
(2014) 04 CAL CK 0055
In the Calcutta High Court
Case No : W.P. No. 045 of 2014

Shri. U. Binu

APPELLANT

Vs

The Union of India and Others

RESPONDENT

Date of Decision : 03-04-2014

Acts Referred:

Citation : (2014) 04 CAL CK 0055

Hon'ble Judges : Soumen Sen, J

Bench : Single Bench

Advocate : Roshan George, Advocate for the Appellant; Santosh Kumar Mandal, Advocate for the Respondent

Final Decision : Allowed

Judgement

Soumen Sen, J.—This writ petition has a chequered history. The writ petitioner has approached this court on three previous occasions where in substance the petitioner has prayed for regularization and/or absorption of the writ petitioner as Home Guard. The petitioner was initially appointed as Home Guard Volunteer in terms of section 4 sub-section 1 of the Andaman & Nicobar Islands Home Guard Regulation 1964 for a period of three years from 24th March, 1993. Since the service of the petitioner was not regularized even after putting more than five years of service continuously, the petitioner made a departmental representation and ultimately filed an application along with other applicant being OA No. 122/AN/99 for regularization. In the said proceeding, an order was passed on 13th October, 1999 directing the respondent authorities not to pass any order detrimental to the interest of the said applicants including the petitioner in respect of their status of Home Guard as being enjoyed and performance of duty being performed by them till the disposal of the case. In spite of the aforesaid, the petitioner was discharged from service on 22nd January, 2002 by the Area Commandant, Home Guard Andaman & Nicobar Islands prior to the disposal of the OA 122/AN/99 the reason for the discharge of the petitioner was that the petitioner was not in proper uniform. In 2008, the

petitioner filed a writ application being WP No. 048 of 2008 challenging the said order of discharge and disciplinary proceeding in which Justice Pinaki Chandra Ghosh as His Lordship then was before His Lordship's elevation to the Hon''ble Supreme Court held that the said dress code violation is not that fatal which would visit the petitioner with an order of discharge and the writ petition was disposed of by directing the respondent No. 3 to treat the writ petition as representation and consider the same sympathetically and on humanitarian ground.

2. Following the aforesaid the respondent No. 6 passed an order by which the petitioner was enrolled afresh as Home Guard Volunteer with immediate effect against existing vacancy for a period of three years. The said appointment would be governed by Andaman & Nicobar Islands Home Guard Regulation 1964 and Rules 1965. Thereafter the petitioner again approached this court being WP 994 of 2010 inter alia for regularization of his appointment on the ground that persons similarly situated have been absorbed.

3. The learned Single Judge by a judgment and order dated 07th February, 2011 in WP No. 994 of 2010 disposed of the said writ application by directing the authorities concerned to consider the case of the petitioner in accordance with the scheme to be framed as directed by the Hon''ble Division Bench in judgment and order passed on 04th February, 2011 in MAT No. 064 of 2010, MAT No. 065 of 2010 and MAT No. 066 of 2010. The Hon''ble Division Bench by which direction was issued upon the respondents to frame a scheme by issuing appropriate notification within six months for regularization of the service of the Home Guard in accordance with the judgment of the High Court in MAT No. 25 of 2006 and decision of the Apex Court in Union of India (UOI) and Others Vs. Parul Debnath and Others, . Thereafter the petitioner was discharged from service on 13th May 2011 which gave rise to another writ petition being WP No. 946 of 2011. In the said proceeding the petitioner has challenged the order of discharge passed by the said respondent authorities by which the petitioner was discharged from service on and from 13th May 2011. The learned single judge disposed of the said writ application on February 07, 2012 by observing that the petitioner had earlier served the organization between the years 1993 to 2002. He was discharged from service on disciplinary ground in the year 2002. Subsequently he was given a fresh appointment after consideration of his case in pursuance of the direction of this court passed on 08th April, 2008 in WP. No. 048 of 2008. On completion of three years, after he was given a fresh appointment, he was discharged from service. At various point of time, different scheme is framed by the administration for absorption of Home Guard in Police Force as well as other department of the administration. Since the scheme is in operation with regard to regularization of Home Guard being Regularization of Home Guard-Scheme of Andaman & Nicobar Administration 2011 and having regard to the fact that the representation of petitioner for absorption was still under consideration, the authority was directed to take a decision for regularization of the petitioner considering the applicable scheme and the fact that he had served the

organization in the past. The authority concerned in purported compliance of the said order passed an order dated 24th February, 2012 rejecting the request for regularization in supernumerary post. The reasons for rejecting the said application is that the petitioner did not fulfill the eligibility criteria as stipulated in the scheme for regularization. He was appointed afresh in terms of Andaman & Nicobar Island Home Guard Regulation, 1964 and Rules 1965 for specific period of three years with effect from 23rd June, 2008 and did not possess the five years of continuous service without any break. Furthermore the scheme of 2011 does not envisage continuing of past service rendered by the petitioner since he was discharged on disciplinary ground.

