
(2006) 11 GAU CK 0038
In the Gauhati High Court

Union of India (UOI) and Others

APPELLANT

Vs

Pradip Kumar Acharjee and Others

RESPONDENT

Date of Decision : 07-11-2006

Acts Referred:

Constitution of India, 1950 — Article 226, 227
Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 — Section 2, 47

Citation : (2007) 1 GLT 601

Hon'ble Judges : B.D. Agarwal, J;A.H. Saikia, J

Bench : Division Bench

Judgement

A.H. Saikia, J.—Heard Mr. S. Sharma, learned Standing Counsel, N.F. Railway appearing for the petitioners as well as Mr. G. K. Bhattacharjee, learned Sr. counsel assisted by Mr. B. Choudhury, learned Counsel representing the respondent No. 1.

2. By means of this writ petition filed under Articles 226/227 of the Constitution of India, the petitioners have sought for issuance of writ of or in the nature of Certiorari and/or Mandamus and/or any other appropriate writ, order or direction for quashment of the impugned judgment and order dated 27.4.2001 passed by the Central Administrative Tribunal Guwahati Bench (for short, "the CAT") in O.A. No. 172, of 1998.

3. On close perusal of the impugned judgment and order, it appears that the respondent No. 1, being aggrieved by the order dated 24.6.98 (i) promotion the nine officers, respondent Nos. 2 to 10, being junior to him, to the rank of Assistant Electrical Engineer superseding the respondent No. 1 as well as (ii) the selection process including the select list prepared by the Selection Committee for the post of Assistant Electrical Engineer Group-B against the 70% vacancies, moved the application being O.A. No. 172/98 before the CAT seeking interference with the said order of promotion by which the respondent No. 1 was superseded without considering his case for promotion though he fell within the zone of

consideration for such promotion.

4. The CAT, by the impugned order, upon hearing the learned Counsel for the parties as well as on proper scanning of the materials available on record including the pleadings exchanged by and between the parties, passed the following orders:

....The respondents are accordingly directed to hold a review DPC towards selection against 70% vacancies drawn on 3.6.1998 on the basis of the available records mentioned therein. For the sake of fairness we feel that the respondents should also take steps to cause fresh medical examination of the applicant. The respondents are further directed to complete the above exercise as expeditiously as possible, preferably within a period of three months from the date of receipt of the order by holding a review DPC as well as fresh medical examination of the applicant.

5. Dissatisfied with the said direction, this writ petition has been filed as mentioned above basically on the grounds--that (1) the CAT ought not have interfered with the selection process for the promotion to the post of Assistant Electrical Engineer i.e. from Grade "C" to Grade "B" post directing to hold a review DPC on evaluation of the relevant A.C.Rs. of the applicant itself and thereby it exceeded in its jurisdiction and (2) since the respondent No. 1 was earlier medically found to be unfit for promotion in terms of report dated 25.5.98 by which the concerned Officer remarked that the respondent No. 1 was not to be connected with train working or use of trolley", the question of causing fresh medical examination on the respondent No. 1 in view of the above direction, did not arise.

6. Initially while the writ petition was moved, this Court vide order dated 20.12.2001, by issuing notice of motion, in the interim, passed the following order:

Till the matter is taken up after notice, the impugned judgment of the Central Administrative Tribunal, Guwahati Bench dated 27.4.2001 in O.A. No. 172/98 (as in Annexure-6 to the writ petition) shall remain stayed.

7. However, by order dated 4.4.03, this Court upon hearing the learned Counsel for the parties at the time of entertaining the Misc. Application No. 384/03 preferred by the respondent No. 1, vacated the interim order of stay passed on 20.12.2001 as referred to above.

8. Eventually, this writ petition was admitted to be heard on 20.6.2003 and by the same order, on the basis of the submission advanced by the learned Counsel for the respondent No. 1 to the effect that the Department was going to conduct a limited departmental competitive examination for promotion to four posts of Assistant Electrical Engineer Group-B and if the respondent No. 1 was not being permitted to appear in the said examination or his case was not being considered taking into consideration his ACRs. for the year 1993-94 and 1995-96, he would

suffer irreparable loss and injury, this Court directed that the petitioners/ Department should keep one post out of consideration for promotion as Assistant Electrical Engineer Group-B till disposal of the writ petition.

