(2013) 07 DEL CK 0496

In the Delhi High Court

Case No : Writ Petition (C) No. 4603 of 2013

Umesh Kumar APPELLANT

Vs

Union of India and Others RESPONDENT

Date of Decision : 23-07-2013

Acts Referred:

Constitution of India, 1950 — Article 226

Citation : (2013) 07 DEL CK 0496

Hon'ble Judges : Valmiki J Mehta, J

Bench : Single Bench

Advocate : Soumya Chakraborty and Mr. Anas Tanwar, for the Appellant; Amrit Pal Singh, CGSC and Mr. Gurjinder Kaur, for R-1, 2 and 5, for the Respondent

Final Decision : Dismissed

Judgement

Valmiki J Mehta, J.—This writ petition is filed by the petitioner Sh. Umesh Kumar effectively seeking continuation of his tenure as Member (Finance) with respondent No. 3/Damodar Valley Corporation as Financial Advisor. Petitioner was appointed as a Financial Advisor with the respondent No. 3 by the order/ letter dated 7.9.2009 read with notification dated 30.9.2009 for a period of five years or till further orders. Entitlement of any person to continue in a post ordinarily can only be if there is an order of a specific/fixed tenure appointment. If there is no fixed tenure of appointment, and even if there is a fixed tenure of appointment but which is subject to further orders, such a tenure can always be brought to an end by appropriate orders of the employer.

2. Petitioner when he was appointed with the respondent No. 3 by the order dated 7.9.2009, came on deputation to respondent No. 3 from his parent organization which was Jharkhand State Electricity Board. Petitioner in terms of the order dated 7.9.2009 and the notification dated 30.9.2009 was continuing in the post of Financial Advisor of the respondent No. 3, and when the Damodar Valley Corporation Act, 1948 under which the respondent No. 3 was formed was amended by the DVC (Amendment) Act, 2011 whereby in Section 44 of the

Principal Act in sub-Section(1) Financial Advisor was to be substituted by Member (Finance), this post of Member (Finance) was created on full time basis.

3. Petitioner by the letter dated 6.3.2012 was asked by the respondent No. 3 that since the post of Financial Advisor of respondent No. 3 has been abolished, does the petitioner agree and give consent for his continuation as Member (Finance) as an interim arrangement. To this offer, the petitioner by his acceptance letter dated 6.3.2012, gave his unconditional consent to be a Member (Finance) as an interim arrangement. Therefore, the fact of the matter is that the petitioner''s appointment which was originally made in terms of the order dated 7.9.2009 and notification dated 30.9.2009 as Financial Advisor, became appointment as a Member (Finance) as an interim arrangement i.e. a post with no specific tenure.

4. At this stage, it will be relevant to state that petitioner in a way can be said to be guilty of concealment of material facts when approaching this Court because while the petitioner has filed the order dated 7.9.2009, however, the detailed terms and conditions of the appointment of the petitioner as Financial Advisor of respondent No. 3 have not been filed. The object of concealment could be that as per the terms and conditions of appointment (as Financial Advisor of the respondent No. 3), there would have been specified in the detailed terms lack of fixed tenure appointment because after stating the period of appointment as 5 years, the terms would have stated that the appointment was till further orders. In fact, this is also made very clear in first part of the order dated 7.9.2009 and which specifically states that appointment is for 5 years from the date of assumption of charge or until further orders.

5. In the earlier writ petition W.P. (C) No. 2704/2012 filed by the petitioner which was disposed of by the order of this Court dated 29.4.2013, more or less and effectively the same reliefs which are sought in the present petition were claimed. That writ petition was disposed of by the following order:-

CM 5122/2013 (Exemption)

Exemption allowed subject to just exceptions.

CM stands disposed of.

W.P. (C) 2704/2013 & CM 5121/2013

1. Learned senior counsel for the petitioner states that petitioner has been repatriated only because arrest warrants had been issued against him, but arrest warrants have been cancelled by the judgment dated 21.03.2013 of a learned Single Judge of the High Court of Jharkhand.

