be evident from the posts and laurals which he has owned both in this country as well as abroad. The fact that the said Chief Inspector of Factories have neither taken any steps on the representation as filed by the petitioner nor given any reply to the same, according to the petitioner, also establishes malafide on his part. That apart he has alleged that at the instance of the said Chief Inspector of Factories one of the remaining vacant post of Joint Chief Inspector of Factories is being sought to be filled up by one of the 6 Deputy Chief Inspector of Factories, who are respondent Nos. 5 to 10 and all are juniors to him.

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The portions of the judgment which are not relevant for the purpose of the report have been left out.

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Omit Paras 7 to 25.

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25. On the pleading in the case and the evidence as disclosed and on my findings as above, I hold that since Respondent Nos. 3 and 4 were also duly qualified for holding the concerned post or for selection for the same, the petitioner has no claim on merits and as such the cases as mentioned above would not be applicable and the case under consideration would not be a case of supersession, illegally or unauthorisedly made, the more so when the post is a selection one the petitioner could not claim the same as a matter of course and on the basis of

seniority only.

26. The orders of appointment of Respondent nos. 3 and 4 as Officiating Joint Chief Inspector of Factories are in Annexures "I" and "J" respectively. These orders, as mentioned above, have been contended to be bad and void, as they are not speaking orders. The orders show that the appointments were made in the interest of public service. In support of his contentions on this point and as recorded hereinbefore, Mr. Chakravarti relied on the determination in the case of Union of India (UOI) Vs. Mohan Lal Capoor and Others, . In the facts of that case, it has been laid down that it was incumbent on the Selection Committee to state reasons in a manner which would disclose how the record of each superseded officers stood in relation to the records of those who were to be preferred. The case before the Supreme Court, was one of promotion and not a case of selection as in this case and as such the determination which was made in the matter as indicated above, on a challenged being thrown on the question of infringement of rights under Articles 14 and id, in my view would not be applicable in this case. Furthermore, on my findings as above, on the pleadings and records as produced, I do not find any reason to hold that there was any non application of mind and that too when I have found earlier that the changes of malafide, on grounds other than non-communication of adverse entries, have not been established. The post being admittedly a selection one, the petitioner, in view of the memorandum in Annexure "V" to the petition, could not claim promotion to the same, mainly on the basis of seniority. In view of the above the determination in Lalchand Pagal v. Director CD and MES & M, AIR 1971 J & K 108, to which reference was also made by Mr. Chakravartti, appear to be inapplicable in this case.

27. Now, I shall have to consider and find out the effect of non-communication of the adverse entries. That the adverse entries were not communicated, cannot be denied or disputed. Let us now see how far the Respondents were justified in that and what should be the effect of such non-communication, in the facts of the case, specially when the petitioner has admittedly retired during the pendency of the Rule. It was contended amongst other by Mr. Chakravartti that the adverse remarks, not having been furnished to the petitioner, yet having been considered, has made the entire proceedings void and bad. He stated that such remands should not have been considered behind the back of the petitioner or without any notice of opportunities to him. On the question of communication of adverse remarks, Mr. Chakravartti relied on the determination in the case of Sarat Chandra Misra v. The State of Orissa and Ors., 1976(1) S.L.R. 378. In that case, it has been observed that it is necessary to establish communication adverse remarks and in the absence of such communication, no action should be taken. Reliance was secondly placed by Mr. Chakravartti in the case of Chief Security Officer, Eastern Railway v. Ajoy Chandra Bagchi, 1975(2) S.L.R. 660. In this case, it has been observed that principles of natural justice and fair play require that when an action is to be taken against an employee, on the basis of some adverse entries or reports, they must be made known to him. In that case,

