
(2012) 09 CAL CK 0113
In the Calcutta High Court
Case No : Writ Petition No. 1447 of 2010

Shri Zaki Ahmed	Vs	APPELLANT
The Lieutenant Governor and Others		RESPONDENT

Date of Decision : 18-09-2012

Acts Referred:

Constitution of India, 1950 — Article 14, 16

Citation : (2012) 09 CAL CK 0113

Hon'ble Judges : Harish Tandon, J

Bench : Single Bench

Advocate : Gopala Binu Kumar, for the Appellant; Arul Prasanth for the Official Respondents and Mrs. Anjili Nag for the Private Respondent, for the Respondent

Final Decision : Dismissed

Judgement

Harish Tandon, J.—This writ petition has been taken out by the petitioner challenging the order No. 1402 dated 11th May, 2001 passed by the respondent No. 5 whereby and where under the private respondent was promoted to the post of Assistant Engineer (Electrical). This case has a chequered history. The parties have approached this Court and were subjected to several round of litigation. It is undisputed that the petitioner was appointed as Junior Engineer under the Municipal Council, Port Blair on temporary and ad hoc basis. Subsequently, the petitioner was promoted as Assistant Engineer (E & M) on ad hoc basis initially for a period of six months which was extended from time to time. The said appointment was subsequently regularized as per Order No. 674 dated 18.02.2004. The private respondent was also ad hoc appointee and appointed w.e.f. 04th December, 1992. Subsequently, the authorities promoted certain candidates by excluding the candidature of the private respondent which constrained him to approach this Court by filing the Writ Petition being W.P. No. 82 of 2000. According to the private respondent, the selection for promotion was selective and the authorities did not consider his candidature and therefore has acted in gross violation of Articles 14 and 16 of the Constitution of India. The

Hon''ble Single Bench by its judgment dated 10th August, 2000 set aside the appointment of the selective candidate as the same was in contravention to the recruitment rules. The mandamus appeal, against the said judgment and order preferred by the private respondents, came up for consideration before the Division Bench of this Court. While disposing of the said mandamus appeal on 13.12.2000, the Division Bench recorded the submission made on behalf of the official respondents to the effect that the recruitment rules as referred and relied upon by the Hon''ble Single Bench are yet to be notified under the provisions of law. While notifying Clause 11(eleven) of the said Recruitment Rules it was categorically observed that it does not provide for a promotion in the post of Assistant Engineer (Electrical) of a Junior Engineer (Mechanical) and directed the respondent concerned to constitute a Departmental Promotion Committee for such promotion upon consideration of eligible Junior Engineers (Electrical) as the aforesaid Recruitment Rules had not been notified as yet. In spite of the aforesaid direction, the authority concerned did not venture to call upon all the eligible candidates who are entitled for such promotional posts which led to filing of a Contempt Petition before this Court being CPAN No. 009 of 2001. The said Contempt Petition was disposed of with the following orders which read thus:-

Mr. Biswas, learned Advocate appearing for the alleged Contemnors/Respondents submits that the promotional order in favour of Sri Ram Chander, dated 11th May, 2001 takes effect from date i.e. 11.5.2001 and the promotional status, salary and all other benefits and emoluments attached to the promotional post shall be made available to Ms. Ganguly's client on and from 11.5.2001.

With this clarification, and on the basis of the letter dated 11.5.2001, the contempt application is disposed of without any further orders.

The personal appearance of the alleged contemnors/Respondents be dispensed with.

The Contempt Rule is also discharged.

2. Consequent thereupon by order No. 1402 dated 11th May, 2001 the private respondent was promoted to the post of Assistant Engineer (Electrical) on the terms and conditions as admissible to the similar cadre of employees of the Municipal Council. It is pertinent to record that one of the Junior Engineers namely Shri Sanat Kumar Chakraborty filed a SLP before the Hon''ble Supreme Court against the judgment of the Division Bench delivered on 13th December, 2000. Although the said candidate is not a party to the instant writ petition, but the parties have been informed that the said SLP is pending. Be that as it may, the fact remains that the private respondent was promoted w.e.f. 11th May, 2001.

3. Several seniority lists from time to time were prepared by the Municipal Council which include the name of the petitioner who has been shown to have been regularized to the post of Junior Engineer w.e.f. 18th February, 2004. While preparing the seniority list the authorities took into consideration the period which each of the candidates rendered on ad hoc and temporary basis.

