
(2013) 10 CAL CK 0020
In the Calcutta High Court

Case No : Writ Petition No. 866 of 2011 and G.A. No. 3693 of 2011

Suvra Kumar Dey

APPELLANT

Vs

The State of West Bengal and Others

RESPONDENT

Date of Decision : 09-10-2013

Acts Referred:

Citation : (2013) 10 CAL CK 0020

Hon'ble Judges : Aniruddha Bose, J

Bench : Single Bench

Advocate : Arun Kumar Maity, Mr. Susanta Pal and Mr. Biswajit Konar, for the Appellant; Pantu Deb Roy and Mr. Siddhartha Roy, for the Respondent

Final Decision : Disposed Off

Judgement

Aniruddha Bose, J.—Promotion of the petitioner to the post of superintendent in the Calcutta Tramways Company (1978) Limited is the subject of dispute in this writ petition. The petitioner had joined the said company as a peon in the year 1979 and thereafter selected for the post of clerk which, it is pleaded in the petition, is a promotional post. As pleaded, the petitioner has been serving in the post of clerk since 2nd February, 1982. The controversy in this matter is over his next promotion, to the post of Superintendent. The petitioner had once earlier approached this Court with a writ petition, registered as W.P. No. 1788 of 2008, with a complaint that some employees, who were junior to him, had been promoted to the post of Superintendent in violation of the terms of a memorandum bearing no. 10620/F, dated 19th December, 2000. The said memorandum contains the promotional policy of the company. There was an understanding between the contesting parties in connection with the dispute during the pendency of that writ petition and a compromise petition, being G.A. No. 1602 of 2011 was filed in W.P. No. 1788 of 2008. On the basis of such compromise, the writ petition was disposed of by an Hon'ble Single Judge by an order passed on 13th June 2013 to the following effect, on consent of the parties;-

After hearing the parties to the Writ Application and on consideration of the materials on record, the Respondent No. 4 is directed to consider the grievances of the Writ Petitioner supported by documents annexed to the Writ Application and the Supplementary Affidavit in connection thereto and to take a reasoned decision after giving an opportunity of hearing to the Writ Petitioner within three weeks from the date of communication of this order positively.

However, it is made clear that this Order shall not be treated as a precedent in any other case.

Since no Affidavit-in-Opposition has been filed by the Respondents, the allegations made in the Writ Application are not admitted.

The Writ Petition is disposed of without any Order as to costs.

All parties are to act on a signed photocopy of this order on the usual undertaking.

Thereafter, the petitioner was given opportunity of hearing and upon hearing the petitioner, an order was passed by the Managing Director of the company (respondent no. 4) on 22nd June, 2011. It was specified in the said order:-

The points to be reckoned are that the candidature of Shri Suvra Kumar Dey was not considered at all for the lapses of office though he had very much applied and that he was deprived and that his juniors were made to rise above him. In the personal opinion of the undersigned also Shri Suvra Kumar Dey is by no means inferior to any of the employees promoted to the post of Superintendent-B and Superintendent-A in November 2006 and November 2007 respectively. This lapse of not considering his legitimate case needs to be rectified though this cannot be equated with other normal cases of pay-protection as the circumstances in this particular case is apparently abnormal. The Hon''ble Calcutta High Court has also kindly observed -

However, it is made clear that this order shall not be treated as a precedent in any other case.

On that basis of above facts, the present writ petition as per solemn direction of the Hon''ble Calcutta High Court is disposed of with the following order -

(a) That Shri Suvra Kumar Dey will be deemed to have been promoted to the post of Superintendent-B with effect from 01.11.2006 and notional benefit to be awarded to him for this.

(b) That Shri Suvra Kumar Dey will be deemed to have been promoted to the post of Superintendent-A with effect from 01.11.2007 and notional benefit to be awarded to him for this.

(c) The actual effect of the benefit of promotion (now to the post of Superintendent-A) will however be allowed to Shri Suvra Kumar Dey, Superintendent-A with effect from 01.07.2011.

2. The petitioner however felt that his actual grievance was not considered properly and on 23rd June 2011 wrote to the respondent no. 4:-

This is for your kind information that I have received your order under reference and having gone through the same I understood that my actual prayer as made in W.P. No. 1788 of 2008 has not been considered properly.