9. During the pendency of the writ petition and when the order dated 20.6.03 above was in force, an attempt was made by the petitioners to fill up 70% vacancies by initiating process of selection by issuing a Notification dated 9.5.05 and the respondent No. 1 apprehending to be prejudiced by such selection process, approached this Court by filing Misc. application No. 1762/05 for staying the abovementioned selection process for Assistant Electrical Engineer (Grade "B") against 70% vacancies in terms of Notification dated 9.5.05 and this Court on 29.8.05 after hearing the learned Counsel for the parties passed the following relevant orders:

Considering the direction given by the learned Tribunal, Guwahati Bench in O.A. No. 172/98 by order dated 27.4.01 and the order dated 20.6.03 passed by this Court, we direct that the respondent/authority may proceed with the selection process in pursuance of the notification dated 9.5.05 (Annexure-A) but shall not make any appointment without the leave of this Court. In the meantime, the respondent/authority is directed to comply with the direction given by the learned Tribunal in O.A. No. 172/98 vide order dated 27.4.01 and the order passed by this Court on 20.6.03.

10. Thereafter, the Union of India/petitioners filed Misc. application being MC Case No. 211/2006 arising out of W.P. (C) No. 7249/2001 praying for modification/vacation of the interim order dated 29.8.2005 passed in Misc. case No. 1782/ 2005 as already quoted above. In the instant Misc. application, the petitioners informed the Court that since the stay of the impugned judgment and order was already vacated on 4.4.03, pursuant to the direction of the CAT given in the impugned judgment and order, the medical examination was caused upon the respondent No. 1 on 16.1.06 and he was found medically unfit for promotion to Grade-"B" post in technical category for" sub-standard vision" and to this effect a Certificate of Fitness of Employees for Promotion from Non-Gazetted to Gazetted post (Group "B") was issued on 16.1.06 which was annexed as Annexure-2 to Misc. Case No. 211/06.

11. In view of such medical examination, being a condition precedent for consideration of promotion of respondent No. 1 from Group "C post" to Group "B" posts, by which the respondent No. 1 was found to be medically unfit, the petitioners have complied with the direction given by the impugned judgment and order and this writ petition has therefore, become infructuous.

12. However, this Court on 27.2.06, instead of closing the writ petition as being infructuous, disposed of the Misc. case No. 211/06 modifying the order dated 29.8.06 passed in Misc. Case No. 1782/05 which reads as follows:

....This court vide its order dated 29.6.05 in MC No. 1782/05 having considered the direction given by the Central Administrative Tribunal, Gauhati Bench in OA

No. 172/98 by order dated 27.4.01 and as well as the order dated 26.6.03 passed by this Court directed the respondent Railway Authorities to proceed with the selection in pursuance of the notification dated 9.5.05 but did not make any appointment without leave of this Court.

This order, in our considered opinion, requires modification as it served as a bar by stalling the whole selection process. The selection and appointment pursuant to the notification dated 9.5.05 shall be subject to further orders to be passed in the writ petition. The very selection process need not be interrupted at this stage. The order is accordingly modified.

13. In the course of hearing of the instant petition on 3.11.06, Mr. Sharma, learned Standing Counsel, N. F. Railway, reiterating his earlier stand taken in Misc. Application No. 211/06, has contended that impugned judgment and order and this writ petition has therefore, become infructuous.

14. However, this Court on 27.2.06, instead of closing the writ petition as being infructuous, disposed of the Misc. case No. 211/06 modifying the order dated 29.8.06 passed in Misc. Case No. 1782/05 which reads as follows:

....This court vide its order dated 29.6.05 in MC No. 1782/05 having considered the direction given by the Central Administrative Tribunal, Gauhati Bench in OA No. 172/98 by order dated 27.4.01 and as well as the order dated 26.6.03 passed by this Court directed the respondent Railway Authorities to proceed with the selection in pursuance of the notification dated 9.5.05 but did not make any appointment without leave of this Court.

This order, in our considered opinion, requires modification as it served as a bar by stalling the whole selection process. The selection and appointment pursuant to the notification dated 9.5.05 shall be subject to further orders to be passed in the writ petition. The very selection process need not be interrupted at this stage. The order is accordingly modified.

15. In the course of hearing of the instant petition on 3.11.06, Mr. Sharma, learned Standing Counsel, N. F. Railway, reiterating his earlier stand taken in Misc. Application No. 211/06, has contended that in view of the Medical Certificate dated 16.1.06 above, the direction given in the impugned judgment has been implemented and as such, this writ petition may be closed on becoming infructuous.

