

(2014) 06 TP CK 0002
TRIPURA HIGH COURT
Case No: Writ Petition (C) No. 43 of 2008

Apan Kumar Sarkar

APPELLANT

Vs

State of Tripura and
Others

RESPONDENT

Date of Decision: June 30, 2014

Citation: (2015) 2 GLT 84

Hon'ble Judges: S. Talapatra, J.

Bench: Single Bench

Advocate: C.S. Sinha, Advocate, for the Appellant; S. Chakraborty, Addl. G.A., for the Respondent

Final Decision: Dismissed

Judgement

S. Talapatra, J. By way of this writ petition, the petitioner has challenged the Memorandum No. F.2(85)-FISH(ESTT)/200-05 dated 18.07.2007, Annexure-8 to the writ petition, whereby the petitioner's pay in the post of the Deputy Director (Fisheries) has been re-fixed based on the pay which the petitioner had enjoyed in the post of Superintendent of Fisheries even though the petitioner had enjoyed the benefit of pay and allowances for the post of the Deputy Director (Fisheries) for the period from 18.03.1994 to 23.05.1995 and has also challenged the order contained in the letter No. F.2(85)-FISH(ESTT)/04-05 dated 09.10.2007, Annexure-11 to the writ petition, rejecting his prayer made to the Secretary, Department of Fisheries, Government of Tripura as regards the fixation of pay by the Memorandum dated 18.07.2007. The petitioner has further challenged the order of promotion of the respondent No. 6 under No. F.2(532)-Fish(Estt)/1988-89 dated 27.11.2004, Annexure-7 to the writ petition, and has again challenged the final seniority list in the grade of the Deputy Director (Fisheries) as published by the Memorandum No. F.2(303)-FISH(ESTT)/84-85, Annexure-6 to the writ petition. Further, the petitioner has prayed for a direction to promote him in the post of the Joint Director of Fisheries from the date when the respondent No. 6 was promoted to that post and

to treat him as regularly appointed in the post of Deputy Director (Fisheries) w.e.f. 19.03.1994 when he was appointed on ad-hoc basis and to declare him senior to the respondent No. 6 in the grade of the Deputy Director (Fisheries). There is no dispute that the petitioner was appointed on ad hoc basis on 19.03.1994 in the post of the Deputy Director (Fisheries) and the said ad-hoc appointment continued till the petitioner was regularly appointed by the Notification No. F.2(632)-FISH(ESTT)/93-94 dated 23.05.1998, Annexure-2 to the writ petition. It is also not in dispute that when the petitioner was appointed in the post of the Deputy Director (Fisheries) on ad-hoc basis he was given the benefit of fixation of pay in terms of FR 22(1)(a)(i) in the scale of pay of Rs. 3000-5000/- with other usual allowances and the petitioner had enjoyed such pay scale till he was regularised without any interruption whatsoever. It is also not in dispute that the post of Deputy Director (Fisheries) is a selection post and on recommendation of the Group-A DPC the post has been filled up.

2. It appears that both the petitioner and the respondent No. 6 namely Shri Badal Chandra Roy were considered by a Group-A DPC held on 20.01.1998 and it has been observed by the DPC as under:

"8. The D.P.C. on the basis of the over-all gradings of the officers coming in the zone of consideration with due regard to their seniority prepared a year-wise "Select List" in order of merit and a consolidated select list in accordance with the instructions contained in the Government of India's decision No. (1) below paragraph X.7 of Appendix-29 of C.S.R. Vol-III and as per instruction laid down in the Government of India, Ministry of Personnel, Public Grievance and Pensions, Department of Personnel, New Delhi O.M. No. 22011/5/86-Estt.D dated 10.3.89 as adopted by the Government of Tripura vide Appointment & Services Department Memo No. F.35(1)-GA/92 dated 23.3.1992 as follows:-

Year-wise select list for promotion to the post of Deputy Director of Fisheries/Principal, TFTI.