I, therefore, request you to kindly keep in abeyance your order under reference and I shall further move before the Hon"ble High Court for redressal in this regard, as, there is no chairman in CTC presently. This letter is submitted without any prejudice.

3. On receiving the said communication, the Managing Director of the company by an order passed on 24th June, 2011, recalled the entire order by which the petitioner was granted promotion. In this order it was stipulated:-

On the basis of prayer submitted by Shri Suvra Kumar Dey, Law Clerk dated 23.06.2011 and received by this office on 24.06.2011, this Office Order No. MD/OR/1375 dated 22.06.2011 is hereby cancelled.

4. The petitioner approached this Court with a second writ petition, being W.P. No. 712 of 2011 (Suvra Kumar Dey Vs. The State of West Bengal & Ors.) questioning the validity of the said order passed on 24th June, 2011. On 26th July, 2011, the second writ petition was disposed of by an Hon"ble Single Judge of this Court with the following observations and directions:-

Having heard the learned Counsels appearing for the respective parties as also considering the facts and circumstances of this case, I find that by the order dated June 22, 2011 the respondent no. 4 accepted the claim of the petitioner and extended some benefits in his favour. No reason is assigned by the respondent no. 4 for canceling the above order by virtue of the impugned order. Therefore, the same cannot be sustained in law. At the same time, I find that the petitioner did not assign any reason for his dissatisfaction with regard to the order dated June 22, 2011.

In view of the above, the impugned order dated June 24, 2011 passed by the respondent no. 4 is quashed and set aside. Leave is granted to the petitioner to file a representation afresh before the respondent no. 4 stating reasons for his dissatisfaction with regard to the order dated June 22, 2011 passed by the respondent no. 4 within a period of two weeks from date. In the event such a representation is filed by the petitioner, the respondent no. 4 is directed to dispose of the same by passing a reasoned order in accordance with law within a period of six weeks from the date of receipt of the representation thereof.

Since no affidavit-in-opposition is filed by the respondents, the allegations raised against them in the writ application are to be treated as denied by them.

I make it clear that I have not entered into the merits of this case and all points are kept open.

This writ application is, thus, disposed of. There will, however, be no order as to costs.

5. The petitioner again wrote to the Managing Director of the company two letters dated 1st and 2nd August, 2011, copies of which have been made Annexures P7 and P8 to the writ petition respectively. By the first letter the petitioner sought to inform the Managing Director that the order of promotion was being accepted by him without prejudice to his rights and contentions. In the second letter, the petitioner in substance sought redressal of his grievances on two counts. First, his plea was that there was no existence of the post of superintendent "B" grade, to which post he was promoted at the initial stage. He wanted clarification from the employer to the effect that non-existence of the post of Superintendent B would not create any administrative problem in future. Secondly, he wanted direct cash benefit from the date of promotion on 1st November, 2006. He was given notional benefit by the Managing Director in his order of 22nd June, 2011 from that date. Subsequently, the petitioner had also requested for an identity card specifying his new designation. This communication was made on 3rd August, 2011.

6. It was thereafter a fresh order was issued by the Managing Director of the respondent company, which is under challenge in this writ petition. This order passed on 2nd September 2011 records the events pertaining to the subject controversy and also revokes the order of his promotion. It has been recorded in this order;-

I treat these three letters dated 1st August, 2011, 2nd August, 2011 and 3rd August, 2011 as your representations and dispose of the same on the ground that no reasons has been stated vis-?-vis your dissatisfaction as regards the order dated June 22, 2011, in your two letters being 1st August, 2011 and 3rd August, 2011, and, hence, owing to such lack of reason in connection with the said order dated June 22, 2011, I am unable to deal with your purported dissatisfaction, if any. You have stated your purported dissatisfaction only in your letter dated 2nd August, 2011, in which you have stated that the post bearing the nomenclature Superintendent B is a non-existent one, which is disputed by me. I clearly state that such post bearing the nomenclature Superintendent B is in existence and there is no reason to suspect or to prove that such a post bearing such nomenclature is non-existent. Moreover, you have not placed reliance on any document/s or rather the lack it which made you arrive at such a decision. I can only reiterate that the posts bearing nomenclature Superintendent B is very much in existence and it was in existence when such an order was issued to you promoting you to the post of Superintendent B. Secondly in your letter dated 02.08.2011, you have alleged that you have not got promotion in time, but you have stated nothing as regards the time when such promotion was due to you, and representations have been made by you as regards the denial of promotion to you. You have alleged that that promotion has been awarded to you with notional benefit with effect from 01.06.2006 and cash benefit with effect