2. Without in any manner commenting as to whether or not repatriation was or was not only on the basis of warrants of arrest, since the petitioner has filed a representation dated 12.04.2013 to the respondent No. 1 (which representation however is not on the record of this writ petition), this writ petition and

application for stay are dismissed as withdrawn for the present with a direction to the respondent No. 1 to consider and dispose of the representation dated 12.04.2013 in accordance with law, within a period of six weeks from today.

Writ petition and application for stay are accordingly dismissed as withdrawn subject to the aforesaid observations.

6. The order dated 29.4.2013 in W.P. (C) No. 2704/2013 was passed because petitioner contended that the only ground for his repatriation from the respondent No. 3 to his parent department in Jharkhand State Electricity Board was that certain warrants of arrest were issued but this aspect was incorrect because those warrants of arrest were quashed by the High Court of Jharkhand. Accordingly, the earlier writ petition was disposed of with the direction for passing of an order as to whether the ground of repatriation was only because of the warrants of arrest, and which if was the only ground, and the warrants of arrest having been quashed, possibly the repatriation order may not then be passed.

7. Pursuant to this order of this Court dated 29.4.2013, Secretary of Ministry of Power has passed the following order dated 5.6.2013 upholding repatriation of the petitioner:-

Subject: Civil Writ Petition No. 2704 filed before the Hon''ble Delhi High Court Titled as Umesh Kumar Vs. Union of India & ors.

In the aforesaid Writ Petition the Hon''ble Delhi High Court on 29.4.2013 has passed an order as under:-

Quote

Without in any manner commenting as to whether or not repatriation was or was not only on the basis of warrants of arrest, since the petitioner has filed a representation dated 12.04.2013 to the respondent No. 1 (which representation however is not on the record of this writ petition), this writ petition and application for stay are dismissed as withdrawn for the present with a direction to the respondent No. 1 to consider and dispose of the representation dated 12.04.2013 in accordance with law, within a period of six weeks from today. Writ petition and application for stay are accordingly dismissed as withdrawn subject to the aforesaid observations.

I have carefully perused the representation given by the petitioner Shri Umesh Kumar in regard to his repatriation to his parent cadre i.e. Jharkhand State Electricity Board (JSEB) and the relevant file of the Ministry of Power.

2. Shri Umesh Kumar was appointed Financial Advisor (FA) to the Damodar Valley Corporation on 22.9.2009 for a period of five years or until further orders. However, the DVC Act was amended on 8.1.2012 and the said amendment was duly published in the official Gazette Notification, Govt. of India on 9.1.2012 also. As per this amendment, the Corporation has been reconstituted with inter alia,

creation of a corporation (Board) level position namely Member, Finance. As intimated to Shri Umesh Kumar vide letter No. 1/1/2012-DVC dated 6th March, 2012, the post of Financial Advisor, DVC was abolished. A full time Board level post of Member (F) has been created and FA is a below board level position.

3. In his representation, Shri Umesh Kumar has alleged that he has been repatriated to his parent cadre only on the basis of the arrest warrant issued against him by the State Vigilance Department. I have perused the internal noting of the department on the said subject. From the facts on file it appears that Chairman, DVC vide his letter dated 26.02.2013 has raised certain issues with regard to the functioning of Shri Umesh Kumar stating inter alia that Shri Kumar has not protected the interests of DVC at times. These were also taken into consideration while deciding his repatriation to his parent cadre. The allegations of Shri Kumar are thus unfounded.

4. The PESB is likely to notify the vacancy of Member (Finance) Damodar Valley Corporation very soon and Shri Umesh Kumar is at liberty to apply for the said post of Member (Finance), DVC as and when notified by the PESB. Since the post of Member (Finance) in DVC was vacant, the charge has been given to Shri A.G. West Kharkongar, Director (Finance), North Eastern Electric Power Corporation Ltd. (NEEPCO) on 26.4.2013.

