

ASR 146.
Ct. no. 24.
5.12.2024

WPA 20564 of 2021
With
CAN 1 of 2023

Ajay Kumar Jolly
Vs.
Union of India & Ors.

Mr. Soumya Majumder, Sr. Adv.
Mr. Victor Chatterjee
Mr. Barnomay Basak

.....For the Petitioner

Mr. Ranjay De
Mr. Basabjit Banerjee
Mr. Adityajit Abel Bose

..... For the Respondent no. 3

Mr. Dibashis Basu

...For the Union of India

Writ petitioner had joined the Indian Navy Service in the year as a Cadet, Commissioned in 1988, thereafter he was promoted from time to time and lastly he was promoted in the rank of Commodore with effect from 2014.

Department of personal training (public enterprise selection board) was issued an advertisement for the post of Chairman cum Managing Direct of Jute Corporation India Limited. The date of vacancy was mentioned on 1st February, 2019 and it was advertised

that the application should be filed and duly forwarded to the PESB by 19th April, 2018. The employment status of the said advertisement is set out as follows:

2. EMPLOYMENT STATUS:

The applicant must, on the date of application, as well as on the date of interview, be employed in a regular capacity-and not in a contractual/ad-hoc capacity- in one of the followings:-

a) Central Public Sector Enterprise (CPSE) (including a full time functional Director in the Board of a CPSE);

b) Central Government including the Armed Forces of the Union and All India Services;

c) State Public Sector Enterprise (SPSE) where the annual turnover is Rs 500 crore or more;

d) Private Sector in company where the annual turnover is Rs. 500 crore or more.

(The average audited annual turnover of three financial years preceding the calendar year in which the post is advertised shall be considered for applying the approved limits).

In the said advertisement one provision was made for Central Government Officers as follows:

6. CONDITION OF IMMEDIATE ABSORPTION FOR CENTRAL GOVERNMENT OFFICERS

Central Government Officers, including those of Armed Forces of the Union and the All India

Services, will be eligible for consideration only on immediate absorption basis.

The petitioner applied for the post by duly filled up application format as provided for the Central Government employees. The Ministry of Defense (Navy), Director of Personnel has forwarded the application of the petitioner to the Secretary Public Enterprises Selection Board recommending and authenticating the candidature of the petitioner for consideration his appointment “on permanent absorption basis”.

The Jute Corporation of India issued a mail in favour of the petitioner on 18th November, 2018 asking him his willingness to join in the post of Chairman cum Managing Director of Jute Corporation in reply to their mail the petitioner has given his willingness through a latter dated 19th November, 2018 for taking charge of the post of Chairman cum Managing Director of the Jute Corporation of India. On the basis of such willingness, Jute Corporation of India has issued an appointment letter in favour of the petitioner on 17th December, 2018 to the post of Chairman cum Managing Director in the Jute Corporation of India with effect from 1st February, 2019 for a period of five (5) years or till the date of superannuation, whichever is earlier.

The appointment of the petitioner was duly forwarded to the concerned ministry and after getting approval from the ministry, the petitioner got selected by PESB on the post CMD, JCI with effect from 27th June, 2018.

After appointment of the petitioner, the Ministry of Textiles and Jute has forwarded a letter to the concerned ministry for fixation of the terms and conditions of the service of the petitioner. It is not out to place to mention herein that after joining the petitioner, Jute Corporation of India submitted a draft terms and conditions of his appointment and were forwarded to IFW of the Ministry for Jute. IFW advised to regulate to pay of CMD, JCI (petitioner) in terms of the provision laid down upon by DPE's OM dated 14.12.2012.

IFW also advised to fix the pay of petitioner considering his pension etc. in the post of CNDE of Ministry of defense. The file was forwarded to the department of public enterprise twice for consultation. Ultimately, the IFW stated that the appointment of the petitioner as CMD, Jute Corporation of India would be re-employment basis. The file was forwarded and routed through the ministry in Cabinet. Thereafter, the impugned letter dated 26th November, 2021 was forwarded to the petitioner contending inter alia that his appointment

as a CMD, JCI could be treated as re-employment basis, since there is a gap of seven months from the date of premature retirement from active service till joining in JCI.

