
(2012) 01 DEL CK 0091

In the Delhi High Court

Case No : Writ Petition (C) No. 478 of 2012

Surrender Kumar, Ex. Petty Officer

APPELLANT

Vs

Union of India and Others

RESPONDENT

Date of Decision : 23-01-2012

Acts Referred:

Citation : (2012) 01 DEL CK 0091

Hon'ble Judges : J.R. Midha, J;Anil Kumar, J

Bench : Division Bench

Advocate : Sukhjinder Singh, for the Appellant; Ravinder Aggarwal, for the Respondent

Final Decision : Dismissed

Judgement

Anil Kumar, J.—The petitioner has sought the quashing of orders dated 20th November, 2008, 25th August, 2010 and 4th May, 2011 and has also sought directions to promote the petitioner w.e.f. 1st June, 2006 with all the consequential benefits and deem that the petitioner has completed 10 months in the rank of Chief Petty Officer pursuant to the respondent's communication dated 24th January, 2007 in terms of Section 16 (b) of the Navy Act, 1957.

2. The petitioner filed an original application before the Armed Forces Tribunal, contending, inter-alia that he had joined the Indian Navy on 9th January, 1986. The petitioner had rendered 21 years of service and was eventually promoted to the rank of Petty Officer w.e.f. 11th November, 1999.

3. In his last posting, he was borne in INS Angre, Mumbai and on 7th January, 2007, he was transferred to Commodore Bureau of Sailors in the "Release Centre", for carrying out release formalities.

4. The petitioner alleged that by communication dated 24th January, 2007, it was intimated to him that he would be promoted as a Chief Petty Officer w.e.f. 1st June, 2006 and therefore the petitioner was required to be re-engaged for two months to complete 10 months service to enable him to earn pension in the rank

of Chief Petty Officer.

5. According to the petitioner, he applied for two months extension on 29th January, 2007 which was allegedly duly approved and acted upon and he was informed that he would now retire on 31st March, 2007 and that his release from the service would be kept in abeyance.

6. On account of this alleged assurance, the petitioner alleged that he was to be deemed to have been re-enrolled for two months in terms of Section 16 (b) of the Navy Act, 1957 and the Regulations made thereunder.

7. The petitioner contended that, however, to his utter shock he was retired on 31st January, 2007 without assigning any reason and without intimating the fate of his request/application for grant of extension of two months service to enable him to complete the requisite 10 months to earn the pension of the rank of Chief Petty Officer.

8. It was further alleged that the Bureau of Sailors, suo moto brought out in the communication dated 24th January, 2007 that the Petty Officer to the Chief Petty Officer roster is supposed to run on 1st January, 2007 and would be effective for the period from 1st October, 2006 to 30th September, 2007 and that the Sailors retiring in the month of January, 2007 batch would be affected by the new roster.

9. Aggrieved by the order of his discharge dated 31st January, 2007, the petitioner had filed a writ petition being W.P.(C) 1789/2007 in the High Court of Bombay.

10. According to the petitioner, the Bombay High Court allowed the petitioner to withdraw the writ petition for making appropriate representations to the respondents by order dated 16th July, 2008. The petitioner, accordingly, appealed to the Central Government and Chief Naval Staff, through respondent No.3, the Commodore Bureau of Sailors, by his representation dated 1st August, 2008 which was rejected by the respondents by communication dated 20th November, 2008.

11. Against the order dated 20th November, 2008, the petitioner filed a writ petition in the High Court of Bombay being W.P.(C) No.101/2009, which was dismissed by order dated 8th April, 2009. The petitioner alleged that on 8th April, 2009, the advocate of the petitioner could not appear on account of the death of his relative. The petitioner, therefore, filed a review petition No.21 of 2009 which was disposed of by order dated 11th December, 2009 directing the petitioner to approach the respondents.

12. The grievance of the petitioner is that thereafter he approached the respondents by petition dated 11th June, 2010, however the same has not been disposed of till date.