Therefore, if those periods are counted and are taken into consideration at the time of preparation of the seniority list, naturally, the petitioner stood on a better footing than the private respondent. Although the date of regularization of the appointment of the petitioner is shown as 18.2.2004 whereas the date of regularization of the appointment of the private respondent is shown as 11.5.2001, the petitioner did not choose to challenge the said seniority list. Rather the private respondent assailed the seniority list on the allegation that the authorities could not have taken into consideration the period rendered by the candidates as ad hoc employees, but such seniority list must be prepared on the basis of the date of regularization of the appointment. The said writ petition which was numbered as W.P. 335 of 2007 came up before the Hon'ble Single Bench for final disposal on November 25, 2010. It is held therein that if any promotion is made on ad hoc basis after regularization, then ad hoc period cannot be taken into consideration for the purpose of determining seniority. While quashing and setting aside the said seniority list it was directed that the Municipal Council shall re-fix the seniority list on the basis of substantive order of promotion having been granted to the respective parties without taking into consideration the length of service rendered on ad hoc basis. It is relevant to record that in the said writ petition the petitioner was arrayed as respondent No. 9 therein. It is after the aforesaid judgment is passed the petitioner has filed the instant writ petition challenging the order by which the appointment of the private respondent was regularized.

4. The parties have locked their horns to the point that after a gap of more than 12 years and having suffered several orders during interregnum period, the writ petition is liable to be dismissed on the ground of delay and laches. Apropos to the core point as indicated above, an ancillary point has been taken at the instance of the private respondent that the petitioner having the knowledge of the date of regularization of the appointment cannot take a rebound after having suffered an order passed in the previous writ petition by contending that the initial order of regularization is bad and was not made in accordance with the rules.

5. To counter the aforesaid points evolved in this writ petition Mr. Gopala Binu Kumar, learned advocate appearing for the petitioner, strenuously submits that the delay and laches itself cannot be a ground to defeat the writ petition if it could be aptly demonstrated that an earlier order impugned in the writ petition is palpably illegal and de hors the statutory rules. To support the aforesaid contention he placed reliance upon the following judgments of the Apex Court:-

- i) Ramchandra Shankar Deodhar and Others Vs. The State of Maharashtra and Others,
- ii) M/s. Dehri Rohtas Light Railway Company Limited Vs. District Board, Bhojpur and District Board, Shahabad and others,
- iii) State of U.P. and Others Vs. Raj Bahadur Singh and Another, and

iv) Kumar Veda Kantha Sinha Roy Vs. The State of West Bengal and Others,

6. He further submits that there is sufficient explanation in the Writ Petition which occasioned the delay in challenging the impugned order and as such the writ petitioner cannot be a guilty of delay in approaching the Court. Lastly, he submits that since the petitioner was always kept above the private respondent in order of seniority there was no occasion to challenge the order of regularization of the appointment of the private respondent. It is only after the judgment and order dated November 25, 2010 passed in W.P. No. 335 of 2007 by which this Court directed the re-fixation of the seniority list on the basis of a substantive order of promotion the petitioner felt aggrieved by an order of regularization of an appointment of the private respondent.

7. Par contra, Mrs. Nag, learned advocate appearing for the private respondent vehemently submits that the petitioner having accepted the order of regularization of the private respondent he cannot turn around and challenge the said order after having found the order dated November 25, 2010 as not favourable to him. She succinctly submits that the writ petition has been filed after a long delay, more particularly, when several orders intervened in the meantime which is not permissible. She lastly submits that the order of regularization of the appointment was made in terms of a Division Bench order, more particularly, after an order disposing of the contempt application, therefore, any interference, would amount to upsetting the order of the Division Bench which is opposed to judicial discipline.

8. On behalf of the official respondents Mr. Arul Prasanth, Learned Counsel, submits that the order of regularization was issued in terms of an order of the Division Bench dated 13.12.2000 which has not been challenged by the petitioner meaning thereby that the petitioner has accepted the said order. He therefore submits that the petitioner is prevented from challenging the said order in this writ petition.