Consolidated select list for promotion of the officers in the post of Deputy Director of Fisheries/Principal, TFTI.

9. The records containing the over-all grading made by the D.P.C. in respect of each of the Officers considered by the committee year-wise are kept in a separate sealed cover which may be opened by the competent authority as and when required and re-sealed after doing the needful.

In making its recommendation the D.P.C. has observed the procedure as laid down in the Govt. of India, Ministry of Personnel Public Grievances and Pensions, Deptt. Of Personnel, New Delhi O.M. No. 22011/5/86-Estt.(D) dated 10.3.89 as adopted by the Govt. of Tripura vide Appointment & Services Deptt. Memo No. F.33(1)-GA/92 dated 23.3.1992."

3. It is apparent the post was a selection post and the respondent No. 6 occupied the better merit position in the select panel. The petitioner does not assign any reason in the petition to impinge the said select panel. As such, the petitioner cannot claim seniority over the respondent No. 6 in the post of Deputy Director (Fisheries). Thus, the challenge in this regard falls through.

4. Mr. C.S. Sinha, learned counsel has submitted that the refixation of the pay of the petitioner in the grade of Deputy Director (Fisheries) by the impugned Memorandum dated 18.07.2007 is entirely erroneous and contrary to the provisions of Fundamental (Tripura Amendment) Rules, 1999 as available in the Notification No. F. 19(1)-FIN(G)/83 dated 03.10.1999 and also against the provisions of FR 22(1)(a)(i).

5. Mr. S. Chakraborty, learned Addl. G.A. has stoutly submitted that the last pay drawn by the petitioner as the Deputy Director (Fisheries) on ad-hoc basis cannot be the basis and the official respondents have rightly ignored such plea by the impugned Memorandum dated 18.07.2007. The petitioner is entitled to get the protection of pay that he received on 19.03.1994.

6. For appreciation, relevant provisions of Fundamental (Tripura Amendment) Rules, 1999 is extracted hereunder:

"(1) Save in cases of appointment on deputation to an ex-cadre post, or to a post on ad-hoc basis, the Government servant shall have the option, to be exercised within one month from the date of promotion or appointment, as the case may be, to have the pay fixed under this rule from the date of such promotion or appointment or to have the pay fixed initially at the stage of the time-scale of the new post above the pay in the lower grade or post from which he is promoted on regular basis, which may be refixed in accordance with this rule on the date of accrual of next increment in the scale of the pay of the lower grade or post. In cases where an ad-hoc promotion is followed by regular appointment without break, the option is admissible as from the date of initial appointment/promotion, to be exercised within one month from the date of such regular appointment:

Provided that where a Government servant is immediately before his promotion or appointment on regular basis to a higher post, drawing pay at the maximum of the time-scale of the lower post, his initial pay in the time scale of the higher post shall be fixed at the stage next above the pay notionally arrived at by increasing his pay in respect of the lower post held by him on regular basis by an amount equal to the last increment in the time-scale of the lower post or rupees twenty five, whichever is more.

(2) When the appointment to the new post does not involve such assumption of duties and responsibilities of greater importance, he shall draw as initial pay, the stage of the time-scale which is equal to his in respect of the old post held by him on regular basis, or if there is no such stage, the stage next above his pay in respect of

the old post held by him on regular basis;

Provided that where the minimum pay of the timescale of the new post is higher than his pay in respect of the post held by him regularly, he shall draw the minimum as the initial pay:

Provided further that in a case where pay is fixed at the same stage, he shall continue to draw that pay until such time as he would have received an increment in the time-scale of the old post, in cases where pay is fixed at the higher stage, he shall get his next increment on completion of the period when an increment is earned in the time-scale of the new post.

On appointment on regular basis to such a new post, other than to an ex-cadre post on deputation, the Government servant shall have the option, to be exercised within one month from the date of such appointment, for fixation of his pay in the new post with effect from the date of appointment to the new post or with effect from the date of increment in the old post."