13. The petitioner, therefore, filed an original application being OA No.507/2010, titled as "Surrender Kumar Ex. Petty Officer v. Union of India & Ors.," before the

Principal Bench of the Armed Forces Tribunal.

14. The petition before the Armed Forces Tribunal was contested by the respondents contending, inter-alia that the petitioner was promoted from time to time up to the rank of Petty Officer and on the expiry of his initial engagement on 31st January, 2001, he was granted a re-engagement for three years up to 31st January, 2004. The petitioner, thereafter, had sought re-engagement for a further period of three years from 1st February, 2004 to 31st January, 2007 with Lesser Period Certificate (LPC) which was also granted.

15. The petitioner had thereafter again sought further re-engagement for five years w.e.f. 1st February, 2007 seeking an extension of service up to 26 years, which was, however, duly turned down as the permissible limit of service in the rank of PO(MER) is 23 years. The petitioner had also sought re-engagement for a further period of two years which was also declined since as per para 12 of the NO(Str) 17/96 it does not provide for further re-engagement of a sailor who has submitted the Lesser Period Certificate (LPC), and consequently, the petitioner was released from service in the rank of Petty Officer on 31st January, 2007.

16. The respondents emphasized that aggrieved by the order of his release w.e.f. 31st January, 2007, the petitioner had filed a petition in the Bombay High court, which was dismissed. Another petition was filed by the petitioner based on the Staff Minute Sheet dated 24th January, 2007 which was also dismissed. The writ petition that was filed by the petitioner as well as the review petition was disposed of. The respondents contended that in the OA before the Tribunal, the petitioner has again raised the same issues which had been declined twice by the Bombay High Court. It was also contended that the liberty granted to the petitioner to approach the respondents was thoroughly examined and duly replied to. Therefore allegation that the representation of the petitioner was not taken into consideration is not correct as the same was taken into account while computing the applicant's roster position at 82 as against the 70 vacancies available for promotion till 31st March, 2007. The respondents pleaded that no legal right of the petitioner has been jeopardized and that the petitioner is not entitled for any relief.

17. The Armed Forces Tribunal, Principal Bench, dismissed the original application of the petitioner's by order dated 4th May, 2011 holding that the Division Bench of the Bombay High Court had considered the pleas and contentions of the petitioner and relied on para 4 of the reply affidavit of the respondents detailing the Staff Minute Sheet dated 24th January, 2007 which was not disputed and it was stated to be in the order of merit. Consequently it was held that the grievances of the petitioner do not survive and therefore the petition was dismissed. The Tribunal, therefore, held that the grievances of the petitioner had already been taken into consideration and adjudicated upon. It was also held that since the decision of the Bombay High Court operates as a judicial precedent, on account of the principle of res judicata the same could not be interfered with by the Tribunal.

18. Aggrieved by the order of the Tribunal, the petitioner has filed the present writ petition, contending, inter-alia that the Tribunal has erred in passing a non-speaking and laconic order after admitting the OA and on completion of the pleadings. The petitioner contended that the Bombay High Court did not dispose of his petition by a speaking order and in any case in the review petition, the liberty to approach the respondents was granted to the petitioner regarding the non-appearance of the petitioner's name on the promotion roster.

19. The petitioner has alleged that he approached the respondents by letter dated 11th June, 2010 which was declined by the respondents by their letter dated 25th August, 2010 and thus, the petitioner has a fresh cause of action in his favour. The petitioner further emphasized that his case had not been heard on merit by the Bombay High Court.

20. The petitioner has contended that the order passed by the Bombay High Court was too laconic and does not fall within the ambit of the definition of a judgment. In support of this submission the petitioner relied on Balraj Taneja and Another Vs. Sunil Madan and Another, . The petitioner has also placed reliance on Cellular Operators Association of India and Others Vs. Union of India (UOI) and Others, . According to the petitioner, the dismissal of the writ petition by a non-speaking order neither attracts the doctrine of res judicata, or the doctrine of merger and therefore it is required to be heard on merits.

