24.08.2023
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<u>WPCT 104 of 2021</u>
The Principal Commissioner of Customs
– Versus –
Smt. Leena Bose & Others
With
<u>WPCT 80 of 2021</u>
Smt. Leena Bose
– Versus –
The Union of India & Others

Mr. Surajit Samanta,
Mr. Biswajit Samanta,
Ms. Sohini Samanta
… for the Petitioner [in WPCT 80 of 2021]
and
Respondent no.1 [in WPCT 104 of 2021]

Mr. K. K. Maiti,
Ms. Aishwarya Rajyashree
… for the Petitioner [in WPCT 104 of 2021]
and
Respondent no.2 [in WPCT 80 of 2021]

The first writ petition, being WPCT 80 of 2021 has been preferred by the applicant/petitioner herein, namely, Leena Bose (in short, Leena) challenging the judgment dated 23rd September, 2021 passed in an original application, being O.A. 350/00305/2016. By the said judgment the learned Tribunal upheld the demotion order dated 8th February, 2016 by which Leena was demoted to the post of Senior Tax Assistant (in short, STA) from the post of Inspector (Preventive Officer) (in short, Inspector).

The second writ petition, being WPCT 104 of 2021 has been preferred by the respondent no.2 in the original application, being O. A. 350/00305/2016 challenging a part of the judgment dated 23rd September, 2021 by which the learned Tribunal restrained the respondents therein from recovering the pecuniary benefits received by Leena with effect from 29th December, 2011 i.e. the date on which she was promoted to the post of Inspector till the date of order of demotion dated 8th February, 2016 to the post of STA.

Shorn of unnecessary details, the facts are that Leena was initially appointed in the post of LDC in Customs Department in the year 1993 and was promoted to the post UDC and regularised in the said post in the year 1996 and 2000 respectively. Thereafter, on 25th May, 2006 Leena was promoted to the post of STA. On 14th July, 2010 she was called for physical test for promotion to the post of the Inspector but she was not considered since it was found that her height was 151 cms though the height required for the said post was 152 cms. A fresh selection process for promotion to the post of Inspector was initiated in the year 2011 in which Leena participated. Upon physical measurement, her height was found to be 152 cms. Accordingly, she was called for a *viva voce* test in which she emerged to be successful and by an order dated 29th December, 2011 she was promoted to the post of Inspector. Subsequently, she was regularised in the said post on 16th September, 2014. By a memo dated 18th February, 2015 Leena was directed to attend to the Chief Medical Officer/Superintendent, M. R. Bangur Hospital on 25th February, 2015 for measurement of her height in reference to complaint made by one Smt. Ratna Das and one Smt. Sutapa Dey. About six months thereafter by a memo dated 31st August, 2015 she was intimated about initiation of demotion proceedings and was asked to show cause. By a representation dated 11th September, 2015 Leena requested the Customs authorities (in short, Customs) to let her know about the complaint on the basis of which the demotion proceeding had been contemplated but in vain. On 16th November, 2015 Leena replied to the show cause and thereafter, by an order dated 8th February, 2016 she was demoted to the post of STA.

Mr. Samanta, learned advocate appearing for Leena submits that the contents of the judgment dated 23rd September, 2021 are self-contradictory. On one hand the learned Tribunal arrived at a finding that *'the respondents themselves are undisputedly in complicit error for recording the incorrect height of the applicant'* and on the other hand penalised Leena, refusing to interfere with the illegal order of demotion.

According to him, the impugned judgment is violative of the principles of natural justice. Customs initiated a demotion proceeding about four years after Leena was promoted to the post of Inspector and that too without supplying copy of the complaint on the basis of which the demotion proceeding was initiated. Being oblivious of such fact situation the learned Tribunal erred in law in observing that '*we do not find any violation of the principles of natural and procedural justice in the conduct of the respondent authorities'*.

He argues that the learned Tribunal erred in law in not appreciating that Customs had proceeded against Leena with a pre-conceived mind inasmuch as in the memo dated 6th October, 2015 it was recorded that such proceeding had been initiated since Leena was promoted on the basis of a *'fabricated report'.* Thus at the show cause stage itself Customs arrived at a finding of guilt against Leena. There was no such fabricated report since Customs upon constituting a Committee measured the height of Leena and upon ascertaining that her height was 152 cms, appointed her to the post of Inspector.

He contends that Customs could not have reopened the issue of promotion of Leena four years after such promotion that too on the basis of alleged complaint lodged by unsuccessful candidates. In support of the arguments reliance has been placed upon an unreported judgment of the Hon'ble Supreme Court delivered in the case of *J. Chitra Vs. District Collector and Chairman State Level Vigilance Committee, Tamil Nadu & Ors.* in *Civil Appeal No.5160 of 2010*.

Per contra, Mr. Maiti, learned advocate appearing for the respondent no.2 in the original application/ writ petitioner in WPCT 104 of 2021 submits that at the time of entry into service Leena incorporated her height to be 4 feet 10 inches. Surprisingly, in the year 2010 Leena's height was stated to be 151 cms and as such, she was rightly denied promotion in the selection process of 2010 since the height criterion as per the rules was 152 cms. Again in the year 2011 Leena illegally declared her height to be 152 cms and on the basis of such measurement she was promoted. It is absurd to suggest that there would be variation in height of a person after he/she attains the age of majority. From such sequence it is explicit that Leena herself had misled the authorities. Upon receiving the complaint, Leena was sent to the Chief Medical Officer / Superintendent, M. R. Bangur for measurement of her height and the competent Medical Board of doctors declared her height to be 150 cms and as such, there is no infirmity in the decision taken by Customs to demote her.

