

IN THE HIGH COURT AT CALCUTTA
Constitutional Writ Jurisdiction
APPELLATE SIDE

Present:

The Hon'ble Justice Tapabrata Chakraborty
&
The Hon'ble Justice Partha Sarathi Chatterjee

WP.ST 53 OF 2024

Mohan Kumar Halder
-Versus-
The State of West Bengal & Ors.

For the Petitioner : *Mr. Biswarup Biswas.*

For the State Respondents : *Mr. Tapan Kumar Mukherjee, Ld. AGP,*
Ms. Ashmita Chakraborty.

Hearing is concluded on : *19th November, 2024.*

Judgment On : **11th December, 2024**

Tapabrata Chakraborty, J.

1. The present writ petition has been preferred challenging, *inter alia*, an order dated 19.02.2024 passed by the learned Tribunal in the original application (in short, OA), being OA 69 of 2023. By the said order, the learned Tribunal directed the respondents to consider the petitioner's claim

for condonation of the deficiency in qualifying service and for disbursement of pension.

2. Shorn of unnecessary details, the facts are that the petitioner was provisionally selected for appointment to the post of Excise Constable on the basis of the recommendation of the Recruitment Committee under the respondent no. 8 herein, *vide* a memo dated 04.04.1995 but he was not appointed to the said post due to pendency of a criminal proceeding against him. After he was exonerated from the said proceedings by the competent criminal court, he submitted a representation for appointment to the concerned post. As his claim was not considered, he preferred OA 1468 of 2006 which was disposed of by an order dated 15.06.2006 directing the competent authority to consider his claim. The respondent no. 8 thereafter passed an order dated 07.01.2009, rejecting the petitioner's claim as he had crossed the age bar. Aggrieved thereby, the petitioner filed OA 754 of 2009 but the same was dismissed by an order dated 08.02.2010. Challenging the said order, the petitioner preferred a writ petition being WPST 91 of 2010 which was disposed of by an order dated 09.04.2010 directing the respondents to issue appropriate order for petitioner's appointment positively within a period of three weeks from date of communication of the said order. Upon obtaining the certified copy of the said order, the petitioner's learned advocate communicated the same to respondent no. 8 on 04.05.2010. Though the period of three weeks expired thereafter on 25.05.2010, the appointment letter was issued on 22.11.2010. Thus, there was a delay of 5 months and 27 days on the part of the respondents in issuing the letter of appointment. The petitioner joined the said post on

22.11.2010 itself and rendered continuous service till the date of his superannuation on 31.05.2020, as notified *vide* memo dated 07.11.2017. In the midst thereof, he was granted MACP benefit on 21.11.2018. The petitioner was released on 31.05.2020 *vide* memo dated 29.05.2020. Thereafter, the respondents disbursed the petitioner's gratuity and provident fund but his pension was withheld on a purported plea that he had rendered less than 10 years of qualifying service. In reply to a petitioner's application under the Right to Information Act it was intimated *vide* memo dated 16.12.2020 that the petitioner's service was of 9 years 6 months 9 days. Aggrieved thereby and citing the provisions of the West Bengal Services (Death-cum-Retirement) Benefit Rules 1971 (in short, the 1971 Rules), the petitioner preferred OA 66 of 2022 which was disposed of by an order dated 07.06.2022 directing the State respondents to consider the petitioner's representation, if submitted, as regards condonation of deficiency of about 5 months and 27 days in qualifying service and to dispose of the same within three months. Upon communication of the said order, the respondent no. 5 referring to a memo dated 20.10.2022 issued by the respondent no. 3, intimated *vide* memo dated 16.11.2022 that the petitioner's claim was considered by the Pension Cell, Finance Department and was denied. Challenging *inter alia* the said decision, the petitioner preferred OA 69 of 2023 which was disposed of by the order impugned in the present writ petition, directing the respondent no. 5 to submit a fresh proposal for condonation of deficiency in qualifying service, placing reliance upon an order passed in WPST 81 of 2014 and observing *inter alia* that '*it is opinion of this Tribunal that the Hon'ble Court has in WPST 81 of 2014*

passed an order , which was quoted above, that the Notes appended to a Rule cannot take away the right of an applicant’.