16. To-day also when the matter has been taken up for further hearing, Mr. Sharma has placed before us an additional affidavit dated 7.11.06, renewing his earlier prayer to close the writ petition as being infructuous, stating therein that causing of medical examination is a condition precedent for a holding a review of DPC because only those who are qualified in the medical examination with the prescribed standard shall only be called for viva-voce. In other words, before consideration for promotion of the incumbent from the post of Grade "C to Grade -B" in technical cadre, one must be medically examined first proving his fitness

for the job.

17. Learned Standing Counsel has also referred to Paras 530 and 532(3) of Indian Railway Medical Manual Volume-1 Third Edition-2000 corrected up to 30.9.99 (for short, "the Manual") which has been annexed as Annexure-5 to the writ petition.

18. Paras 530 and 532(3) of the Manual may be noticed as under:

530. Classification of gazetted posts for the purpose : For the purpose of examination of visual acuity of Railway employees promoted from non-gazetted to gazetted posts, the gazetted posts should be divided into two categories as follows:

(a) AH posts of Mechanical, Electrical, Civil and S. & T. Engg. and Traffic (Transportation and Commercial) Department.

(b) All posts of other departments which are not connected with train working or use of trolley on open line.

532 (3). All employees promoted to gazetted cadre from non-gazetted cadre will be examined for visual acuity and colour vision as per standards mentioned above irrespective of their medical category I the non-gazetted cadre.

19. An ordinary reading of those above the case at hand, the ground taken by the learned standing counsel for the petitioner for closure of the writ petition as infructuous as the respondent No. 1 is found to be unfit, is not a valid and legal one as the direction so given by the CAT has not yet been complied with in its letter and spirit which is clearly evident from the pleadings filed on behalf of the petitioners N.F. Railways as well as from the submissions canvassed on their behalf because the petitioners have failed to hold a review DPC towards selection against 70% vacancies and as such the vital part of the direction i.e. consideration of the case for promotion of respondent No. 1 from the post of Grade "C" to Grade "B", has not yet been complied with till date. In such backdrop of the factual premises, it cannot be said by any stretch of the imagination that the impugned judgment and order has wholly been complied with and as such it is submitted that such circumstances should not influence and persuade this Court to declare this writ petition to be rendered infructuous.

20. Having given our anxious consideration to the rival contentions advanced on behalf of both the parties as well as upon meticulous examination of the materials available on record including the pleadings of the parties, it transpires that the writ petition has been filed by the N.F. Railway/petitioners challenging the impugned judgment and order containing the direction given against the interest of the N.F. Railway.

21. But. the impugned judgment and order has at no point of time been challenged by the respondent No. 1 before this Court. Even non-compliance of the impugned order has not also been raised before any appropriate forum by

filing appropriate application.

22. What reveals from the perusal of the materials available on record is that though initially the stay of the impugned judgment was granted, the same was later on vacated by the order as indicated above and thereafter the modified order dated 20.6.03 in this writ petition was passed to the extent of directing the Union of India/N.F. Rly, to keep one post vacant out of consideration for promotion as Assistant Electrical Engineer Group B till disposal of the writ petition.

23. It also appears that during the pendency of the writ petition, in view of the direction given on 29.8.05 in Misc. Case No. 1782/05, the petitioners have initiated for medical examination of the respondent No. 1 and accordingly, on 16.1.06 he has been medically examined and is found him to be unfit for promotion to Grade B post in technical category for "substandard vision".

24. The said fact situation of medical examination has also been highlighted before this Court by filling Misc. application No. 211/06. However, this Court by order dated 27.2.06 rendered in the said Misc. case gave direction to proceed with the selection and appointment in pursuance of the notification dated 9.5.05 as mentioned above which was the subject matter in Misc. Case No. 1782/05, opining that in view of the order dated 29.8.05 no similar direction was necessary and it was open to the respondent to initiate appropriate steps as against the Railways for non-compliance of the order dated 29.8.05. However, it is seen from the records made available before us that no steps have been taken by the respondent No. 1 for non-compliance of the order dated 29.8.05, if any.