4. This order was challenged by the petitioner in WP No. 115 of 2012. The learned single Judge on consideration of the orders passed in earlier proceedings and the materials on record held that the two folds grounds on which the application of the petitioner was rejected namely: firstly the petitioner does not possess the requisite qualification of five years of continuous service as on 06.05.2009: and secondly that the said scheme does not envisage the counting of past service is contrary to the order passed by this court on 07th February, 2012 in WP No. 946 of 2011. The learned single Judge observed that this Court in the earlier proceedings directed the authorities to consider the case of the petitioner relating to absorption/regularization in terms of the applicable scheme; and, while considering the same, they shall also take into consideration his past service. The authorities cannot take contrary stand to the order of this Court passed on February 07, 2012 in WP No. 946 of 2011.

5. On the above ground, the order impugned was quashed and set aside.

6. The said authorities were accordingly directed to consider the case of the petitioner afresh within six weeks from the date of communication of this order in accordance with law.

7. The said authority in considering the representation was directed not only to take a decision in the light of the applicable scheme but also to take into consideration of the order passed by the High Court on February 07, 2012 in WP No. 946 of 2011.

8. This time the authorities rejected the said application on the same ground but with some elaborate reasoning.

9. The petitioner being aggrieved filed a contempt application.

10. The contempt application was disposed of with an observation that though several grounds have been assigned to reject the application of the petitioner, it is precisely on the similar ground which was taken on an earlier occasion. However, the learned Single Judge dismissed the contempt application on the ground that there was willful and deliberate violation of the order.

11. Mr. S.K. Mandal, learned senior counsel appearing on behalf of the respondent authorities submits that the writ petitioner did not challenge the

order of discharge till 2008 when the order was passed on 8th April, 2008 by which the respondent no. 3 in the said writ petitioner was directed to consider the representation of the petitioner sympathetically. It is submitted that in those five years, the petitioner did nothing and in fact he accepted the order of discharge. It is submitted that it is a settled law that delay defeats equity and even if for the argument sake, the petitioner is able to establish that he has right to claim regularisation and/or absorption in view of such long delay, no relief can be granted in favour of the petitioner.

12. Mr. Mandal has referred to a decision of the Apex Court in the case of *The Municipal Council, Ahmednagar and Another Vs. Shah Hyder Beig and Others*, . It is submitted that in a similar case concerning regularisation of Home Guard, the Hon"ble Division Bench in its judgment dated 10.06.2011 in MAT No. 008 of 2011 (*Union of India vs. Smt. Sujatha Yadav*) rejected the claim of the applicant therein for regularisation.

13. In further advancing his argument on the scope of the order dated 8th April, 2008, it is submitted that the Hon"ble Court did not set aside the order of discharge passed by the authorities concerned on disciplinary ground and the matter was sent back only for reconsideration on humanitarian ground. The petitioner pursuant to the order dated 08th April, 2008 was appointed as a Home Guard Volunteer afresh for a period of three years and the petitioner has accepted the said appointment without any protest. Mr. Mandal has referred to various provisions of the Andaman & Nicobar Home Guard Regulation 1964 and the Rules 1965 and submitted that the Rules are still in force. It is submitted that these Rules are applicable to the petitioner.

14. Mr. Mandal submitted that on a true and meaningful interpretation of the order dated 07th February, 2011 it would appear that the case of the petitioner was to be considered in accordance with the scheme to be framed as directed by the Hon"ble Division Bench and such direction cannot be held to be mandatory in nature. The power and jurisdiction of the authorities concerned has not been curtailed by the said order or even by the subsequent order dated 24th September, 2012 directing the authorities to dispose of the writ application with the observation that the said order "shall not have persuasive effect upon the said authority." Moreover, the writ petitioner has not challenged the scheme of 2011. Mr. Mandal refers to the scope the scheme and submitted that the scheme specifically provides that the Scheme is not applicable to the Home Guard Volunteers, who have already resigned from voluntary service or have been discharged from the roll of the A & N Islands Home Guards Organization on disciplinary and/on other grounds. The Scheme is also not applicable to the Home Guard Volunteers, who have been appointed afresh in terms of the A & N Islands Home Guards Regulation, 1964 and the Rules, 1965.

15. It is contended that the case of the petitioner has been considered by the authority concerned carefully in the light of the scheme of 2011 and the petitioner was found ineligible for regularization as the Scheme-2011 does not

envisage counting of past service of Home Guards, who were discharged on disciplinary grounds. Therefore, the request of the petitioner for regularization in supernumerary post has been rejected by a reasoned order being Order No. 266 dated 24.02.2012.

16. It is submitted that hundreds of Home Guards who were working for several years and discharged on various grounds prior to notification of Scheme for regularization would now come forward and would claim for regularisation in the event the prayer of the petitioner is allowed and the same would open flood gate of litigations involving huge financial burden on the government exchequer.

