

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

WPCT 128 of 2019

Md. Subid Ali
-Versus-
Union of India through the Secretary & Ors.

For the petitioner in-person : *Md. Subid Ali.*

For the UOI : *Mr. D.N. Ray*
Mr. Saurav Mandal,
Mr. Rajesh Kumar Shah,
Ms. Esha Das.

For the BSNL : *Mr. Anil Kumar Gupta.*

For the Amici Curiae : *Mr. Ujjal Ray,*
Mr. Arpa Chakraborty.

Hearing is concluded on : *26th July, 2024.*

Judgment On : **16th August, 2024.**

Tapabrata Chakraborty, J.

1. The present writ petition has been preferred challenging an order dated 25.01.2019 passed in the original application (in short, OA), being OA 297 of 2017. The operative part of the said order runs as follows:

'In the aforesaid back drop, although we fail to agree with the applicant that he deserved to continue with the erroneously conferred BCR benefit, we agree with his contention that recovery due to erroneous fixation of BCR, which was not as a result of any fraud or misrepresentation on his part, cannot be permitted. Therefore, although the respondents would be at liberty to refix the pension of the applicant, they would refund the entire recovered amount to him with interest as he would be entitled to in accordance with law, within 2 months from the date of receipt of a copy of this order.'

2. Shorn of unnecessary details the facts are that the original applicant/petitioner herein was appointed on 09.08.1977 as a Lower Division Clerk (in short, LDC) in the office of the erstwhile General Manager, Telecom Factories, Calcutta under the Department of Telecom. Due to decentralization of the telecom factories many staff members were declared surplus and the petitioner was transferred to Calcutta Telephones in the year 1987. On 10.08.1992 the petitioner appeared in the departmental Upper Division Clerk (in short, UDC) examination, 1992 and secured the 8th position in the merit list published on 16.07.1993. He was thereafter promoted to Grade-III under the Biennial Cadre Review (in short, BCR) Scheme with effect from 11.11.1993. In the midst thereof, the department introduced the TOA Scheme in place of LDC and UDC *vide* memo dated 09.09.1992. The petitioner was thereafter promoted to the post of Senior TOA (G) with effect from 29.11.1996 and after completion of 26 years of service, he was granted BCR benefit and his pay was fixed at Rs. 9,600/- with effect from 17.11.2003 and thereafter he retired from his service on 30.11.2012. Subsequent thereto, by a memo dated 05.02.2013 the

petitioner's pay was downgraded and refixed taking into account the BCR placement with a direction that the excess amount paid would be recovered since he would not be senior to one Himadri Dutta, who was granted OTBP Gr-II on 09.09.1992. Challenging *inter alia* the memo dated 05.02.2013 the petitioner preferred an OA 61 of 2014 which was disposed of by an order dated 25.02.2016 directing the BSNL to deposit the entire amount which was recovered from the petitioner in some nationalized Bank and thereafter to dispose of the matter upon issuing a show cause notice to the petitioner and after granting him an opportunity of hearing. The said order was duly complied with and a speaking order was passed on 08.02.2017. Challenging the said order, the petitioner again preferred OA 297 of 2017. Aggrieved by the order passed in the said OA on 25.01.2019, Union of India and its functionaries preferred a writ petition being WPCT 50 of 2019 which was dismissed by an order dated 19.07.2019 observing in the last paragraph that the *'time for complying with the order of the tribunal is extended by a month from date. If the dues of the respondent no. 1 are not paid, the tribunal shall be at liberty to proceed with the pending contempt proceedings in accordance with law'*. Alleging violation of the said order 19.07.2019, the petitioner preferred a contempt application which was dismissed on 27.09.2019 as not maintainable *'on consideration of the order dated 19.07.2019, more particularly the last paragraph thereof'* and observing *inter alia* that the said order *'shall not preclude the petitioner to pursue his remedy before the appropriate forum by initiating the proceedings in accordance with law'*. However, in the midst thereof, the petitioner was paid an amount of Rs. 5,98,0159/-. Thereafter the petitioner submitted a representation on 19.10.2019 *inter alia* praying for reconsideration of fixation of his pay. As the

same was not responded to, the petitioner preferred the instant writ petition challenging the order dated 25.01.2019 passed in OA 297 of 2017 for reconsideration of the matter by way of setting aside the memoranda dated 05.02.2013 and 08.12.2017.

