

(2011) 09 CAL CK 0085
In the Calcutta High Court
Case No : W.P.C.T. No. 102 of 2008

Union of India (UOI) and Others

APPELLANT

Vs

Sri Mrinal Kanti Samaddar and Another

RESPONDENT

Date of Decision : 02-09-2011

Acts Referred:

Constitution of India, 1950 — Article 309

Citation : (2011) 09 CAL CK 0085

Hon'ble Judges : Mrinal Kanti Chaudhuri, J;Ashim Kumar Banerjee, J

Bench : Division Bench

Advocate : Ashok Chakrabarty and Ashim Kumar Ganguly, for the Appellant;L.K. Gupta, Arjun Ray Mukherjee and Joydeep Acharya, for the Respondent

Judgement

Ashim Kumar Banerjee, J.—Mrinal Kanti Samaddar, the Respondent above named, was working as Law Assistant in Chittaranjan Locomotive Works. He was appointed as such on December 1, 1986. He was promoted as Assistant Law Officer on February 22, 1992 and, subsequently, as Law Officer with effect from June 19, 2000. He started drawing the scale of Law Officer since his promotion to the said post. He continued to enjoy such scale up to July 1, 2002 when the Railway recalled the benefit on the ground that his original up gradation in the post of Law Officer was irregular since he did not spend eight years non-fortuitous service in the Fidler post. Such benefit was restored to him with effect from May 1, 2004 after completion of eight years period. The Railway initiated a recovery proceeding for the overdrawn pay for three years from 2000 to 2003. Such action of the Railway became subject matter of challenge in a Tribunal application filed by Mrinal being O.A. No. 946 of 2006. The Tribunal disposed of the same vide judgment and order dated August 9, 2007 inter alia allowing the application. The Tribunal set aside the order impugned dated January 12/20, 2005 and the communications dated September 21, 2005 and October 23, 2006. The Tribunal directed to re-fix his seniority with effect from February 20, 1992 and give all consequential benefit therefore.

2. Being aggrieved, the Eastern Railway filed the instant application before us which was heard by us on the above mentioned dates. Mr. Ashok Chakraborty, learned senior counsel appearing for the Railways being assisted by Mr. Ashim Ganguly, learned advocate contended as follows:

i) The initial entry of Mrinal in 1992 was ad hoc, subject to a regular selection process. He was successful in the promotional process and got the regular appointment in 1995 as Assistant Law Officer. Hence, he should be considered to have promoted to the post of Assistant Law Officer in 1995 and not 1992. He would thus not be entitled to claim seniority and/or scale as on that date (1992).

ii) His subsequent promotion to the post of Law Officer should also be considered as regular after 2003 and not 2000 since he was to serve the Fidler post of Assistant Law Officer by giving eight years non-fortuitous service in the said post.

3. Mr. Chakraborty further contended that as per Article 309 of the Constitution the Service Rules were having statutory force and the Railway was within their right to implement such rule correctly and if necessary by correcting their mistake as and when surfaced.

4. To support his contention, he cited the decisions of the Apex Court in the case of Subbegowda (Dead) by Lr. Vs. Thimmegowda (Dead) by Lrs., and State of Haryana Vs. Haryana Veterinary and A.H.T.S. Assn. and Another,

5. On the issue of right to challenge the action of the Railway while correcting any mistake Mr. Chakraborty cited the Division Bench decision of this Court in the case of Pradip Biswas v. Union of India and Ors. 2010 (2) CLJ 806.

6. He also drew the analogy of right of an ad hoc appointee so elaborately discussed in the Constitution Bench decision of the Apex Court in the case of Secretary, State of Karnataka and Others Vs. Umadevi and Others,

7. Mr. L.K. Gupta, learned senior counsel appearing for Mrinal, while opposing the application, drew our attention to the relevant annexure to the petition to show that the appointment in the post of Assistant Law Officer as on February 18, 1992 duly gave him the regular scale for the post of Assistant Law Officer. Hence, his subsequent promotion to the post of Law Officer rightly fixed him at the higher scale with effect from April 16/June 15, 2000 and the Railway was not entitled to upset such extension of benefit by the subsequent order passed in 2005. Mr. Gupta contended that Mrinal got the benefit in the post of Assistant Law Officer from 1992. The Railway never altered such situation even after correction of so-called mistake. Hence, the Railway could not disturb his subsequent promotion to the post of Law Officer and the Tribunal was right in upsetting such attempt.