3. Mr. Biswas, learned advocate appearing for the petitioner submits that having arrived at a finding that the note appended to Rule 36 of the 1971 Rules cannot take away the right of the petitioner towards condonation of deficiency of qualifying service, the learned Tribunal ought not to have delegated its duty to an executive authority and such delegation of power apart from being illegal and unconstitutional amounts to avoidance of constitutional duties and functions to decide such disputes which are exclusively entrusted to the learned Tribunal by law.

4. He contends that the impugned orders dated 20.02.2022 and 16.11.2022 are not sustainable in law inasmuch as the same have been issued being oblivious of the observation made by this Court in the first writ petition being WPST 91 of 2010 that the respondents *‘should not have refused to appoint the petitioner even after being selected to the post of Excise Constable only on the ground of pendency of a criminal case since against him since the pendency of a criminal case cannot make a candidate unfit for government service and can have also no adverse effect on the service prospect of an individual’.*

5. He argues that admittedly the respondents did not comply with the directions contained in the order dated 09.04.2010 passed in WPST 91 of 2010 within the time mandatorily specified. Though the period of three weeks expired on 25.05.2010, the appointment letter was issued on 22.11.2010. Thus, there was a delay of 5 months and 27 days on the part of the respondents in issuing the letter of appointment and for such delay the

petitioner cannot be made to suffer. Had the respondents discharged their obligation within the time stipulated, there would have been no deficiency in qualifying service. In support of such contention reliance has been placed upon the reported judgments delivered in the cases of *Union of India & Others vs. Major General Madan Lal Yadav (Retd.)*, reported in (1996) 4 SCC 127, *Kusheshwar Prasad Singh vs. State of Bihar & Ors.*, reported in (2007) 11 SCC 447, *State of West Bengal & Others vs. Aparesh Chandra Datta & Others*, reported in 2016 (2) CHN 494, *Uday Kumar Pore vs. The State of West Bengal*, reported in 2023 (2) CHN 236 and the unreported judgments delivered in the cases of *State of West Bengal & Ors. Vs. Sumohon Mondal & Ors.*, *Asim Kumar Chakrabarti vs. The State of West Bengal & Others* and *Saktipada Hazra vs. The State of West Bengal & Ors.*

6. *Per contra*, Mr. Mukherjee, learned advocate Additional Government Pleader appearing for the State respondents submits that that the note appended to Rule 36 of the 1971 Rules cannot be segregated from the substantive provision of Rule 36 and the contents of the note need to be read as a part of Rule 36 which reveals that the deficiency should not be condoned with a view to make up the minimum prescribed qualifying service for the purpose of disbursement of superannuation pension. The exercise of power conferred is abridged and controlled to the extent indicated in the said Rule. In support of such contention reliance has been placed upon the Three Judges Bench judgment delivered by the Hon'ble Supreme Court in the case of *Tara Singh and Others vs. State of Rajasthan and Ors.*, reported in (1975) 4 SCC 86.

7. He argues that the petitioner accepted the letter of appointment dated 22.11.2010 and joined on the said date without raising any objection and continued in service till the date of his superannuation on 31.05.2020, as notified *vide* memo dated 07.11.2017. The petitioner claimed condonation of deficiency in qualifying service only after the cessation of employer-employee relationship accepting the terms of service existing on the date of superannuation. The petitioner's claim was thus stale and unacceptable and as such the competent authority refused to exercise discretion in his favour. In support of such contention reliance has been placed upon the unreported judgment delivered in the case of *Jagat Bandhu Biswas vs. State of West Bengal & Ors.*

8. According to Mr. Mukherjee, the decision in the case of *Uday Kumar Pore (Supra)* was given *per incurium* since the Court had acted in ignorance of the previous decision of a Three Judges Bench judgment delivered by the Hon'ble Supreme Court in the case of *Tara Singh (Supra)* which covered the case before it.