an order of retirement, based on under closed adverse entries although made in public interest, was held and observed to be bad. By the above determination, "the initial determination by the learned Single Judge in the case of Ajoy Chandra Bagchi v. The Chief Security Officer, Eastern Railway, 1975(2) S.L.R. 407 which was also referred to by Mr. Chakravarti and were affirmed. In view of the above determination and view of the decision in Anil Kumar Banerjee, v. State of West Bengal, 1979 (1) SLR 703, adverse entries in the confidential character rolls of the employee concerned, are ordinarily and, except in exceptional circumstances or cases where such entries cannot be disclosed, should be communicated, informed or intimated to the concerned employee, for the purpose of rectifying his shortfalls. The Respondents have not claims any privilege in the matter of disclosure of the adverse entries. The learned Advocate appearing before me, produced two forms for recording the annual confidential reports. I have directed the said forms to be kept in the records being marked as exhibits "A" and "B". Exhibit "A" is the form relevant for gazetted Officers and Exhibit "B" is meant for members of the staff. The Exhibit "B", which is meant, for members of the staff contains notes with some exceptions, which on the face of the same, require or suggest the communications of the adverse entries. But such notes are admittedly absent in Exhibit "A", which in view of the petitioner's character of employment has application. In view of the absence of such notes, it was considered on behalf of the Respondent that it was not obligatory on their part to communicate or make known to the petitioner, the adverse entries against him. This form in Ext. "A", subject to the modifications as mentioned in the record in Annexure RI to the petition, do correspond with the same. The modifications as mentioned in Annexure R 1 are in respect of Assessment of integrity and the said record lays down or makes provision for communicating the adverse entries in some specified cases. These apart, reference was also made to Memo No. 14(12) A/C dated January 31, 1942, which while dealing with the method of communication of confidential reports to officers concerned, has observed, on a reference to the earlier instructions, relevant for communication of remediable defect only, that not only such remediable but also in remediable defect should also be made known to the officers. The Respondent, in this case have of course contended that since there were no obligation to communicate the adverse entries, so they have neither committed any wrong or any illegality nor the action as taken, could thus be termed as against principles of natural justice, and further-more, they were not even-required to make such adverse comments available to the petitioner, even if, he had applied for the same. It is true that such adverse entries are required to be communicated to non-gazetted staff and not to the officers of the category of the petitioner, in terms of the Exhibits as referred to hereinbefore. But principles of natural justice, which may not always be incorporated rule, may be implied in certain cases and specially in a matter like the present one, where an action, prejudicial to the petitioner, has been said to be taken and that too on the basis of adverse entries, without any communication. Entries if adverse and on that basis, action prejudicial to an employee is taken, in my view, would require communication, even if such

communication is not required in terms of the form prescribed for recording Annual Confidential Reports. Such communication is also required for the purpose of offering an opportunity to the employee concerned to rectify his character. So in the instant case, at least there is such violation of principles of natural justice.

28. So, we are left now with the consideration of the effect of such nor communication in the facts of the case and more particularly when, the petitioner has definitely retired during the pendency of the Rule, on attaining the due age of retirement. To establish that such retirement would not be a bar in entertaining this application or determining the issues as involved, Mr. Chakravartti, relied firstly on the case of State of Mysore Vs. C.R. Sheshadri and Others, . The employee concerned in that case had retired the day before the judgment of the High Court. The High Court granted the prayers of the employee and amongst others directed payment of such amounts as he would be entitled, had his due interse seniority and promotion was given. On a challenge being thrown to such order, the Supreme Court dismissed the appeal and directed the authority concerned to consider promptly the claim of the employee concerned in the light of the observation as made and to make the necessary payment within a stipulated time, Reliance was next Placed on the determinations in the case of Rameshwar and Others Vs. Jot Ram and Another, , or purpose or establishing that since the right to relief is to be determined on the date of the institution of proceedings, even if the petitioner has retired-subsequent to the issue of this Rule and during the pendency of the same, he would be entitled to the reliefs as claimed. In the case, as mentioned above, it has been observed by the Supreme Court that:-

It is basic to our processual jurisprudence that the right to relief must be judged to exist as on the date a suit or institutes tire legal proceedings. This is an emphatic statement that the right of a party is determined by the facts as they exist on the date the action is instituted. Granting the presence of such facts, then he is entitled to its enforcement. Later developments cannot defeat his right. The Court's procedural decays can not deprived him of legal justice or rights crystallised in the initial cause of action and Courts can, however, take note of subsequent events and mould the relief accordingly, but this can be done only in exceptional circumstances. Rights vested by statute, can not be divested by this equitable doctrine.