8. To support such contention, Mr. Gupta drew our attention to the Black Law Dictionary on the definition of "fortuitous" which means "occurring by chance". In this regard he referred the following Apex Court decisions:

- i) Shri L. Chandrakishore Singh Vs. State of Manipur and Others,
- ii) T. Vijayan and Ors. v. Divisional Railway Managers and Ors. 2004 (4) SSC 20
- iii) S.N. Dhingra and Others Vs. Union of India and Others,

Mr. Gupta also formally cited the decision in the case of Shyam Babu Verma and Ors. v. Union of India and Ors. reported in 1994 (27) SCC 521 on the issue of recovery of overdrawn amount.

9. Mr. Gupta distinguished the decisions cited by Mr. Chakraborty by contending that decision in the case of Pradip Biswas (Supra) had no relevance in the instant case whereas the decisions in the case of Sanjoy Kumar Sinha (Supra) and State of Haryana (Supra) would not be applicable as the law decided therein did not fit in the facts and circumstances involved in the case in hand before us. He prayed for dismissal of the application filed by Union of India through Railways.

10. While giving reply Mr. Chakraborty contended that being an ad hoc appointee in the year 1992 Mrinal did not acquire any right to claim regular pay scale. The ad hoc appointment and/or officiation would attract special allowance and not the regular scale. He referred to paragraph 8.2 of the entitlement of pay and ad hoc promotion to senior scale. In this regard, he relied upon the Apex Court decision in the case of The Regional Manager and Another Vs. Pawan Kumar Dubey, He prayed for setting aside of the judgment and order impugned in the application.

11. Before we go into the controversy let us consider the guideline and/or the rule. Paragraph 8.2 being relevant herein is quoted below:

8.2 Group "B" officers who have not put in 8 years of regular service in Group "B", on their ad-hoc promotion to Senior Scale in the miscellaneous departments, will be entitled to draw charge allowance, as prescribed from time to time, subject to the usual conditions. The quantum of charge allowance w.e.f. 1.1.96 is R.750/- p.m. On completion of 8 years of regular service in Group "B", they are entitled to draw pay in senior scale with the approval of G.M.

Note:

Miscellaneous Departments are Hindi, Printing & Stationary, Law, Chemical & Metallurgical and Public Relations etc.

12. On a plain reading of the aforesaid paragraph it would mean that the post of officiation would attract special allowance. It also provides that on completion of eight years regular service in the Fidler post, the promotional post would attract the regular scale and the corresponding benefit. As per the 2000 and 2004 circulars referred to above, Miscellaneous Department would include "law". However, the 1991 circular did not include "law". Hence, Mrinal contended that his promotion in the year 1992 being guided by the 1991 circular would not have the benefit of paragraph 8.2., rather he would get the benefit of 8.1(b) which inter alia, provided, "the Group "B" officers, on ad-hoc promotion to Sr. Scale will be entitled to draw pay in the Senior Scale under normal operation of rules". The

entire argument of Mr. Gupta was based on the analogy of paragraph 8.1(b) supported by 1991 circular. Mr. Gupta however missed out a relevant fact that as and by way of clarification issued subsequently on November 1, 2004 Law Department was also included retrospectively.

13. To decide the controversy let us look back to the original order on promotion issued in the year 1992. Page 105 of the petition would depict as follows:

Sri M.K. Samaddar, Law Asstt. COS/CLW/Cal. Officer in Group-C serving in scale Rs. 1600-2660/- is appointed to officiate as Asstt. Law Officer in group "B" service in scale Rs. 2000-3500/- against the post newly created vide O.O. No. GMA/GS/1266 dt.14-1-92 subject to his medical fitness.