3. Md. Subid Ali, the petitioner appearing in person submits that the learned Tribunal passed the impugned order being oblivious of the fact that Mr. Himadri Dutta, as referred to in the order dated 05.02.2013, got promotion to Grade-III under the BCR Scheme with effect from 09.09.1992 without higher responsibility and the petitioner having been promoted with effect from 17.11.1993 after four months of becoming UDC ought to have been granted Grade-III promotion at par with those who got promotion with effect from 09.09.1992 and that as such the purported reason towards down gradation of pay upon refixation was palpably illegal moreso when a promotion granted way back in the year 1993 had been interfered with after the petitioner's relationship with the employer stood ceased.

4. He argues that the order impugned was a cryptic one and no reason was disclosed as to how the learned Tribunal arrived at a finding that the petitioner had been erroneously conferred benefits under the BCR Scheme.

5. On our request Mr. Ujjal Ray and Mr. Chakraborty have appeared in the matter as amici curiae and have advanced their arguments. According to Mr. Ray after cessation of employer and employee relationship on 30.11.2012, the respondents could not have downgraded the petitioner's pay or refixed the same altering the terms and conditions of the petitioner's service as were existing on the date of retirement. The rectification of alleged mistakes after considerable lapse of time and after cessation of employer and

employee relationship would be hit by the principles of promissory estoppel and principles analogues thereto. In support of such contention reliance has been placed upon a judgement delivered by a co-ordinate Bench of this Court in *WPCT 112 of 2012*.

6. According to Mr. Ray the learned Tribunal ought not to have unsettled a promotion granted to the petitioner in the year 1993 and that too after his retirement. A right which stood vested upon the petitioner had been curtailed by the impugned memo dated 05.02.2013. The petitioner's claim was turned down only on the rudiments of an observation that '*we fail to agree with the applicant that he deserved to continue with the erroneously conferred BCR benefit*'. The said order thus being a cryptic one needs to be interfered with. In support of such contention reliance has been placed upon the judgments delivered in the cases of *Shiba Shankar Mohapatra and Ors. Vs. State of Orissa and Ors.*, reported in (2010) 12 SCC 471 and *Rabindranath Bose and Ors. Vs. The Union of India and Ors.*, reported in (1970) 1 SCC 84.

7. Drawing our attention to the order dated 27.09.2019 passed in the contempt application in connection with WPCT 50 of 2019, Mr. Ray submits that the maintainability of the present writ petition cannot be questioned since in the said order it was categorically observed that the dismissal of the contempt application would not preclude the petitioner to pursue his remedy before the appropriate forum. In view thereof, the petitioner submitted a representation to the authorities on 19.10.2019 with a prayer for reconsideration of the order passed on 05.02.2013.

8. Mr. Gupta, learned advocate appearing for BSNL denies and disputes the contention of the petitioner and submits that the writ petition is not maintainable in as much as a co-ordinate Bench of this Court in a writ petition being WPCT 50 of 2019 preferred by BSNL did not interfere with the order impugned in the present writ petition. With the dismissal of the said writ petition the issues amongst the parties attained finality and same cannot be reopened. By the subsequent writ petition, the petitioner had sought to challenge the self-same order of the learned Tribunal which had already been affirmed by a co-ordinate Bench of this Court.

9. We have heard the learned advocates appearing for the parties at length and we have given our anxious consideration to the facts and circumstances of the case.