5. The representation of Shri Umesh Kumar is accordingly disposed off with the observation that as and when the vacancy of Member (Finance), DVC is notified, he is at liberty to apply for the same. A copy of the order be sent to Shri Umesh Kumar.

8. It is this order dated 5.6.2013 which is impugned before me on the following grounds:-

(i) The order has been passed without complying with the principles of natural justice of giving a personal hearing to the petitioner.

(ii) The order records for the first time that there has been remarks against the petitioner of not protecting the interest of respondent No. 2 at times and which averments are wholly incorrect.

(iii) Petitioner is entitled to continue as Member (Finance) of the respondent No. 3 because actually the original post of Financial Advisor has been substituted with the post of Member (Finance) and unless the post of Member (Finance) is filled in, petitioner cannot be repatriated by removing him from the post of Member (Finance).

9. In my opinion, the writ petition is quite clearly an abuse of the process of law. No doubt, persons may want to stick on to high posts to which they are appointed, however, there has to be some basic respect for the appointment process and orders passed for termination of appointment by the employer and repatriating the employee to the parent organization.

10. It is trite that an employee continues at the requirement and pleasure of the employer, and which is more so in the present case, for two very important reasons. First is that the petitioner''s tenure of appointment as Financial Advisor with the respondent No. 3 was not a fixed tenure of 5 years. This is clear from the appointment letter dated 7.9.2009 itself and the notification dated 30.9.2009 which specifies that the appointment is for 5 years or till further orders, whichever event takes place earlier i.e. even before the expiry of 5 years, the petitioner at the pleasure of the employer-respondent No. 3 can be repatriated and his appointment can be cancelled. The second important reason is that the appointment to the post of Financial Advisor of the respondent No. 3 no longer existed after the petitioner accepted his appointment as the Member (Finance) only as an interim arrangement with the respondent No. 3 in terms of his unconditional consent letter dated 6.3.2012 and in view of his acceptance letter dated 6.3.2012, hence he is estopped from contending that the post of Financial Advisor is the same as Member (Finance), especially when in fact and reality also it is not so. Therefore, what emerges is that neither the original appointment was a fixed tenure period and nor is the present appointment a particular/fixed tenure appointment which is sought to be cancelled before the expiry of the tenure.

11. There is no requirement that a personal hearing has to be given with respect to administrative orders which are passed by the State for bringing an appointment such as the one in the present case to an end, especially when the appointment itself is admittedly not a fixed tenure appointment but only an interim arrangement. As already stated above, petitioner had given his unconditional acceptance to his appointment as Member (Finance) only as an interim arrangement vide his letter dated 6.3.2012. With respect to an administrative order of repatriation, there is no requirement of following of the principles of natural justice.

12. Learned counsel for the petitioner has placed reliance upon the following paras 33 and 34 of the judgment in the case of B.P. Singhal Vs. Union of India (UOI) and Another, to argue that ''pleasure'' is not an unfettered discretion:-

33. The doctrine of pleasure as originally envisaged in England was a prerogative power which was unfettered. It meant that the holder of an office under pleasure could be removed at any time, without notice, without assigning cause, and without there being a need for any cause. But where rule of law prevails, there is nothing like unfettered discretion or unaccountable action. The degree of need for reason may vary. The degree of scrutiny during judicial review may vary. But the need for reason exists. As a result when the Constitution of India provides that some offices will be held during the pleasure of the President, without any express limitations or restrictions, it should however necessarily be read as being subject to the "fundamentals of constitutionalism". Therefore in a constitutional set up, when an office is held during the pleasure of any Authority, and if no limitations or restrictions are placed on the "at pleasure" doctrine, it means that

the holder of the office can be removed by the authority at whose pleasure he holds office, at any time, without notice and without assigning any cause.

