

(2013) 07 DEL CK 0175

In the Delhi High Court

Case No : Writ Petition (C) No. 1722 of 2013

Sh. Mukesh Jha and Another

APPELLANT

Vs

Union of India and Others

RESPONDENT

Date of Decision : 11-07-2013

Acts Referred:

Citation : (2013) 07 DEL CK 0175

Hon'ble Judges : Valmiki J Mehta, J

Bench : Single Bench

Advocate : Kirti Uppal and Mr. Sujeet Kumar Mishra, Mr. Dipak Bhattacharya and Mr. Harman Guliani, for the Appellant; Rajeev Mehra, ASG, Mr. Jatan Singh, CGSC, Mr. Soayib Qureshi and Mr. Kartikey, Advocates for UOI, Mr. Ashish Wad and Ms. Kanika Butani, Advocates, for the Respondent

Final Decision : Disposed Off

Judgement

Valmiki J Mehta, J.—This writ petition is filed by the petitioners seeking the relief of continuation of petitioner No. 1 as the Chairman-cum-Managing Director of the respondent No. 4/M/s. Bridge and Roof Company (India) Ltd. till the age of 65 years. Petitioner No. 1's ordinary date of superannuation was 31.10.2012 and therefore petitioner No. 1 superannuated on 31.10.2012 as he had reached 60 years being the age of superannuation. The petitioner No. 1 claims continuation as the Managing Director of the respondent No. 4-company placing reliance essentially on the circular dated 24.7.2007 of the Government of India, Ministry of Heavy Industries and Public Enterprises, Department of Public Enterprises and the related circulars. As per the petitioner No. 1 this circular allows the petitioner No. 1 to continue as the CMD of the respondent No. 4 on the ground that the petitioner No. 1 has contributed to turn around the loss making PSU/respondent No. 4. Petitioner No. 1 was first appointed as the Director (Finance) of the respondent No. 4-company for five years or till his date of superannuation or till further orders by the letter dated 1.4.2005 of Ministry of Heavy Industries and Public Enterprises. Before this period of five years or till further orders or till the

date of superannuation came to an end the petitioner No. 1 came to be appointed as the Managing Director of the respondent No. 4 vide letter dated 1.2.2007 of the Ministry of Heavy Industries and Public Enterprises for a period of five years or till the date of his superannuation or till further orders. Appointment of the petitioner No. 1 was w.e.f 1.5.2007 to 30.4.2012. Irrespective of the fact that the appointment was till further orders even if we take the appointment as a fixed period of five years, the period of five years expired. From 31.10.2012, the date of superannuation, the petitioner No. 1 was continued as CMD of the respondent No. 4 by the letter dated 19.9.2012 of the Ministry of Heavy Industries and Public Enterprises. The issue is of continuation after 31.10.2012 at least for one year and preferably upto sixty five years in terms of the circular dated 24.7.2007.

2. The essence of the circular dated 24.7.2007 is to give encouragement to good entrepreneurship of the board level appointees of PSUs such as the respondent No. 4 whereby if the public sector undertaking to which the board appointment is made is a loss making/sick undertaking and this loss making/sick undertaking is turned around because of the board level appointee, such board level appointee in terms of the circular dated 24.7.2007 gets an entitlement to be considered for being continued till the age of 65 years. It may be noted that there is no legal entitlement of appointment but only an entitlement for consideration for appointment because the expression used in the letter dated 24.7.2007 is "may" and not "shall". Obviously, the expression used is "may" because it is an employer which decides the continuation of appointment of an employee. No employee can force his continuation with an employer, more so after the ordinary date of superannuation.

3. The only issue which is called for decision in the present case is that whether the board level appointees who turned around the sick company can take benefit of earlier appointment as another board level appointee at another post of the board of the concerned company prior to his being appointed in the present post of which continuation is sought. In the case of the petitioner No. 1, we are talking of the petitioner No. 1's continuation as a CMD till the age of 65 years i.e. continuation is sought as the Chairman-cum-Managing Director and not of any other post. Once the claim is to continuation for 65 years is of a post, then, in my opinion the only interpretation which may be given to the circular dated 24.7.2007 is that the person who seeks continuation till the age of 65 years that continuation is at the post for which continuation is sought and qua that post/appointment it is to be seen that when he was appointed the undertaking in question was a loss making/sick undertaking and during the tenure of appointment (of the petitioner No. 1), this loss making/sick undertaking has been converted into a profit making undertaking. In my opinion, no benefit can be given of prior service in another post with the respondent No. 4 of the petitioner No. 1 inasmuch as the continuation is sought upto 65 years not at the earlier post but at the present post.

4. There is no dispute from the balance sheets of the respondent No. 4-company which has been filed on record that on the date when the petitioner No. 1 was appointed as CMD of the respondent No. 4, the respondent No. 4-company was not a loss making/sick undertaking. The financial data alongwith the balance sheets show that there is a profit before tax for each financial year from 2007-08 to 2011-12. Therefore, it cannot be said that the respondent No. 4 was a loss making undertaking as on the date when the petitioner No. 1 took the charge as the CMD of respondent No. 4-company. Unfortunately, what is a sick industry does not seem to find mention or is defined in the circular dated 24.7.2007 and therefore I would in this regard feel that once for continuous number of years there is a profit before tax, a company cannot be said to be a sick company. It may also be noted that the sick company is not defined in any of the circulars of the concerned Ministry as a company which is under the aegis of BIFR under the Sick Industrial Companies (Special Provisions) Act, 1985. Also, at this stage, I must take on record the documents filed by the respondents and which show that in fact the respondent No. 4-company has been a profit making company from the year 2002-03 onwards.

5. I may note that the entire discussion aforesaid is made and the case is decided by me on the ground of entitlement to continue upto the age of 65 years on the plea of turning around of the loss making/sick company, however, I may at the cost of repetition state that even assuming there is turning around of a loss making/sick company it is not mandatory on the Union of India to continue the board level appointee to the age of 65 years because the expression used in the letter of the Government of India dated 24.7.2007 is "may" and not "shall".

6. After the arguments were concluded and the judgment was completely dictated in Court, learned senior counsel for the petitioner No. 1 has drawn the attention of this Court to paragraph 4(a) of the resolution of the Government of India, Ministry of Heavy Industries and Public Enterprises dated 6.12.2004 to show that what is a sick company and which reads as under:-

4(a) All sick CPSEs will be referred to the Board for revival/restructuring. For the purposes of the Board's consideration, company will be considered sick" if it has accumulated losses in any financial year equal to 50% or more of its average net worth during 4 years immediately preceding such financial year and/or a company which is a sick company within the meaning of Sick Industrial Companies (Special Provisions) Act, 1985 (SICA).

However, when one goes through the averments made in the writ petition, one does not find any factual basis whatsoever laid out as to how this para 4(a) with its sub parts are complied with for the respondent No. 4-company to become a sick company in terms of this para 4(a) and how accordingly petitioner No. 1 can take benefit. In any case, I have already referred to the fact that the circular dated 24.7.2007 only requires the appointment as a discretionary measure because the word used is "may" and not "shall". There is therefore no legal or contractual right for the petitioner No. 1 for being continued as CMD for 65 years.

In view of the aforesaid discussion, I am of the opinion that petitioner No. 1 has no legal entitlement to continue as a CMD of the respondent No. 4-company upto the age of 65 years. Accordingly, I do not find any merit in the writ petition which is accordingly dismissed, leaving the parties to bear their own costs. Since the writ petition stands disposed of, all the pending applications also stand disposed of. Next date of 21.8.2013 will stand cancelled.