from 01.07.2006, which is anomalous in terms of your said letter. In this regard, I wish to put on record that the said order granting promotion had already been cancelled by me, and such order of cancellation has been the subject matter of your writ petition. His Lordship after hearing the counsel for the parties was pleased to pass an order directing you to submit your reasons for dissatisfaction, if any, as regards the order dated 22nd June, 2011, and I have been directed to deal with it and pass a reasoned order as regards the same.

I most humbly state that since the question of submission of representation vis-?-vis your dissatisfaction as regards the said order dated 22nd June, 2011, remained open, the question of automatic revival of the order dated 22nd June, 2011, does not arise at all at the same time. It needs to be noted that in the said order, nothing has been written as to your conditional acceptance of the impugned order as well as stating your reasons for dissatisfaction as regards the said order simultaneously. You had been directed to submit your reasons for dissatisfaction vis-?-vis the order dated 22nd June, 2011, and in response to the same, you wrote three letters presuming automatic revival of the order dated June 22, 2011, accepting the terms of the same conditionally, leaving room for filing representations, as well as seeking new badge number for such promotional posts. I am of the opinion that two remedies cannot be pursued simultaneously.

Hence I deal with the contents of all the letters taken together and state that two remedies cannot be pursued together, that the post of Superintendent B was and still is in existence, since you have not stated as to when your promotions have become due, I am not in a position to state anything as regards your alleged denial of promotion.

On the grounds as stated above, I reject all your contentions.

Hence, since your observations are considered and rejected, there is no scope to grant you promotion or to issue new badge in connection with the same.

7. The respondents have contested this proceeding by filing affidavit-in-opposition. Their stand is that the petitioner was not promoted as he had avoided the competitive examination held for the promotional post of superintendent from the post of clerk. On the question of bifurcation of the cadre of superintendent into Category A and B, it has been submitted that such subdivision has been notified duly and was in existence all along. It has also been pleaded in the said affidavit that it is the prerogative of the employer to categorize cadres and an employee cannot have any objection to such categorization. In support of the order impugned, it has been stated that since the petitioner had raised grievance about his earlier order of promotion, originating from the order of the Managing Director of the company dated 22nd June 2011, and dissatisfaction being aired by the petitioner in respect of such order, the same was being recalled. It is also the case of the respondents that the decision of this Court in W.P. No. 712 of 2011 did not revive the order of

promotion automatically. It has further been submitted on behalf of the respondents that the petitioner would have to sit for the examination as and when it shall be conducted for the purpose of promotion from the post of clerk to Superintendent B category.

8. Learned counsel appearing for the petitioner has argued that the petitioner's request to keep the order of 22nd June, 2011 in abeyance was made as he had certain grievances concerning the manner in which the benefits were conferred on him. The petitioner had no grievance concerning the order of promotion itself and he had never sought for recalling that order. The decision of this Court in W.P. No. 712 of 2011 invalidated the order of cancellation of his promotion and thus, the order dated 22nd June, 2011 revived. In pursuance of liberty given by this Court in the decision delivered on 26th July, 2011, he made the representations primarily pertaining to grant of notional benefit and his initial promotion to the post of Superintendent in B category. The Managing Director of the organization had no jurisdiction to altogether upturn the order of his predecessor who found the petitioner eligible for promotion. He has relied on a judgment of the Hon'ble Supreme Court in the case of Union of India (UOI) and Another Vs. Hemraj Singh Chauhan and Others, to contend that right of promotion is fundamental right. Referring to the judgment of the Hon'ble Supreme Court in A.P.S.R.T.C. and Others Vs. G. Srinivas Reddy and Others, , he submitted that when a Court directs an authority to consider a case, such authority is required to apply his mind to the facts and circumstances of the case and then take the decision in accordance with law. Submission of the learned counsel for the petitioner is that the authority in this case did not examine his representations made in pursuance of direction of this Court contained in the order passed on 26th July, 2011, and traveled beyond the mandate of the Court.