34. The doctrine of pleasure, however, is not a licence to act with unfettered discretion to act arbitrarily, whimsically, or capriciously. It does not dispense with the need for a cause for withdrawal of the pleasure. In other words, "at pleasure" doctrine enables the removal of a person holding office at the pleasure of an Authority, summarily, without any obligation to give any notice or hearing to the person removed, and without any obligation to assign any reasons or disclose any cause for the removal, or withdrawal of pleasure. The withdrawal of pleasure cannot be at the sweet will, whim and fancy of the Authority, but can only be for valid reasons.

13. The aforesaid observations which were made by the Supreme Court in the case of B.P. Singhal (supra) were with respect to removal from the office of a Governor, a constitutional post, and which is definitely not so in the facts of the present case, more so because the appointment of the petitioner was specifically only till further orders and subsequently also admittedly as per the petitioner''s unconditional consent "as an interim arrangement" only. Therefore, the observations which have been made in the case of B.P. Singhal (supra) have no application to the facts of the present case.

14. Therefore, in my opinion, it is not permissible for the petitioner to contend that the impugned order dated 5.6.2013 be set aside and the petitioner be allowed to continue as Member (Finance) of the respondent No. 3.

15. The order dated 5.6.2013 of the Secretary of Ministry of Power which has been reproduced above shows that the petitioner has been repatriated not only because of the arrest warrants but because of two other additional reasons. First additional reason is that the post of Member (Finance) is being filled in through the regular recruitment process and petitioner has complete liberty to apply for the same and seek appointment. The second reason is that petitioner was found to be lacking in protecting the interest of respondent No. 3 at times.

16. No doubt, the action of an employer, even of repatriation, cannot be wholly and completely arbitrary, however, judicial review in these types of matters is extremely limited. This Court cannot substitute itself for the employer with respect to satisfaction of the services of an employee. Unless and until ex facie gross injustice or arbitrariness is found, Courts will not interfere with administrative decisions which bring about termination of appointment to a post by repatriation of a person to the parent department. In the present case, the issue is quite clearly more so against the petitioner, and as already many a times repeated above, that the petitioner''s appointment was only an interim arrangement, and in fact, presently, there is a process going on for full time appointment of Member (Finance) of the respondent No. 3. Petitioner in case he wants appointment as Member (Finance), is surely entitled to apply in the process and which is made clear by the impugned order dated 5.6.2013. The

petitioner however cannot contend that till the appointment process comes to an end, he is bound to be continued in the post of Member (Finance).

17. Counsel for the petitioner also placed great stress and reliance upon the meaning of the word ''substitution'' as held by the Supreme Court in para 22 of the judgment of State of Maharashtra Vs. The Central Provinces Manganese Ore Co. Ltd., and which reads as under:

22. A principle of construction contained now in a statutory provision made in England since 1850 has been:

Where an Act passed after 1850 repeals wholly or partially any former enactment and substitutes provision for the enactment repealed, the repealed enactment remains in force until the substituted provisions come into operation.

(See: Halsbury''s Laws of England, Third Edn. Vol. 36, P. 474; Craies on'' "Statute Law", 6th Edn. p.386).

Although, there is no corresponding provision in our General Clauses Acts, yet, it shows that the more use of words denoting a substitution does not ipxo facto or automatically repeal a provision until the provision, which is to take its place becomes legally effective. We have as explained above, reached the same conclusion by considering the ordinary and natural meaning of the term "substitution" when it occurs without anything else in the language used or in the context of it or in the surrounding facts and circumstances to lead to another inference. It means, ordinarily, that unless the substituted provision is there to take its place, in law and in effect, the pre-existing provision continues. There is no question of a "revival".