9. Having considered the respective submissions made above, it is undisputed that the initial appointment on ad hoc basis of the petitioner was prior to the initial ad hoc appointment of the private respondent. The seniority list prepared from time to time envisaged that the petitioner was also included therein. The order of promotion of one of the candidates which was done selectively was assailed before this Court by the private respondent which was set aside and quashed by this Court. The Division Bench while considering the illegality and propriety of the order of the Hon"ble Single Bench specifically observed that the recruitment rules has not been notified as yet by the official respondents and therefore has no statutory force. However, it was directed to constitute a Departmental Promotion Committee to consider the promotion to the post of Assistant Engineer (Electrical) after considering all eligible Junior Engineers (Electrical). Pursuant to the said order the private respondent's appointment was regularized w.e.f. 11th May, 2001. The petitioner accepted said order as he did not challenge the same before the higher forum. Subsequently, the private

respondent being aggrieved by the preparation of the seniority list approached this Court and it was directed that the Municipal Council shall re-fix the seniority list on the basis of a substantive order of promotion. The aforesaid order was passed in presence of the petitioner which has not been assailed by way of intra court appeal.

10. Therefore, the omission of the petitioner to challenge the order of regularization has created a sense of security into the private respondent i.e. date of regularization is as on 11th May, 2001 which was acceptable to all. Furthermore, the petitioner was aware of such position in the year 2001 and had ample opportunity to challenge the same. (See Dr. Ku. Nilofar Insaf Vs. State of Madhya Pradesh and others,

11. The matter can be viewed from another angle. By judgment dated November 25, 2010 passed in W.P. 335 of 2007 the Court directed the Municipal Council to re-fix the seniority list on the basis of substantive order of promotion without taking into consideration the length of service rendered on ad hoc basis.

12. The aforesaid judgment and order is to be respected and must be allowed to operate with full rigor and force in absence of any challenge before the higher forum. The private respondent who was aware that his date of regularization is prior to the date of regularization of the petitioner has acquired a right in absence of any challenge at the time of its making. The petitioner was sitting over the fence and has assailed the said order after a period of 12 years.

13. In case of Ramchandra Shankar Deodhar and others (supra) the Apex Court held that the court may not enquire belated and stale claim is not a rule of law but a rule of practice based on sound and proper exercise of discretion. It is further held that each case must take on its own facts. There is no dispute to such proposition.

14. In the present case, the regularization was done on the strength of an order of the Division Bench. More particularly, from the date of an order on which date the contempt application was disposed of.

15. The aforesaid fact would be reflected from the impugned order which was well within the knowledge of the petitioner. Having sat over the matter for a considerable period of time knowing fully well that his right has been infringed, he cannot be permitted to challenge the said order when in the meantime several litigations and/or orders had been passed crystallizing the rights of the parties.

16. The Apex Court in case of M/s. Dehri Rohtas Light Railway Company Limited (supra) was considering a matter where no relief was claimed in an earlier instituted suit. The relief subsequently claimed was based upon an independent footing and there was a sufficient explanation for not raising the question of legality offered in a subsequent proceeding. In the backdrop of the aforesaid factual matrix, it was held in the special facts of the said case that the delay cannot be a ground for refusal to grant relief if otherwise the litigant is entitled

to. Similar ratio has been laid down in case of State of U.P. and others Versus Raj Bahadur Singh and another (supra) by the Apex Court. Even the Division Bench in case of Kumar Veda Kantha Sinha Roy (supra) did not lay down the proposition that the delay is not the relevant and material factor but in a given facts of the said case it is held that if there is sufficient explanation offered and if a person has a good case on merit, the court should decide the matter in controversy instead of dismissing the same on the ground of delay.

17. As indicated above, the order of regularization passed on 11th May, 2001 cannot be said to be par se illegal in the sense that it has been passed without any basis and in complete contravention to the relevant rules. The aforesaid order originated from an order of the Division Bench and had occupied the field for a considerable period of time i.e. nearly more than 12 years and as such should not be quashed and set aside when several subsequent litigations initiated between the parties have proceeded on the aforesaid basis.

18. Recently the Apex Court in case of Shiba Shankar Mohapatra and Others Vs. State of Orissa and Others, held that a fence-sitter can not be allowed to raise the disputes or challenge the validity of order after its conclusion and no party can claim the relief as a matter of right as one of the grounds for refusing relief is that the person approaching the Court is guilty of delay and latches.

19. Thus I have no hesitation to hold that the petitioner is guilty of gross delay and latches in challenging the impugned order. Even otherwise the petitioner has not been able to convince this Court as to the illegality, perversity in the impugned order on facts as well on law.

20. The writ petition is thus dismissed. There shall however be no order as to costs.