9. On the question of requiring the petitioner to sit in the competitive examination, his submission is that this issue was being raised for the first time in the affidavit as an afterthought. The said issue was not spelt out in the order impugned or at any other point of time earlier. Relying on the judgment of the Hon'ble Supreme Court in the case of Mohinder Singh Gill and Another Vs. The Chief Election Commissioner, New Delhi and Others, , it has been submitted that such course is impermissible in law.

10. On behalf of the respondents, argument has been advanced before me in the line of the case made out in the affidavit-in-opposition. Contention of the respondents is that though the order passed by the employer on 24th June 2011 was set aside in W.P. No. 712 of 2011, the earlier order passed on 22nd June 2011 did not automatically revive as the Court had directed the petitioner to ventilate his grievances again. It was thereafter a reasoned order was passed canceling promotion of the petitioner.

11. In this writ petition, I shall examine first as to whether after the decision was delivered by this Court in W.P. No. 712 of 2011, it was open to the respondents to revoke the order for promotion passed on 22nd June 2011. In the order of this

Court passed on 26th July, 2011, His Lordship had been pleased to quash the order passed by the respondent no. 4, being the Managing Director of the company on 24th June 2011. By that order, the earlier order passed on 22nd June, 2011 by the same authority was sought to be cancelled. In the order of the Managing Director of the organization passed on 22nd June 2011, there was specific finding to the effect that there was lapse on the part of the employer in denying promotion to the petitioner. When an order of an authority is set aside by the Court, the natural consequence would be revival of the situation which existed prior to passing of the order which is eventually set aside. Unless of course the Court directs some different course to be followed. In the decision of this Court in W.P. No. 712 of 2011 leave was given to the petitioner to file representation afresh before the respondent no. 4 stating the reasons for his dissatisfaction with regard to the order dated 22nd June, 2011. The three letters issued by the petitioner, on 1st, 2nd and 3rd August, 2011 contain acceptance of the order of promotion, followed by outlining the grievances of the petitioner pertaining to the manner in which the order of promotion was sought to be implemented. The third letter, dated 3rd August, 2011 is not of much significance so far as the present proceeding is concerned, as in this letter only request has been made for taking certain formal measures for implementing the order for promotion. There was no substantive grievance of the petitioner against the order of promotion. He complained against sub-categorization of the post to which he was being promoted, and the date from which financial benefits pertaining to the promotional post was being conferred on him. His grievance being confined to these limited issues, in my opinion it was erroneous on the part of the concerned respondent to proceed in this matter treating the order of cancellation of promotion to have been retained. The sole implication of the order passed on 24th June 2011 was invalidation of the order for promotion. The said order having been set aside, and there being no direction to the effect that the order of promotion shall remain suspended, the order of promotion stood automatically revived. In his letter of 23rd June 2011 the petitioner himself had prayed for keeping the order for promotion in abeyance. But there is no material before me from which it can be inferred that the employer had acted on that basis. The respondent no. 4 had reacted to the said letter by invalidating his promotion, and it was in this manner the request of the petitioner to keep his promotion order in abeyance was acted upon. Thus, after the step taken by the respondent no. 4 in consequence of the petitioner's letter of 23rd June 2011 was invalidated by this Court, the letter of 23rd June 2011 cannot be said to have been resuscitated. Thus when leave was given to the petitioner to file representation, the order for promotion remained intact. There was no specific direction on the petitioner to file representation, and the right of the petitioner to make representation was preserved in the form of liberty granted to him. The implication of such leave was that the petitioner had a choice to file a representation. In the event the petitioner did not file the representation, then the only consequence of the order of this Court would have been revival of the order for promotion in terms of the communication dated 22nd June, 2011.