18. Once again, reliance in this regard on the aforesaid para 22 is misconceived because petitioner unconditionally gave consent for his appointment to the new post of Member (Finance) and that too only as an interim arrangement. Once that is so, it does not lie in the mouth of the petitioner to harp on the old post for continuing as Financial Advisor. Also, once the regular recruitment process has been initiated for appointing Member (Finance) for respondent No. 3, I do not think, and I am of the opinion that, there is any entitlement in the petitioner to continue as a post of Member (Finance) and by preventing his repatriation in accordance with the wishes of the employer to his parent department viz. Jharkhand State Electricity Board.

19. The history of litigation in the present case shows that desperate attempts on behalf of the petitioner are being made somehow or the other to continue in the post of Member (Finance) of the respondent No. 3 and for which purpose since March petitioner is on leave and has not joined his parent organization. This is impermissible. Petitioner''s appointment was an interim arrangement and the employer is best suited to decide suitability for continuation of a person on the post and this Court would definitely not like to substitute that opinion of the employer in the facts of the present case.

20. Counsel for the petitioner also contended that the advertisement in question by which the respondent No. 3 is seeking to appoint Member (Finance) should be quashed, because no recruitment rules have been framed. Once again, this argument is wholly misconceived because no doubt recruitment rules ordinarily ought to be framed for ensuring consistency with respect to qualifications and other procedure of appointment, however, there is no law that unless and until recruitment rules are framed, no appointment whatsoever can be made inasmuch as exigencies of appointment in a new post may require expeditious action created on account of administrative or other urgent reasons and hence is the requirement for filling up the post. Once the requisite qualifications for appointment are decided by the appropriate authority in the respondent No. 3, and which requirement of qualifications as also other procedural requirements are uniformly applied for appointment in a post, the process of recruitment initiated for the post of Member (Finance) cannot be stalled by the persons such as the petitioner. I really fail to understand the recalcitrant attitude of the petitioner of not wanting the regular recruitment process to go ahead. Obviously, this is because the petitioner somehow or the other and in one way or the other wants to continue in a post which he cannot continue including for the reason that terms of the appointment do not so entitle as there is lack of satisfaction of the employer.

21. Petitioner may want to contend that Courts should examine the validity of the fact which is stated in the impugned order dated 5.6.2013 that the petitioner has not been protecting the interest of respondent No. 3 at times, however, in administrative decisions such as those encompassed in the order dated 5.6.2013, and especially also because of existence of disputed questions of fact, as to whether or not petitioner has or has not protected the interest of respondent No. 3, I am disinclined to examine this aspect in a writ petition under Article 226 of the Constitution of India.

22. The upshot of the above discussion is as under:-

(i) The petitioner''s original appointment as Financial Advisor of respondent No. 3 was not a fixed tenure appointment but was for a period of 5 years or only until further orders, whichever is earlier.

(ii) The post of Financial Advisor was brought to an end and a full time Member (Finance) post was created by the respondent No. 3.

(iii) Petitioner unconditionally accepted his continuation as Member (Finance) of the respondent No. 3 as an interim arrangement only.

(iv) An employer is always competent to decide whether or not to continue the interim arrangement or to repatriate an officer to his parent cadre.

(v) Principles of natural justice do not have to be followed in administrative orders of repatriation of an employee, and with which orders Courts ordinarily do not interfere more so when disputed questions of fact are involved and there are other valid reasons for repatriation of an employee including the aspect of lack of protecting the interest of respondent No. 3/employer.

(vi) Petitioner malafidely wants to continue in the post although the respondent No. 3 wants to fill in the post of Member (Finance) by selecting the best person for the job through the open competition by calling candidates by inserting advertisement in newspaper.

(vii) The impugned order dated 5.6.2013, though could be better worded, but it is not the law that administrative authorities must like a judgment of a civil court pass a very detailed order. Once the substance and reasons become clear, courts would not like to substitute their opinion with the opinion of the employer, more so on the aspect of continuation of an interim arrangement post.

In view of the above, the writ petition is accordingly dismissed with costs of Rs. 50,000/-. Respondent No. 3 can recover the costs in accordance with law.