10. From the order impugned it appears that the learned Tribunal did not find any infirmity in the order towards re-fixation of the petitioner's pay. However, it was held that as the recovery determined was not as a result of any fraud on the part of the petitioner, the respondents should refund the same. By the said order, thus, the re-fixation of the petitioner's pay was not interfered with and the said portion of the order was not contemporaneously challenged by the petitioner. Instead, the petitioner preferred a contempt application before the learned Tribunal alleging non-compliance of the same. In the midst thereof, the respondents herein challenged the order dated 25.01.2019 passed in OA 297 of 2017 in a writ petition being WPCT 50 of 2019. Upon contested hearing, the writ petition was dismissed. Due to such dismissal, the order dated 25.01.2019 attained finality amongst the parties. Records also reveal that after dismissal of the writ petition, the respondents

had refunded an amount of Rs. 5,98,159/- and such payment was duly accepted by the petitioner. In view thereof, the contempt application preferred alleging violation of the order dated 19.07.2019 was dismissed.

11. The issue which arises for consideration is as to whether on the basis of the observation made by co-ordinate Bench of this Court in the contempt application on 27.09.2019 to the effect that the said order shall not preclude the petitioner to pursue remedy before the appropriate forum, the petitioner can be allowed to reopen his challenge against the order dated 05.02.2013 and claim for reconsideration and/or review of the said decision. On a perusal of records and after granting appropriate opportunity of hearing to the petitioner the respondents reconsidered the issue of fixation of pay as directed by the learned Tribunal. The petitioner's grievances were reconsidered and turned down by a speaking order dated 08.02.2017 detailing the reasons. The propriety of the said order along with the orders dated 05.02.2013 and 08.02.2017 was duly considered by the learned Tribunal while disposing of the OA. It is not a case that the respondents have unilaterally sought to downgrade and refix the petitioner's pay. The contents of the order would reveal that such refixation was consequential to orders passed by the Hon'ble Supreme Court interpreting the BCR Scheme. In view thereof, we are unable to accept the contention of Mr. Ray that such refixation was a belated one and due to long continuance of disbursement of consequential benefits, a right stood vested upon the petitioner which could not have been interfered with after his retirement. An erroneous fixation of pay does not confer any vested right upon any incumbent. However, the benefits enjoyed by the petitioner on the basis of such erroneous fixation

cannot be recovered after the cessation of the employer employee relationship since the petitioner had no role to play towards disbursement of such benefits. In view thereof, the direction towards recovery was rightly interfered with and the recovered amount was subsequently disbursed which the petitioner accepted. After getting such benefits, the petitioner again made an attempt to reagitate the issue that the orders dated 05.02.2013 and 08.02.2017 were not sustainable in law. The acceptance of such prayer would reinvigorate a claim which had attained finality.

12. Records would reveal that the quantum of the recovered amount paid was disputed by the petitioner at the time of final hearing of the contempt and as such the contempt application was dismissed observing that the said order shall not preclude the petitioner to pursue remedy before the appropriate forum. The said observation cannot be construed as a liberty granted to the petitioner to again challenge the fixation of pay scale. The petitioner also did not prefer any writ petition contemporaneously challenging portion of the order impugned by which his challenge against the impugned order dated 05.02.2013 was turned down. In the said conspectus, the said issue which has already attained finality cannot be reopened in the present writ petition.

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. In the case of *Tarun Kumar Palodhy (supra)* having accepted the petitioner therein

to be a Group-D employee and having disbursed regular salary, the respondents sought to cancel such regularisation after a substantive period of time. In the case of *Rabindranath Bose (supra)* the Court interfered with the act to disturb the appointment and promotion of the incumbent granted long time ago on the proposition that the same would affect a right which stood vested upon the incumbent. The said judgments are, thus, distinguishable on facts.

14. The scope of judicial review is very narrow and limited and such jurisdiction should be exercised sparingly and only in appropriate cases where the judicial conscience of the Court dictates. The impugned order does not suffer from any jurisdictional error or any substantial failure of justice or any manifest injustice warranting interference of this Court.

15. For the reasons discussed above, the writ petition being WPCT 128 of 2019 is dismissed.

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

17. Before we part, we record our sincere appreciation of the services rendered by Mr. Ujjal Ray and Mr. Arpa Chakraborty, whom we appointed as amici curiae in the matter.

18. Urgent Photostat certified copy of this judgment, if applied for, be given to the parties, as expeditiously as possible, upon compliance with the necessary formalities in this regard.

(Partha Sarathi Chatterjee, J.)

(Tapabrata Chakraborty, J.)