17. Mr. Roshan George on the other hand submitted that it would be clear from the orders passed at the different stages in different writ petitions that the authorities concerned are purposely and deliberately denying the petitioner his right for absorption and/or regularisation in the service. It is submitted that the principles of delay defeats equity would not apply in the instant case since this court in its order dated 08th April, 2008 held that the violation of the dress code is not that fatal which could deprive the petitioner of his livelihood and accordingly the authorities concerned were directed to consider the case of the petitioner sympathetically. Mr. George has referred to the subsequent orders and emphasized the observation made by Justice Tandon in his Lordship's judgment and order dated 24th September, 2011 where it has been categorically held that two fold grounds on which the petitioner was found to be ineligible are contrary to the earlier order passed by this court. It is submitted that the respondent authorities made certain cosmetic changes in the earlier order and the impugned order has been passed with same content but dressed up differently but to the same effect.

18. At this stage, the court is required to consider the propriety and legality of the impugned decision namely the order dated 05th November, 2012 in the teeth of the order passed by this court on 24th September, 2011.

19. In my view, the argument put forward and advanced by Mr. Mandal in support of the impugned order is unsustainable. The reading of the orders passed in the earlier proceedings, in my view, lead to the conclusion that the petitioner cannot be held to be not in continuous service as on 06th May, 2009; and accordingly, on that ground the consideration of the case of the petitioner for absorption and/or regularisation cannot be denied. The delay defeats equity would not be applicable in the instant case in view of the fact that this court admitted WP No. 048 of 2008 and held that the discharge of the petitioner was improper since the violation of dress code could not have visited petitioner with an order of discharge. On the basis of the said order, it cannot be said that the petitioner was discharged on disciplinary grounds. It is true that the petitioner was given a fresh appointment on 03rd June, 2008 but the fact remains that he was in service of the respondent authorities between 1993-2002 and by reason of the order passed by the learned single judge on 08th April, 2008 which has the effect of setting aside the order of discharge, the petitioner notionally and for

all practical purposes continued to be in service until he was given the appointment on 03rd June, 2008.

20. Although the petitioner may not have challenged the order of appointment dated 03rd June, 2008 but he filed writ application in the year 2010 claiming absorption in which direction was passed to consider the case of the petitioner in accordance with the scheme to be framed as directed by the Division Bench. Thereafter, on 02nd February, 2012, while directing the authorities concerned to consider the case of the petitioner case for absorption, the authorities concerned were directed to consider his application for regularization under the applicable scheme and to take into consideration that he had served the organization in the past.

21. Since the authorities concerned rejected the application of the petitioner on the ground that the petitioner did not possess the requisite qualification of five years of continuous service as on 06th May, 2009 and the scheme does not envisage the counting of past service, the petitioner filed a writ petition being WP No. 115 of 2012 in which an order was passed on 24th September, 2012 setting aside the said order on the ground that the basis of the impugned order are same and contrary to the orders passed by this court on 02nd February, 2012. The respondent authorities did not challenge any of the orders. The said orders have attained finality. The cumulative effect of all the three orders is that the petitioner continued to remain in service even after 2002, and in any event, his case is required to be considered not only in terms of the scheme but also taking into consideration his past service. It is not in dispute that he was actually in service from 1993 to 2002 and again 2008 to 2011. In between he was not allowed to join duty since he was discharged from service on disciplinary grounds. Since the punishment by way of discharge did not find favour with the court, it means that such discharge is bad in law and he should be deemed to be in service.

22. The authorities concerned having accepted the order dated 08th April, 2008 is clearly precluded from contending that the petitioner could not take benefit of the period between the date of discharge of 2002 and the date of filing of the writ petition. Moreover, having regard to the orders passed in earlier proceedings the authorities are required to consider the case of the petitioner as if the petitioner has not been discharged from his service on disciplinary ground and to take into consideration his past service. The petitioner cannot be disqualified on the grounds stated in the impugned order since it was not open for the respondent authorities to hold that the petitioner is disqualified. The impugned order is contrary to the directions passed by this court on 02nd February, 2012 and 24th September, 2012 respectively.

23. The argument that in the event the present writ petition is allowed it would open flood gate of litigation is not appreciated. A case has to be decided on its own merit. Moreover, if it is found that the respondent authority has acted arbitrarily just because the order would benefit a large number of persons is not

a consideration on which the court would decline to pass appropriate orders since the court is required to uphold the rule of law and strike at the very root of arbitrariness so as to render substantive justice.

24. In view thereof the impugned order is set aside.

25. The respondent authorities are directed to consider the case of the petitioner afresh by taking into consideration that the petitioner shall not be held to be ineligible on the ground that he was discharged from service on disciplinary ground on 22nd January, 2002 and he does not possess requisite qualification of five year years of continuous service as on 06th May, 2009. The past service of the petitioner shall be taken into consideration while considering the said representation afresh. It shall be no more open for the respondent authorities to rely on any of the grounds which form the basis of the impugned order dated 05th November, 2012. The authorities concerned shall decide the representation of the writ petitioner within a period of eight weeks from the date of communication of this order after giving a reasonable opportunity of hearing to the petitioner or his authorized representative and to dispose of the same by a reasoned order which shall be communicated to the petitioner within a week thereafter. The writ petition succeeds. However, there shall be no order as to costs.