Drawing our attention to the office note dated 18th February, 2015, Mr. Maiti submits that it would be explicit from the contents of the same that complaint was lodged against Leena and the allegation was regarding shortage of height and as such, Leena cannot take a stand that she was not aware about the contents of the complaint and accordingly, there had been no violation of the principles of natural justice since a show-cause was issued on 31st August, 2015 to which she duly replied on 16th November, 2015 and upon considering the same, the decision to demote her was taken on 8th February, 2016.

He argues that though from the fact situation it is explicit that Leena suppressed material facts and availed promotion to the post of Inspector, the learned Tribunal erred in law in restraining Customs from recovering the benefits enjoyed by Leena upon illegally serving as Inspector for the period from 29th November, 2011 till 8th February, 2016. In support of such arguments reliance was placed upon a judgment delivered in the case of *High Court Punjab & Haryana & Ors. Vs. Jagdev Singh*, reported in *AIR 2016 SC 3523*.

He strenuously argues that the Hon'ble Supreme Court in *State of Punjab and Ors. vs. Rafiq Masih (White Washer) & Ors.*, reported in *(2015) 4 SCC 334* categorically detailed the situations in which a recovery by the employer would be impermissible. Leena does not come within the ambit of the said clauses and as such, the learned Tribunal erred in law in retraining Customs from recovering the benefits illegally obtained by Leena.

Drawing our attention to the order of promotion dated 29th December, 2011, Mr. Maiti argues that the promotion in the year 2011 was subject to a condition that the persons promoted are liable for reversion if they are found *'unsuitable for retention in the post'* and as such the allegation that Customs could not have reopened the the issue of promotion of Leena is not sustainable. Upon arriving at a finding that Leena did not fulfil the height criterion, she was rightly demoted.

We have heard the learned advocates appearing for the respective parties and considered the materials on record.

Indisputably, Leena was promoted in the year 2011 to the post of Inspector after conducting a physical test on 28th December, 2011. The said test was conducted by a Committee constituted by Customs. It is not a case that Leena was in any manner instrumental towards such measurement and recording of height. In view thereof, we are unable to accept the argument of Mr. Maiti that Leena had misled Customs.

Mr. Maiti had submitted that at the time of entry into service on 9th April, 1993, Leena herself made a declaration that her height was 4 feet 10 inches and as such it is surprising that such height became 152 cms in the year 2011. However, in the year 1993, Leena was aged about 19 years and she was promoted in the year 2011 after the competent Committee constituted by Customs ascertained her height to be 152 cms.

Principle of natural justice is attracted whenever a person suffers a civil consequence or a prejudice is caused to him by an administrative action. The complaint in reference to which the demotion proceeding was initiated was lodged by Ratna Das and Sutapa Dey, who were unsuccessful in the selection process for promotion to the post of Inspector in which Leena competed. Though Leena submitted a specific representation to avail the said complaint, such prayer was not attended to. In view thereof, the learned Tribunal erred in law in proceeding on the basis that there had been no violation of the principles of natural justice.

Customs have not been able to establish, as stated in the memo dated 6th October, 2015, that Leena's promotion was on the basis of *'fabricated report'*. Thus, it appears that at the show-cause stage Customs arrived at a finding of guilt against Leena.

There was no allegation of misconduct or of unauthorised absence or of negligence in performance of duties against Leena and no disciplinary proceeding to that effect was initiated against her. It thus appears that Customs had penalised Leena by demoting her moreso when such demotion was on the basis of purported complaint lodged by two unsuccessful candidates about four years after Leena was promoted. The learned Tribunal glossed over the said infirmities and did not return any finding on the same and as such the impugned judgment suffers from a patent error warranting interference of this Court.

In the case of *Jagdev Singh (supra)* challenge was against a direction issued by the State to the Accountant General for the recovery of an excess payment towards salary of the employee who submitted an undertaking before receiving the revised pay. The said judgment is clearly distinguishable on facts. It is well settled that one little difference in the facts will free the Court from being bound by the ratio of a decided case.

In the said conspectus, we are of the opinion that learned Tribunal erred in law in the rejecting Leena's prayer to set aside the order of demotion. The order of demotion dated 8th February, 2016 is, accordingly, set aside and quashed.

The argument of Mr. Maiti that Customs ought not to have been prevented from realising the pecuniary benefits earned by Leena while working in the post of Inspector during the period from 29th December, 2011 to 8th February, 2016, is not acceptable to us since Leena rendered her duties as Inspector during the said period after she emerged to be successful in a selection process conducted by Customs and after her height was ascertained to be 152 cms by the competent authority constituted by Customs. In view thereof, the learned Tribunal rightly restrained Customs from recovering such benefits. We do not find any reason to interfere with such direction.

We have been informed by Mr. Samanta that the difference of salary to the tune of ₹1,28,862/- for the period from 29th December, 2011 to 8th February, 2016 had already been recovered from Leena.

In view thereof, the Customs authorities are directed to refund the said amount of ₹1,28,862/- to Leena and to restore her to the post of Inspector within a period of two weeks from date of communication of this order.

It is further directed that Leena should be treated to have served in the post of Inspector on and from 29th December, 2011 uninterruptedly. However, in the facts and circumstances of the case, we refrain from directing the Customs authorities to make payment of the difference of salary for the period from 8th February, 2016 till the date she is restored to the post of Inspector in terms of our order.

With the above observations and directions, the writ petitions, being WPCT 80 of 2021 and WPCT 104 of 2021 are disposed of.

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.)**