12. In such circumstances, the respondent no. 4 ought to have confined his enquiry on the issues raised in the representations of the petitioner, in which the complaint of the petitioner pertained to the manner in which the order for promotion was sought to be given effect to. I find from the aforesaid three letters of the petitioner that it was only in the letter dated 2nd August, 2011, his grievances were raised, and such grievances related to two specific issues. I have referred to in the earlier part of this Judgment these two issues. One relates to existence of the post of superintendent in categories A and B and the other relates to the issue of not granting him full cash benefit from the date of promotion, being 1st November, 2006. In this factual background, in my opinion, the respondent no. 4 ought not to have reopened the issue of promotion and altogether revoke the order of the same authority by invalidating the order of promotion of the petitioner. The respondent no. 4 committed error of law in observing that there was no automatic revival of order dated 22nd June, 2011, by which right of the petitioner to be promoted was recognized. While considering the representations of the petitioner, the respondent no. 4 has all along proceeded on the basis that the order of promotion stood invalidated. The respondent no. 4 addressed the issue of existence of the cadre of Superintendent B grade, but ignored the claim of the petitioner for full cash benefit from the date of his promotion. The reason for this, he opined, was that the order granting the petitioner promotion had been cancelled by him. This again was improper and erroneous approach, by which he sought to attribute to a Judgment certain implications which are not there in the Judgment, delivered in W.P. No. 712 of 2011. As held in the case reported in A.P.S.R.T.C. and Others Vs. G. Srinivas Reddy and Others, when the Court directs an authority to consider a case, such authority is required to apply its mind to the facts of the case and then take a decision thereon in accordance with law. In this case, the respondent no. 4 went beyond the scope of the dispute on which he was to take decision, and cannot be said to have acted in accordance with law. As regards the ratio of the Judgment of the Hon'ble Supreme Court in the case of Union of India vs. Hemraj Singh Chouhan (supra) is concerned, I do not think the said ratio is directly applicable in this case. This authority was cited on behalf of the petitioner in support of the proposition of law the right to be considered for promotion is virtually a part of fundamental right guaranteed under Article 16 of the Constitution of India. That question however does not require to be directly addressed to in this proceeding.

13. The petitioner at no point of time had raised any grievance over the substantive issue of granting him promotion after the W.P. 712 of 2011 was adjudicated upon. In fact, in that writ petition also his main complaint was against cancellation of the order of promotion already granted to him. His grievances related to consequential benefits, which he felt was not granted to him as per his entitlement. In terms of the order of Court the petitioner was given liberty, in the form of leave, to take up with the authorities by making representation on his dissatisfaction or grievances. Upon quashing of the order passed on 24th June, 2011, the promotional order had revived in its full vigour.

The respondent no. 4 was not given any leave or liberty by the Court to reopen the issue of grant of promotion to the petitioner.

14. It is also not open at this stage to the respondent no. 4 to raise the issue of clearing of competitive examination by the petitioner. In neither of the two orders dated 22nd June, 2011 and 2nd September, 2011, the question of the petitioner not having cleared the competitive examination was raised. Since the Managing Director of the company himself found in the order dated 22nd June, 2011, that there was lapse on the part of the company in not giving promotion to the petitioner, I do not think that question can be revived in this proceeding by raising this point for the first time in affidavit-in-opposition. The respondents cannot be permitted to improve their case in their affidavit on a point which was never raised by them earlier. The decision of the Supreme Court in the case of Mohinder Singh Gill (*supra*) deprecates such practice. As I am of opinion that the order for promotion of the petitioner is still in subsistence, and the stand of the respondents on this issue is erroneous, in this case I cannot permit the respondents to require the petitioner to sit for competitive examination as a condition precedent for getting promoted to the post of superintendent.

15. The impugned order dated 2nd September 2011, a copy of which has been annexed to the writ petition as "P-11" is accordingly quashed. The petitioner shall continue to serve in the post of Superintendent Group A and draw salary and other benefits for the said post in terms of the order passed by the respondent no. 4 on 22nd June 2011. The respondent no. 4 shall consider the question of granting full cash benefit to the petitioner independently. The decision in this regard shall be taken within a period of six weeks from the date of communication of this order.

16. On the question as to whether the staff pattern permits bifurcation of the post of superintendent into category A and category B, in my opinion, the petitioner has not come up with sufficient material to challenge this division. The primary onus lies with the plaintiff or the petitioner to establish his case. The petitioner in my opinion has failed to discharge the initial onus on this point. In these circumstances I accept the submission of the respondents that sub-categorization of the post of superintendent was within their power or authority.

17. The writ petition shall stand disposed of in the above terms. In the connected application, being G.A. 3693 of 2011, the petitioner has prayed for fixation of his promotional pay in terms of the order passed on 22nd June 2011. This application shall also stand disposed of in the above terms.

18. There shall be no order as to costs. Urgent certified photocopy of this order be made available to the parties if applied for, subject to compliance with all necessary requisite formalities.