Mr. Majumder, learned Senior counsel appearing on behalf of the petitioner submits that the impugned communication of the executives to the petitioner is not tenable in the eye of law. Moreover, it is an estoppel upon the executives to that of the terms of employment of the service of the petitioner and also in terms of the advertisement issued by the department of personal training (Public Enterprises Selection Board). He submits that the petitioner has applied for premature retirement from the service of Indian Navy by an application dated 5th April, 2017 on the ground of lack of carrier prospects for advancement of service. Indian Navy has allowed his commodore to apply for the VRS, accordingly he applied. However, ultimately the said application for premature retirement of the petitioner was approved by the competent authority with effect from 30th June, 2018.

Mr. Majumder has specifically argued that in terms of the advertisement Central Government Officer including officers of Arm Force of the Union can only apply for the post of Chairman-cum-Managing Director of Jute Corporation of India on

the condition of “immediate absorption basis”. He further argued the employment status has specifically pointed out that the applicant must, on the date of application as well as on the date of interview, be employed in a regular capacity and not in contractual/ad hoc capacity in the Central Government.

Mr. Majumder further argued it was never proved by the Union of India that the petitioner was employed in contractual service or ad hoc service rather he was in regular service on the date of application as well as, on the date of interview.

Mr. Majumder further argued that the said issue was raised before the Hon’ble Delhi High court in ***Uma Kantha Sadhab & Ors.- Vs.- Union of India,*** wherein Hon’ble Single Bench of Delhi High Court has quashed the letter of executives regarding pay fixation of the petitioner of that case, as follows:-

15. Nature of appointment of the Petitioners, it was urged, cannot be termed as ‘re-employment’ which was not the mode of appointment specified in the Advertisement/ACC approval/appointment letters and it needs no gainsaying that if the proposal and approval was for re-employment, ACC would not have used the term ‘appointment’. After the end of almost half the tenure, Respondents cannot

wake up to alter the nature of appointment and consequentially the pay-fixation of the petitioners.

Mr. Majumder further argued that the decision of the Hon'ble Single Bench of Delhi High Court was upheld by the Honb'ble Supreme Court.

Mr. Majumder also relied upon an office memorandum dated 14th December, 2012 placed in page 71 of CAN 1 of 2023 filed by the respondent no. 3, Jute Corporation of India.

Mr. Majumder has specifically argued that when a person was appointed as "permanent absorption basis" his pay was protected in respect of his basic pay + grade pay + D.A., which he was receiving from his earlier department. But when a person was appointed on "re-appointment basis" there would be no pay protection. The Paragraph 3 and paragraph 6 of the said office memorandum has detailed about the pay structure of the employees, appointed as permanent "absorption basis" and "re-employment basis".

Mr. Majumder also argued the present petitioner is appointed in the Jute Corporation of India as "permanent absorption basis" so his pay need be protected according to the office memorandum dated 14th December, 2012. He prayed for setting aside the impugned memo.

Mr. Basu, learned counsel appearing on behalf of the Union of India submits that the petitioner misrepresented himself in applying for the post of CMD, JCI. The petitioner applied for voluntary retirement from arm force on 5th April, 2017, the said application was approved and was taken effect from 30th June, 2018. Meanwhile, in March, 2018 the advertisement of selection of CMD was floated by PESB, in which the present petitioner has applied for. It is the argument on behalf of the Union of India that the petitioner was not in active service at the date of application as well as on the date of interview. It is the argument of Mr. Basu that the writ petitioner all along knew that he is going to retire on VRS on 30th June, 2018, prior to that if he can apply and get selected, then he can misinterpret the law and use it for its own benefit and go to “permanent “absorption” with Jute Corporation of India.