29. The last case on which reliance was placed by Mr. Chakrabortti, was that of Md. Mahmood Hussain v. Osmania University 1978(1) S.L.R. 721. The petitioner, in that case under Article 226 claimed for the issue of a Writ of Certiorari or other appropriate Writ, so as to enable him to remain in office as Reader in English, Arts and Science College, Secendrabad in lieu of an order dated December 20, 1975, passed by the Osmania University, he was permanently retired before the date of superannuation. The order in question, was passed in public interest by virtue of the powers conferred on the Vice Chancellor. The contentions of the

petitioner amongst others were that the Vice Chancellor had not had the necessary power or authority to pass the impugned order and the said order was passed irregularly, were accepted and appropriate writs were directed to be issued. It was contended that no order of reinstatement could or should be passed, as the petitioner has already retired and accepting such arguments, it was directed that the petitioner should be paid the salary and all other emoluments from the date, when he has retired till the date when he reached the age of superannuation.

30. From the determinations as mentioned hereinbefore, it can thus be deduced that if an employee has retired, on duly attaining the actual age of retirement during the pendency of the Rule, he would not be entitled to be reinstated or can claim reinstatement. But he can have his claim maintained in terms of money, to which he would be entitled in law, if the order as impeached, appears to be void, illegal and irregular or for any other appropriate cause. So in the instant case, if any action has actually been taken on the basis of the adverse report as entered or considered without notice, information or communication to the petitioner, he would be entitled to claim that his case has not been properly considered and would perhaps be entitled to maintain other appropriate claims for that. But he cannot be reinstated to the post of Joint Chief Inspector of Factories.

31. Mr. Chakravarti also submitted that the withholding of promotion in this case, would be one of punishment, in terms of Rule 8 of the West Bengal Services (Classification, Control and Appeal) Rules 1971, which specify penalties, and since such penalty was imposed in the improper and irregular manner as mentioned above, and the same was also bad for violation of principles of natural justice, as admittedly, no opportunity, before infliction of such penalty was afforded to the petitioner the Rule should be made absolute. Since the post of Joint Chief Inspector of Factories, was a selection one and not a promotional post, the argument as mentioned above, to my mind, are not substantial and as such the case of the petitioner would not come within the preview of Rule 8 of the West Bengal Rules. It should also be noted that Mr. Chakravarti, on a reference to the determinations in *Pooswamy M. v. Union of India* 1978 S.L.J. 298, contended that the right of promotion of the petitioner, during the pendency of the proceedings was alike and as such, in this case, and more particularly when there is no guideline for such promotion, duly laid or established, the petitioner could certainly ask for his right or entitlement to be promoted and that too when one post is lying vacant since January 81, 1974. On this branch of submission, Mr. Chakravarti relied on the determination in the case of *The State of Orissa Vs. Khageswar Das and Others*, . These arguments of Mr. Chakravarti, in view of my findings as above and the entitlement of the petitioner as indicated, appear to be without much substance.

32. Admittedly, a vigilance enquiry against the petitioner has been initiated and the validity or otherwise of the same, is pending in this Court in Civil Rule No. 7506 (W) of 1974. Chakravarti, on a reference to the determinations in the case

of B.J. Shelat Vs. State of Gujarat and Others, , contended that as the Petitioner has already retired, so, such action cannot be continued, as no disciplinary action can be taken once the Government servant has effectively retired. The said Civil Rule No. 7503(W) of 1974 is not for consideration before me and as such, as submitted by the Respondents, I feel that I should not make any observation in this case, which would touch or affect the determinations in the said Civil Rule. As such, I have it on record that nothing contained in order should be construed in saying that any determination has been made in respect of the said Civil Rule. In view of the above the application should fail subject to the determinations in respect of the adverse entries and I order accordingly. The Rule is thus discharged with the observations as above. There will be no order for costs.