The above officiating appointment of Sri Samaddar in group "B" service is made purely on ad-hoc basis for a period of 6 months or till a regular empanelled candidate is available whichever is earlier. This will not confer on him any claim for absorption as such and seniority now or in future in preference to his seniors.

The Hd. Qrs. For the post of Asstt. Law Officer will be at Chitaranjan.

This has the approval of the General Manager.

14. It would thus appear that he was appointed to officiate as Assistant Law Officer in Group-B service against the post newly created subject to his medical fitness. It would also appear that such ad hoc promotion and/or officiation was for a limited period till a regular empanelment was done. It was further made clear that such officiation would not confer on him any claim for absorption as such and seniority now in future in preference to his seniors. If we stop here we would simply infer that he had no claim as made in the petition. Pertinent to note, Mrinal claimed seniority as on February 18, 1992 that was specifically debarred by the said office order.

15. Mrinal got the regular promotion in 1995. If he was allowed to enjoy the scale of Assistant Law Officer during the period of officiation such extension of benefit was nothing but concession being made by the Railway. It would however not give him any corresponding benefit as is available in case of a regular promotion getting the identical scale. Mrinal was a Group-C employee. The Railway, as a policy decision, wanted to upgrade the said post as Group-B and thus the post became obscure. He got an automatic upliftment, however, subject to undergoing a regular promotional process. In case he was unsuccessful he would have been declared surplus having no such Fidler post available to him. He became successful in 1995 and as such got regular benefit from that date. His period of officiation from 1992 to 1995 did not confer him any right to claim regular benefit as it was specifically debarred by the order asking him to officiate in the upgraded post.

16. Mr. Gupta tried to impress upon us that we should not look back beyond 2000 as such period was not called in question. We are unable to accede to his request. It is true that the subject matter of controversy relates to his

entitlement of the pay scale attached to the post of Law Officer that he got in the year 2000. However, to decide such question we would have to look back beyond 2000 to find out the genesis of the controversy that arose in 1992 when the post was upgraded and Mrinal was asked to officiate.

17. Let us now come to the subsequent promotion. Mrinal got the promotion in 2000. He was given the benefit of the scale attached to the post of Law Officer from that date which was sought to be recalled by the subsequent order of 2005. The office order dated April 15, 2000 appearing at page 79 would show that Mrinal was shown as Law Officer on ad hoc basis. Page 81 would show that in cancellation of the earlier order dated July 14, 2000 inter alia asking Mrinal to officiate as Law Officer on ad hoc basis, Railway extended the regular pay scale. Such decision was possibly taken following paragraph 8.1(b) quoted above. However, the regular statutory rule would require the incumbent to have eight years non-fortuitous service in the Fidler post. Mrinal was appointed as Assistant Law Officer on regular basis in 1995. Such fact was not in dispute. Hence, he was entitled to be considered for the next promotional post after eight years i.e. after 2003. He was given the post of Law Officer in 2000. Hence, his promotion to the post of Law Officer during the period of 2000-2003 should be considered as ad hoc and/or officiating attracting special allowance and not the regular pay scale as would appear from paragraph 8.2 quoted above. The Railway realized their mistake subsequently and corrected the same.

18. We however, do not find any fault in Mrinal while receiving benefit of regular pay scale for the period 2000 to 2003. Hence, the ratio decided in the case of Shyam Basu Verma (Supra) would definitely have a role to play and the Railway was not entitled to recover the overdrawn amount. To that extent, we approve of the decision of the Tribunal restraining the Railway from realizing the overdrawn amount.

19. Question thus remains, whether the Railway was right in correcting their mistake and if so, whether Mrinal would get the notional benefit during the said period ignoring the correction made by the Railways.