25. At this juncture, Mr. Bhattacharjee, learned Sr. counsel, raising the plea of the application of the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995 (1 of 1996) (for short, "the Act"), has strenuously argued that once the respondent No. 1 is found to be medically unfit, his case ought to have been considered u/s 47(2) of the Act which provides that no promotion shall be denied to a person merely on the ground of his disability. However, the writ petitioners have failed to carry out in the instant case their statutory obligation so entrusted upon them by the statute book.

26. Per contra, Mr. Sharma, learned Counsel for the N.F. Railway, refuting the statements made by Mr. Bhattacharjee, has straightway submitted that no such pleading has been set out by the respondent No. 1 before the CAT nor even before this Court when they have exchanged their pleadings. Drawing attention of the Court to the application in O.A. No. 172/98, Mr. Sharma has read out each and every averments so narrated by the respondent No. 1 as applicant therein to support his submission. It is stated that the respondent No. 1's only case was for quashment of the order dated 24.6.98 (Annexure X of the said application) by which the respondent No. 1 was superseded by his juniors, Respondent Nos. 2 to 10 herein, ignoring his claim for promotion to the post of Grade "B" and nowhere in the said petition he claimed that he was a person with disability i.e. person

with low vision as defined under Sections 2(i)(ii) and 2(ii) of the Act.

27. In reply to this argument, Mr. Bhattacharjee, learned Sr. counsel has forcefully urged that a pure question of law can be raised at any point of time and there is no bar as such in entertaining such question of law in the higher Court. To supplement his submission, the learned Counsel has relied on a decision of the Apex Court reported in Kunal Singh Vs. Union of India (UOI) and Another, wherein it was held in para 1 that although before the High Court no argument was advanced specifically in support of the writ petition on the basis of Section 47 of the Act, a specific ground was raised in the appeal based on that Section and since it was a pure question of law, contentions of the parties were heard on that point. In view of the above, it is submitted that since application of Section 47 of the Act is a pure question of law, the same is permitted to be raised even though there is no pleading in this regard as such.

28. As regards the question of "infructuous", the learned Sr. counsel appearing for the respondent No. 1, has also relied upon a decision of the Apex Court reported in Union of India (UOI) and Others Vs. Narender Singh, .

29. In Narender Singh's case (supra), the respondent was proceeded against departmentally on a charge of accepting illegal gratification for getting two Afghan nationals cleared through Customs without paying the customs duty payable. Ultimately he was dismissed from service by the authority. The appeal preferred by the respondent before the appellant authority was also rejected. Against such order, the respondent preferred an Original Application before the Central Administrative Tribunal, Principal Bench, New Delhi, (for short, "the CAT") which quashed and set aside the order of dismissal and directed the Union of India to reinstate the respondent. Being aggrieved by such decision, the Union of India preferred an application under Article 226 of the Constitution of India before a Division Bench of the Delhi High Court. The Division Bench of the Delhi High Court dismissed the writ petition as infructuous holding that once the respondent was reinstated, the matter became infructuous. However, though the Union of India still tried to justify the departmental action, the Court was not impressed as the petitioners, as stated, had already implemented the order of the CAT.

30. The ratio of the case stated above cannot be attracted the case at hand in factual premises emerged herein to accept the instant case as not being infructuous due to non-implementation of vital direction as regards holding of a review DPC for consideration of the case of respondent No. 1 for production. From a meticulous screening of the paras 530 and 532(3) of the Manual we are satisfied that for consideration of production for all posts in Technical grade from non-gazetted to gazetted posts not involving train working or use of trolley on open line, medical examination of the incumbent is a condition precedent. It is admitted that the case of promotion of the respondent No. 1 falls under the above category of post and hence, since the respondent No. 1 was found to be medically unfit in a medical examination conducted in compliance of one of two

directions issued by the CAT, it can be easily said that the impugned judgment and order has been duly implemented.

31. In the backdrop of the above facts and circumstances, in our considered opinion, it is felt that if the respondent No. 1 is at all aggrieved by any action taken by the writ petitioners in implementation of the impugned judgment and order in its letter and spirit and if the same has anyway prejudiced the interest of the respondent No. 1, he has the liberty to approach any appropriate forum for redressal of his grievance. Since the petitioners themselves do not want to pursue the writ proceeding, we do not think that the respondent No. 1 would have, or, can raise any grievance against passing of any order of withdrawal/closure of this writ petition as infructuous.

32. In view of what has been discussed and observed above, we are inclined to close this writ petition as being infructuous. We order accordingly.