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* **IN THE HIGH COURT OF DELHI AT NEW DELHI**

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DECIDED ON: 30.08.2017

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LPA 571/2017, CM APPL.31430-31431/2017

BHARAT HEAVY ELECTRICALS LTD (BHEL).... Appellant
Through: Mr. J.C. Seth, Advocate.

versus

JITENDRA MOHAN SINGH Respondent
Through: None.

CORAM:

HON'BLE MR. JUSTICE S. RAVINDRA BHAT

HON'BLE MR. JUSTICE R.K. GAUBA

S.RAVINDRA BHAT, J.(ORAL)

1. The appellant Bharat Heavy Electricals Ltd (hereafter referred to as "BHEL") is aggrieved by an order of this Court whereby the respondent's writ petition was allowed. The restricted claim of the respondent in the writ petition preferred was for grant of consequential benefits - which according to the Single Judge included arrears of salary and allowances for the period from 16.02.2013 to 08.11.2015.
2. The genesis of the controversy is the order of transfer issued by BHEL to the respondent, its officer. At that stage, the officer/petitioner was aggrieved; he claimed that being an individual with special disabilities, the BHEL ought to have retained him in the original place of working. The BHEL had declined the request and

insisted that he moves to the place he was posted. This led to the filing of W.P.(C) No.9036/2015. That petition was dismissed on the first date of hearing in *limine* on 21.09.2015. Aggrieved, the employee carried the judgment in appeal to the Division Bench. The Division Bench noticed that the Single Judge's findings were that since the ailment which the employee complained of, i.e., some kind of mental illness did not fall within the Persons with Disabilities (Equal Opportunities, Protection of Rights and Full Participation) Act, 1995, he could not get the relief. The Division Bench then noted the findings and report of the Medical Board constituted by the BHEL which had reported that he was suffering from Paranoid Schizophrenia and that "he is advised to take his medicines regularly and requires constant support & supervision by caregivers (i.e. family)". The Division Bench thereafter went on to find as follows: -

"8. Learned counsel for the respondent has not been able to point out as to how this Board was not competent to opine on the mental condition of the appellant. Further the authenticity of this report is not disputed. The appellant has placed on record discharge summary dated August 16, 2013 from the VIMHANS which diagnosed the appellant to be suffering from Paranoid Schizophrenia.

9. Indubitably the Act does not provide for reservation of post on the ground of mental illness, however the Act recognises "mental illness" as a disability as defined under Section 2(i). There being nothing on record to dispute the mental illness of the appellant and the Board constituted by the respondent advising him to take regular medicines and noting that he requires constant support and supervision by care-givers i.e. family, the respondent ought to have taken a sympathetic view; on

the contrary however they resorted to an obstinate stand that the appellant should once join at Bhopal and thereafter his case for recalling at Delhi would be considered.

10. In the decision reported as (2004) 11 SCC 402 State of U.P. and Ors. Vs. Gobardhan Lal the Supreme Court laid down a rule of caution to the Courts to not interfere in the transfer orders unless the order of transfer is shown to be an outcome of a mala-fide exercise of power or violative of any statutory provision (an act or rule) or passed by an authority not competent to do so. The guidelines laid down by the Supreme Court are not exhaustive and in a given case the Court can weigh the equities.....”

3. In view of the above findings, the Division Bench held that the writ petition deserved to be allowed. The transfer orders dated 15.01.2013 and 04.02.2013 were, therefore, quashed.

4. The employee/writ petitioner had to approach this Court again - this time with the grievance that despite the quashing of the transfer order, BHEL refused to treat him as in service and that the period between 16.02.2013 and 08.11.2015 (when he was allowed to join) after the Division Bench order, was treated as period not spent on duty. The second writ petition W.P.(C) 12067/2016, therefore, sought a direction to treat the said period as having been spent on duty and grant consequential benefits. The Single Judge by the impugned order held as follows: -