He submits that the ministry has forwarded the file of the present petitioner through the Cabinet level and after consultation of allied ministry, the appointment committee of the Cabinet advised that the appointment of petitioner would be considered as re-employment basis, as there is a gap of seven months from the date of premature retirement from active service till joining in the Jute Corporation of

India. Mr. Basu further argued that this is a policy decision of the Cabinet of the Ministry which can not be put under a question before a writ court. He further argued that the present petitioner was well aware of the state of affairs but he has not disclosed the fact before the ministry or before the PESB regarding his application for VRS. He submits that this impugned notification can not be quashed.

Learned counsel appearing on behalf of the Jute Corporation of India submits that during the pendency of the instant writ petition, one interim order was passed by this court. The Jute Corporation of India has filed an application being CAN 1 of 2023 for vacating the interim order. In terms of prayer appropriate order was passed by this court, which is now subsisting. Learned counsel has also placed page 64 of CAN application and contend that the matter of pay fixation of the petitioner has a great impact upon the officials of Jute Corporation of India, which need be protected.

Having heard the learned counsel for the parties, it appears to me that the fixation of pay of the petitioner as a CMD, JCI is the issue involved in this matter.

The moot question is whether the petitioner was appointed in terms of the advertisement in

“immediate absorption basis” or “re-employment” basis.

Peruse the impugned advertisement placed with the writ petition as annexure P/4; it postulates that the Central Government officer or the officers of Arm Force of Union can only apply on “immediate absorption basis”. It is also apparent that the petitioner has applied in due format for the post of CMD, JCI on “immediate absorption basis”. His application for the post was accepted by the concerned ministry and he was appointed.

Now in dealing with his pay fixation as a CMD, JCI. The ministry is a view that his appointment is on “re-employment” basis.

The ministry has its own reason and logic on the facts that the petitioner has applied for VRS on 5th April, 2017 which was finally approved on 30th June, 2018. It is the clear argument on behalf of the ministry that the present petitioner was not in active service under the Indian Navy since 5th April, 2017 to 30th June, 2018.

It is true that the advertisement has stated that the applicant must, on the date of application, as well as on the date of interview, be employed in a regular capacity. The ministry has interpreted the application of the petitioner for VRS to be not an retire service. The Union of India has not placed any

evidence to show before this court that the present petitioner is not in active service under the Indian Navy after applying for his VRS. But it is true that he was approved for voluntary retirement from service on 30th June, 2018. Thus, the service of the present petitioner never broke till 30th June, 2028. The terms of the advertisement, particularly for the Central Government employee, only allowed them to apply for the post of CMD JCI on the condition of “immediate absorption basis”. If the petitioner being a Central Government employee was appointed in the post of CMD, JCI, he must only be appointed being a condition precedent, to be “immediate absorption basis”.

Relying on the submission of Mr. Basu, had the petitioner disclosed the fact that he applied for VRS from the Arm Force on 5th April, 2017, then also, the status of employment of the petitioner was continuing since 6th April, 2017 till 30th June, 2018. Factually, nothing placed on record, that petitioner was on long leave or discontinued from his service since, 5th April, 2017. Without any specific term in the advertisement, the Union can not put their own logic, which is contrary to the Article 14 to the Constitution of India. Had there be a term in advertisement, that officer applied for VRS can not apply for the post, the petitioner may have not

applied. Now, after the appointment of the petitioner the Union can not change their stand. It appears that the petitioner had allowed to join the post of CMD JCI on 27th June, 2018. Thus in my view the appointment of the petitioner is only “immediate absorption basis”.

Considering the aspects discussed above, I am of the view that the decision of Union of India in the impugned letter dated 26th November, 2021 in terms of fixation of pay structure of appointment of the petitioner as CMD, JCI as “re-employment basis” is legally not tenable. His appointment in the post of CMD, JCI was in terms of the advertisement, and it is to be “permanent absorption basis”.

Under the above observation, the impugned letter is hereby set aside.

The ministry is to fix the pay structure of the petitioner according to the observation made in above as early as possible.

Let the instant writ petition is disposed of.

The connected application (CAN 1 of 2023) is also disposed of.

[Subhendu Samanta, J]