21. Learned counsel for the respondents who appears on advance notice has contended that the writ petition filed by the petitioner was decided by the Bombay High Court on merits as the Minute Sheet dated 24th January, 2007 was considered and held to be not disputed and was found to be in the order of merit and thus, it was consequently held that the grievances of the petitioner does not survive. It is contended by the learned counsel that though the order may be laconic, but it cannot be inferred that it is not on merits, and therefore, the plea of the petitioner that the principle of res judicata, as has been held by the Armed Forces Tribunal, shall not apply, is not correct.

22. This Court has heard the learned counsel for the parties. This is not disputed and cannot be disputed that by order dated 16th July, 2008 the Bombay High Court had held that the issue of re-engagement of the petitioner in the service does not arise as the petitioner has already retired. Regarding his grievance of promotion, it was held that he has an alternate remedy to approach the competent authority by making appropriate representation. The order dated 16th July, 2008 passed by the Bombay High court in W.P.(C) No. 1789/2007, titled as Surrender Kumar PO (UC-I) v. Union of India & Ors., is as under:-

P.C.:

1. Heard.

2. In view of the fact that the petitioner has retired, the issue of re-engagement in service does not survive. In so far as the grievance of the petitioner relating to

his promotion is concerned, he has alternative remedy to approach competent authority in the matter by making appropriate representation. Therefore, we are not inclined to entertain the Writ Petition. Petition is dismissed as withdrawn with liberty to represent his case for seeking promotion which according to him he is eligible and entitled during the course of his service.

23. The petitioner, thereafter, made a presentation which was also declined by the respondents. The petitioner, therefore, filed another writ petition being W.P. (C) No.101 of 2009 which was also disposed of by the Bombay High Court by order dated 8th April, 2009. The Bombay High Court had held that on taking into consideration the Minutes of the Staff Sheet dated 24th January, 2007 and finding it to be in the order of merit, the grievance of the petitioner does not survive. The writ petition was not dismissed in default of appearance of the petitioner and his counsel but was disposed of on merit considering the pleas raised on behalf of the petitioner. The order passed by the Bombay High Court on 8th April, 2009 is as under:- P.C.:

Nobody is present on behalf of the petitioner. In view of the statement made in para 4 of the reply affidavit wherein the Staff Minute Sheet dated 24th January, 2007 is not disputed and is stated to be in order of merit, grievance of the petitioner does not survive. There is no merit in the petition and the same is dismissed.

24. Aggrieved by the order dated 8th April, 2009, the petitioner had filed a review petition which was disposed of holding that there are no grounds to review the order dated 8th April, 2009. The order passed in the review application of the petitioner dated 11th December, 2009 is as under:-

P.C.:

We have heard learned counsel appearing for the parties. We find no appropriate justifiable ground for review of the order in question. It is contended by learned counsel appearing for the petitioner that his name does not appear on the roster. If that be so, he is at liberty to approach the respondents. The Petition is accordingly disposed of.

25. The learned counsel for the petitioner has relied on Balraj Taneja (supra), in which case a suit for specific performance was filed for an agreement for sale. In the suit, despite time given in accordance with law, the written statement was not filed within the time granted by the Court, therefore, the suit for specific performance was decreed under Order 8 Rule 10 of the Code of the Civil Procedure. The review application which was filed against the judgment/decreed was dismissed and the appeal filed against the judgment/ decree and the dismissal of the review application was also dismissed. While decreeing the suit, the Court had held as under:

Defendants are adopting this tactics only to protract the proceedings and have not filed the written statement and reply to the application in spite of sufficient

opportunity having been given. Accordingly, the suit is decreed for specific performance in favour of the plaintiff and against the defendants with directions to plaintiff to deposit the balance amount of Rs. 3,00,000/- (three lakhs only) in this Court within six weeks from today. If the amount is deposited within six weeks, it will be open for the plaintiff to apply for appointment of a Commissioner for the execution of the sale deed. The defendants are also directed to pay the cost of the suit.