“8. I may only record here, during the course of his submissions, Mr. Seth has stated that there is no concept of Seniority in the respondent Organization. He also states, that the promotion is subject to the Rules and

petitioner meeting the merit/benchmark. There is no dispute on that proposition of law. When it was put to Mr. Seth that the effect of the impugned action would result in the petitioner losing the benefit of service between the period February 16, 2013 and November 08, 2015, for the purpose of eligibility for promotion, he states that for the purpose of eligibility, the period in question shall be taken into consideration. In other words, the period of eligibility for promotion shall not be affected. I take this submission on record. If that be so, the only issue needs to be decided is, whether the petitioner is entitled to the back wages for the period between February 16, 2013 and November 08, 2015 and the said issue needs to be decided in favour of the petitioner for more than one reason, inasmuch as the Division Bench has allowed the writ petition by quashing the order of transfer. The consequence thereof is, the petitioner should be put on the same position as if such order has not been passed/issued. Secondly, if the benefit of salary for the said period is denied, it would mean that his nonjoining at Bhopal was unjustified, which is not the case as the transfer order has been quashed.

9. Insofar as the judgment of the Supreme Court in the case of Virender Kumar (supra) relied upon by Mr. Seth is concerned, the same shall not be applicable in the facts of this case, inasmuch as the Supreme Court denied the benefit of pay from retrospective date for the following reasons:- (i) The entitlement of promotion of the respondents in that case was on rota quota rule which was held as inequitable and irrational. (ii) The rota quota rule has to be worked out from the year 1954. (iii) The higher posts were not vacant and were manned by others, who were paid. (iv) The respondents had not actually worked, therefore on the principle of no work no pay, the respondents were denied the pay.

10. It is not the case here, inasmuch as it is not a case of promotion from retrospective date. Rather, the petitioner was transferred for certain unjustifiable reasons, otherwise he could have worked on the said post and earned salary. The judgment is distinguishable and has no applicability.”

5. Mr. J.C. Seth, learned counsel appearing for the BHEL urged that since the previous judgment, i.e., quashing the transfer orders did not deal with any aspect other than the validity of the transfer order and did not grant any further relief, the respondent/employee's claim was unfounded and in fact barred by the principle of *res judicata*. He also urged that the Single Judge in effect has enlarged the scope of the Division Bench's order and, therefore, overstepped his jurisdiction. It was secondly urged that no one can claim back wages as a matter of right or claim consequential benefits, unless the Court specifically so directs in its judgment or order recording the essential and main entitlement to be put back into the employment. It was submitted that in light of the principles established by no less than five Supreme Court judgments, the grant of consequential benefits and arrears of salaries (which was not even claimed by the petitioner) was unwarranted.

6. As far as the second contention with respect to *res judicata* is concerned, this Court would rest its conclusion on two observations. Firstly, the principle of *res judicata* or constructive *res judicata stricto sensu* applies to civil proceedings - it is applied not in the strict letter of the term but only in its underlying principle to writ proceedings which are necessarily more flexible.

7. Consequently and more importantly, the essence of the respondent/employee's grievance was that the BHEL had by overlooking his serious disability undermined the therapy and treatment to be undergone by him and thereby acted in an illegal and unconstitutional manner. Although no personal malice has been attributed yet the insensitivity of BHEL in ignoring the expectation of the individual was impugned. The Single Judge did not agree with the plea. However, the pointed findings of the Division Bench and its observations with respect to *mala fides* underlined that BHEL was utterly unsympathetic and determined to reject his request to be retained in employment. Upon that reasoning, the Division Bench went on to quash the transfer order. This meant that the orders were a nullity from their inception. In such an event, it would be wholly iniquitous for the Court tasked with enforcing the law and keeping in mind the larger public interest, to overlook the just claim of the individual who was kept away from employment on account of an illegal order. The invocation of the "no work no pay" ruling by a public employer BHEL in the circumstances is not only inequitable but entirely contrary to its obligation to follow the principles underlined under Article 14 of the Constitution.

8. As far as the question of the Single Judge overstepping the jurisdiction and enlarging the directions of the Division Bench is concerned, the Court notices that the Single Judge merely gave effect to the consequences of the Division Bench order which nowhere precluded such relief. Notably at the time when the employee went to the Single Judge, the question of consequential benefits did not arise.

9. In view of the above reasons, the Court finds no merit in the appeal; it is accordingly dismissed.

10. Order dasti.

S. RAVINDRA BHAT
(JUDGE)

R.K. GAUBA
(JUDGE)

AUGUST 30, 2017
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