9. The origin of the controversy lies and is traceable to the improper exercise of jurisdiction by the learned Tribunal remitting the petitioner's claim for consideration to an executive authority. Such a direction virtually surrendering its jurisdiction to the executive authority is not acceptable. The Tribunals cannot travel beyond the power conferred on them and delegate their essential function and duty to decide service-related disputes. Such delegation is *ab initio* void [See the judgment delivered in the case of *State of West Bengal Vs Subhas Kumar Chatterjee*, reported in 2010 11 SCC 694].

10. The fact that the order dated 09.04.2010 passed in WPST 91 of 2010 had been communicated on 04.05.2010 is not disputed and had the petitioner been appointed within a period of three weeks from the date of such communication of the order, there would have been no deficiency of qualifying service. The issues as to whether the petitioner having accepted the appointment would be estopped from claiming condonation of deficiency after retirement and as to whether State can set up an estoppel against the petitioner were considered in the case of *Asim Kumar Chakrabarti (Supra)* and the Court held that there is no equity in favour of the State to set up such a defensive doctrine of estoppel. Having failed to discharge its obligation within the mandatory time frame set by the Court, the respondents cannot be permitted to take advantage of such situation.

11. We also do not find any reason to differ with the finding of a co-ordinate Bench of this Court in the case of *Uday Kumar Pore (Supra)* that the first sentence of the note to Rule 36 of the 1971 Rules which confers power upon the Government to condone the deficiency in service is restricted to death gratuity or family pension and, therefore, any other claim apart from the same cannot be perceived to have been included therein.

12. The argument of Mr. Mukherjee that the decision in the case of *Uday Kumar Pore (Supra)* was given *per incurium* is not acceptable to this Court. A judgment cannot be branded to be *per incuriam*, without scanning the facts and circumstances in which the judgment was delivered. In the case of *Tara Singh (Supra)* orders of compulsory retirement were under challenge *inter alia* on the ground that though the proper age of superannuation must be fixed on the scientific basis of the normal expectation of life, Rule 244 (2) of

the Rajasthan Service Rules does not prescribe any such minimum age for compulsory retirement and as such the provisions of the note appended to the Rule could not have been applied. Such argument was negated by the Court observing that the function of the notes is to provide procedure and to control discretion. The real purpose is that when rules are silent, the notes will fill up the gaps. The notes are part of the rules because they are for the guidance of the authorities. They are not inconsistent with the rules but are intended to fill up gaps where the rules are silent. There is no dispute as regards such proposition of law, however, the note appended to Rule 36 of the 1971 Rules, restricts the exercise of discretion towards condonation of deficiency in qualifying service only to death gratuity or family pension and any other claim apart from the same cannot be perceived to have been included therein. Furthermore, an explanatory note cannot supplant the provisions of the Rule to which it stands appended.

13. It is well known that a decision is an authority for what it decides and not what can logically be deduced therefrom. Even a slight distinction in fact or an additional fact may make a lot of difference in decision making process. The judgment is a precedent for the issue of law that is raised and decided and not observations made in the facts of any particular case. There is no dispute as regards the proposition of law as laid down in the case of *Jagat Bandhu Biswas (Supra)* upon which reliance has been placed by Mr. Mukherjee, however, the same is distinguishable on facts. In the said case of *Jagat Bandhu Biswas (Supra)*, the claim of the petitioner therein, was held to be a stale claim since the tribunal application was preferred claiming identical benefits as granted to similar situated persons,

was permitted to be dismissed for non-prosecution on the request of the petitioner therein and there was a complete silence of the petitioner for a period of nearly seven years.

14. For the reasons discussed above, the impugned order dated 19.02.2024 passed by the learned Tribunal in OA 69 of 2023 is set aside and the respondents are directed to condone the deficiency in qualifying service of the petitioner and to disburse the pensionary benefits in favour of the petitioner along with all arrears within a period of eight weeks from the date of communication of this order.

15. With the above observations and directions, the writ application is disposed of.

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

17. Urgent photostat certified copy of this judgment, if applied for, be handed over to the parties on compliance of necessary formalities.

(Partha Sarathi Chatterjee, J.)

(Tapabrata Chakraborty, J.)