The Supreme Court noticed that while decreeing the suit neither the facts were set out, nor were the reasons on the basis of which the Court felt that case of the plaintiff was true and stood proved were detailed. In the circumstances, it was held that the judgment was not a judgment as defined in Section 2(9) of the Code of Civil Procedure. It was further held by the Supreme Court that the Court is not absolved in its obligation to write the judgment as understood in common parlance as a judge cannot merely say "Suit decreed" or "Suit dismissed". In these circumstances, the decree for specific performance passed by the High Court was set aside.

26. The case of the petitioner is apparently distinguishable and the petitioner cannot contend that the judgments passed by the Bombay High Court are not judgments as per the provisions of the CPC. In any case, the judgments passed in the writ petitions cannot be equated with the judgments passed in the suits which are governed by Section 2(9) of the Code of Civil Procedure. Some of the provisions of the CPC may be applicable to the proceedings of the writ petition, however, the CPC cannot be applied so strictly for writ petitions.

27. In any case, the judgments dated 16th July, 2008 and 8th April, 2009 passed in W.P.(C) No.1789/2007 and W.P.(C) No.101/2009 are judgments, as the reasons given by the Bombay High Court, howsoever, laconic they may be are based on some rationale. While passing the order dated 8th April, 2009, it had been held that in view of the statement made in para 4 of the reply affidavit pertaining to Staff Minute Sheet dated 24th January, 2007 the grievance of the petitioner does not survive. By relying on the ratio of Balraj Taneja (supra), the petitioner cannot contend that the judgments of the Bombay High Court are not the judgments in the facts and circumstances, and consequently, the principle of res judicata will not be applicable.

28. Though, it is correct that in the application for the review filed by the petitioner he was given liberty to approach the respondents on the statement of the petitioner that his name did not appear in the roster but at the same time, the Bombay High Court upheld its judgment dated 8th April, 2009 holding that the petition of the petitioner had no merit and thereby dismissed the same.

29. The petitioner pursuant to order of the Bombay High Court giving him liberty to make a representation to the respondents, had filed the representation dated 11th June, 2010 which has been duly considered by the respondents. It was held that the name of the petitioner was identified to be in the promotion zone, as

about 20% of the sailors beyond the stipulated vacancies were also checked and considered to be in the promotion zone in order to meet the eventuality of sailors in higher roster position getting rejected for promotion. This has also been categorically contended that the "Red Recommendation" of the petitioner was considered and the roster position of the petitioner was moved from 95 to 82. The petitioner, however, could not be promoted as there were only 70 vacancies till March, 2007 and therefore, even after taking into account the "Red Recommendation", the petitioner could not be promoted to the Chief Petty Officer (CPO) rank.

30. In the circumstances, the allegation of the petitioner that his name does not appear on the roster is not substantiated. The name of the petitioner appeared on the roster and his "Red recommendation" was also considered and still on account of the petitioner being lower in the roster position and there being less number of vacancies, he was not promoted.

31. While disposing of the representation, the respondents have also considered the allegation of discrimination, however, the learned counsel for the petitioner has not raised any plea with regard to the alleged discrimination.

32. In the totality of the facts and circumstances, neither the order dated 25th August, 2010 rejecting the representation of the petitioner can be faulted, nor can the order of the Tribunal, Principal Bench declining to interfere with the orders of the respondents in view of the judgments of the Bombay High Court be faulted. Learned counsel for the petitioner is unable to point out any such illegality, irregularity, perversity or jurisdictional errors in the orders of the respondents which shall require any interference by this Court in exercise of its jurisdiction under Article 226 of the Constitution of India. The writ petition is without any merit, and it is, therefore, dismissed.