7. In no uncertain terms it has been provided in the said Fundamental (Tripura Amendment) Rules, 1999 that in cases where an ad-hoc promotion is followed by regular appointment without break, the option is admissible as from the date of initial appointment/promotion, to be exercised within one month from the date of such regular appointment and the initial pay be determined on notional calculation. The petitioner's initial pay in the time scale of the higher post shall be either on the basis of the pay drawn in the feeder post which the petitioner had drawn or at his option on the day of appointment in the higher post regularly. There is no difference of opinion that the petitioner has not exercised any option. At least, no such record has been produced before this Court. The petitioner was never asked to exercise the option before fixing his pay in the scale of pay attached to the post of Deputy Director (Fisheries). FR 22(1)(a)(i) provides as under:

"Notwithstanding anything contained in these Rules, where a Government servant holding a post in a substantive, temporary or officiating capacity is promoted or appointed in a substantive, temporary or officiating capacity to another post carrying duties and responsibilities of greater importance than those attaching to the post held by him his initial pay in the time-scale of the higher post shall be fixed at the stage next above the pay notionally arrived at by increasing his pay in respect of the lower post by one increment at the stage at which such pay has accrued.

Provided that the provisions of this rule shall not apply where a Government servant holding a Class I post in a substantive, temporary or officiating capacity is promoted or appointed in a substantive, temporary or officiating capacity to higher post which is also a Class I post;

Provided further that the provisions of sub-rule (2) of rule 31 shall not be applicable in any case where the initial pay is fixed under this rule;

Provided also that where a Government servant is immediately before his promotion or appointment to a higher post drawing pay at the maximum of the time-scale of the lower post his initial pay in the time-scale of the higher post shall be fixed at the stage in that time-scale next above such maximum in the lower post."

8. FR 22(C) even though has been deleted by the Government of India by the notification dated 30.08.1989 published in the Gazette of India as GSR 679 dated 16.09.1989 but that has not been so deleted by the Government of Tripura for filling up of that gap that might arise for deletion of the FR 22(C). A new provision has been incorporated as FR 22(1)(a)(i) which is *pari materia* to a larger extent to that provision of FR 22(C) before its deletion. Thus the impact would remain all the same. Even though the abrupt comparison noted below the Fundamental Rules (Tripura Amendment) Rules, 1999 shows FR 22(C) as the old rule, corresponding to FR 22(1)(a)(i).

9. It has appeared from the record that the ad-hoc appointment of the petitioner in the post of Deputy Director (Fisheries) continued till regularisation without break. True it is that Fundamental (Tripura Amendment) Rules, 1999 is of no help to the petitioner. It cannot as well be held that the impugned order as to re-fixation of pay is grossly illegal. At the same time, what this court has noticed that the amendment rule has created an effect of obfuscation, demeaning the predictability of law.

10. From the underlined part of the extract from the amendment rule, provided for purpose of emphasis, it would be noticed that no protection of the pay, drawn in the ad-hoc appointment has been given though on the first blush of reading it appears that the object was to give such benefits. But this court is not competent to decide on that aspect unless the rule is challenged by the petitioner, which the petitioner has not embarked upon. Even the impugned order is not amenable to the provisions of FR 31A in as much as the petitioner even did not challenge the order of regular appointments to the post of the Deputy Director (Fisheries), which are prospective in nature. Thus the petition deserves no further consideration.

11. When a person continuously officiates on ad-hoc appointment for a substantive tenure, much beyond the period of six months as prescribed by the state, for not filling up the regular vacancy against which such stop gap arrangement is made and later when such appointments get regularised without break, the incumbent may legitimately expect that there would be either a consideration for retrospective effect of the appointment or protection or the pay he was drawing for the ad-hoc appointment. This aspect requires fresh consideration by the state. Hence, the state shall take such exercise to complete the same within a period of six months from today. If any benefit accrues there from, such benefit shall be extended to the petitioner. Subject to the observation and direction as above, this writ petition is dismissed. There shall be no order as to the costs.