20. It is well-settled principle of law that an employer is entitled to correct their mistake as and when surfaced. A mistaken benefit does not give any right to the employee. In this regard, the decision in the case of Shyam Babu Verma (Supra) would support our view. Paragraph 5 of the decision in the case of S.N. Dingra and Ors. (Supra) was cited by Mr. Gupta on the meaning of the word "fortuitous". The Apex Court upheld the contention that continued officiation should be taken into account as a guiding factor for determining seniority. We would have applied this ratio, had there been no specific bar being created in the order of officiation issued on February 18, 1992. The office order clearly debarred him claiming any benefit of seniority during the period of officiation. Such office memo was not under challenge. Hence, the right, if any, to claim benefit of the period of officiation for the purpose of seniority stood extinguished by a specific bar created by the said order itself. Hence, the analogy would not apply.

21. In paragraph 18 and 20 of the decision in the case of T. Vijayan and Ors. (Supra), the Apex Court considered a situation where ad hoc promotions were given in a situation when regular promotion was not immediately possible. Such promotion was subsequently confirmed. Hence, the benefit of the period of ad hoc promotion was granted. Similar was the case in the case of A. Chandra Kishore Singh (Supra). In paragraph 15, the Apex Court observed that in case of probation or officiating appointments which were followed by a confirmation, unless a contrary rule is shown, the service rendered as officiating appointment could not be ignored in case of seniority. Here it was completely debarred by the officiating memo. Hence, this analogy would rather support the action of the Railways.

22. We are thus of the view that the Tribunal did not approach the problem in a right way. We are of the view that the Mrinal was not entitled to the benefit of the officiating period in the Fidler post. Consequently, he would not be entitled to the next promotion on regular basis unless and until he would complete eight years non-fortuitous service in the Fidler post. That situation happened in 2003. Hence, he would be entitled to all benefit including seniority benefit in the promotional post from the said date (May 1, 2004) and during the officiating period he would be entitled to the officiating allowance.

23. On the issue of recovery, Mr. Chakraborty strenuously contended that by an interim order passed on August 17, 1992 Mrinal was successful in stalling the entire process by filing O.A. No. 856 of 1992 inter alia contending that he was entitled to automatic promotion to the post of Assistant Law Officer. Tribunal dismissed such application vide judgment and order dated December 1, 1995. Hence, he would not be entitled to the benefit of the ratio decided in the case of Shyam Babu Verma (Supra).

24. We are unable to accept such contention. The Railway, in their wisdom, upgraded the post of Group-C to Group-B. The incumbents in the said post were given opportunity to participate in a regular selection process in the upgraded post. Mrinal contended that due to change of policy, automatic up gradation of the post would also entail up gradation of the incumbent. He raised such issue before the Tribunal. The Tribunal found prima facie justification in his contention and thus passed an interim order to the said effect. The Tribunal upon regular hearing dismissed his application by a subsequent judgment and order in 1995. Such action could not be termed as fraud or misrepresentation or any unfair act on the part of the employee leading to such overdrawn which would debar him from asking for stoppage of recovery. To that extent, we uphold the ultimate decision of the Tribunal to stall the recovery process.

25. The application partly succeeds and is allowed to the extent as above. The judgment and order dated August 9, 2007 in O.A. No. 946 of 2006 is modified to the extent that the order dated January 20, 2005 refixing Mrinal's pay is upheld. Similarly, the communication dated September 21, 2005 appearing at page 89 of the petition impugned in the Tribunal application is also upheld to the extent of

supporting revision of his pay, however set aside to the extent it directed recovery of the overdrawn amount. The order of the Tribunal setting aside the communication dated October 23, 2006 would stand modified to the extent that the Railways would not be entitled to recover the overdrawn amount, however would not be obliged to re-fix his seniority with effect from February 20, 1992 as directed by the Tribunal. His seniority would remain as the same as a consequence of order dated January 12/20, 2005 so communicated vide memo dated September 21, 2005 and October 23, 2006.

26. The order dated August 9, 2007 is thus modified.

27. W.P.C.T. 102 of 2008 is disposed of without any order as to costs.

28. Urgent Photostat copy will be given to the parties, if applied for.

Mrinal Kanti Chaudhuri, J.

29. I agree.