

13.07.2023

rpan/**04**

MAT 731 of 2023

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IA No.: CAN 1 of 2023

Suman Bhui

– *Versus* –

The State of West Bengal & Others

Mr. Sridhar Chandra Bagari,
Mr. Achin Kumar Majumder,
Ms. Anita Khatri,
Sk. Nizamuddin

... for the Appellant.

Mr. Arjun Roy Mukherjee
... for the State.

Mr. Susanta Dutta,
Mr. Sanjay Saha,
Ms. Sharmila Basu

... for the Respondent no.2.

The present appeal has been preferred challenging an order dated 17th April, 2023 passed in a writ petition, being WPA 28445 of 2022.

The writ petitioner/appellant while working in the post of Senior Engineer under the Bharat Heavy Electricals Limited (in short, the BHEL) applied for participation in a selection process initiated by an advertisement no.16 of 2020 for appointment to the post of District Manager under the West Bengal Essential Commodities Supply Corporation Limited (in short, WBECSC). He was selected and was offered an appointment to the concerned post by letter dated 12th October, 2022. Prior thereto, the appellant by a representation dated 28th January, 2022 requested the Managing Director of WBECSC to consider the basic pay

protection and to fit his initial basic pay at the appropriate level of pay matrix – 16. In response thereto, by a memo dated 11th February, 2022 the General Manager, WBECSC informed that '*there is no provision for pay protection embedded in WBECSC (SERVICE) Regulations, 1974 in any clause*' and as such, the appellant's application cannot be considered. The appellant submitted a further representation dated 19th February, 2022 stating *inter alia* that he should be granted pay protection in terms of clause 42A(5) of the West Bengal Service Rules, 1971 (in short, WBSR). As such prayer was not considered, the appellant was constrained to prefer the writ petition in which initially an order was passed on 9th January, 2023 directing WBECSC to file a report in the form of an affidavit explaining why the basic scale of pay that the appellant was receiving at BHEL should not be granted when he joins the post of District Manager under WBSECS. Pursuant to such direction, WBSECS filed a report in the form of an affidavit to which an exception was filed by the appellant.

Upon contested hearing, the writ petition was dismissed by the order dated 17th April, 2023 observing *inter alia* that the employer is at liberty to fix the nature of duties and the level of pay attached to a particular post considering the nature of duties to be performed and that WBECSC had stated the level of pay in the offer letter

dated 12th October, 2022 and it was upto the appellant to accept or reject the said offer.

The provisions of Rule 42A(5) were taken into consideration, however, the appellant's prayer for such pay protection was refused upon arriving at a finding that the post of District Manager of WBSECS is different in nature / lower in category than the post held by the appellant at BHEL and that the issue of determination of pay scale and pay protection comes within the domain of the employer. In the said conspectus, the learned Single Judge refused to exercise discretion in favour of the appellant and dismissed the writ petition.

Mr. Bagari, learned advocate appearing for the appellant submits that the learned Single Judge erred in law in not properly construing the provisions of Rule 42A(5) of WBSR which fortifies the appellant's claim. As there was no provision towards pay protection in the regulations of WBECS regulations, the WBECS was bound to follow rule 42A(5) of WBSR and to extend pay protection to the appellant.

He further argues that in the post of District Manager in which he had been selected there are different cells of pay. The appellant admittedly was working in the post of Senior Engineer under BHEL and WBECS was under an obligation to fix the appellant's pay in the cell at par with that of the basic pay he was enjoying in the post at BHEL. Though such issue was specifically urged, the

learned Single Judge glossed over the same and did not return the finding.

He urges that the WBECS cannot escape from its obligation to comply with the provisions of WBSR, more so when, cases not covered by the WBECS Regulations, the Government of West Bengal rules shall apply *mutatis mutandis*. Without considering such argument, the learned single Judge mechanically rejected the writ petition.

Mr. Dutta, learned advocate appearing for WBSECS submits that it would be explicit from the provisions of Rule 43A(5) that pay protection would be dependent upon the issue as to whether the concerned employee was *'carrying duties and responsibilities similar to those posts attached to the post held on substantive, officiating or temporary basis.'* Such determination as to whether the post from which the appellant applied and the post in which he was offered to join were carrying similar duties and responsibilities is within the exclusive jurisdiction of the employer. By filing affidavits before the learned Single Judge it has been categorically stated that the post of Senior Engineer in which the appellant is presently working is a higher post than the applied post of the District Manager. In support of such contention, he has drawn our attention to the averments made in the affidavits as well as the requisition of vacancies sent to the West Bengal Municipal Commission, the pay slip of

the employee and a document annexed at page 70 of the application indicating that there are various cells within the said pay matrix starting from Rs.56,100/-.

He argues that in the advertisement itself it was categorically specified that appellant's application would be considered in Level - 16 in pay matrix. Being conscious of such fact, the appellant participated in the selection process and now after selection he insists that unless pay protection is first confirmed he shall not join the post.

Heard the learned advocates appearing for the respective parties and considered the materials on record.

The existence of a right and infringement thereto are the foundations of the exercise of jurisdiction under Article 226 of the Constitution of India. Conscious about the fact that there was no clause towards pay protection in the advertisement, the appellant participated in the selection process and after emerging to be successful and after receiving the appointment letter, he insisted for pay protection before joining and even before any right to the post crystallised in his favour. In the said conspectus, in our opinion, the learned Single Judge rightly observed that it was upto the employee concerned to accept or reject the offer.

The argument of Mr. Bagari that in terms of the provisions of Rule 42A(5) of the WBSR, the appellant should be placed at that particular initial pay / cell which

is equal to his pay in the old post is also not acceptable to us inasmuch as the rule itself would reveal that such pay fixation is saddled with a condition as to whether the post the appellant was enjoying at BHEL and the post which he was offered to join were carrying similar duties and responsibilities. Determination of such issue is within the exclusive domain of the employer.

From the affidavits exchanged by the parties and the documents placed before this Court, it is apparent that the post of the Senior Engineer post was carrying a superior scale of pay than the scale of pay attached to the post of District Manager. The nature of duties and the responsibilities pertaining to the post of District Manager have also been detailed in the affidavit filed by the WBSECS. Considering the same the learned Single Judge rightly arrived at a finding that the nature of duties and responsibilities of the two posts are different.

The learned Single Judge upon considering the arguments, as advanced and scrutinizing the materials on record, refused to exercise discretion in favour of the appellant and we do not find such act to be unreasonable or impulsive.

In view thereof, no interference is called for in the present appeal.

The appeal, being MAT 731 of 2023 and the connected application, being CAN 1 of 2023 are dismissed.

The interim order passed earlier stands vacated.

There shall, however, be no order as to costs.

Urgent photostat certified copy of this order, if applied for, be supplied to the parties, upon compliance of all requisite formalities.

(Partha Sarathi Chatterjee, J.) (Tapabrata Chakraborty, J.)