

(2009) 09 CAL CK 0004

Calcutta High Court

Case No: W.P.S.T. No. 209 of 2009

Pratima Sengupta

APPELLANT

Vs

State of West Bengal and Others

RESPONDENT

Date of Decision: Sept. 8, 2009

Hon'ble Judges: Tapas Kumar Giri, J; Amit Talukdar, J

Bench: Division Bench

Advocate: Partha Sarathi Bhattacharyya, Mr. Mukundalal Sarkar, Mr. Raju Bhattacharya, Mr. Pritam Maji and Mr. Arunava Maity, for the Appellant; Surajit Samanta and Shri Biswajit Samanta for the Private Respondent, Shri Soumitra Dasgupta, Senior Govt. Advocate and Shri Tulsi Das Maity for the State, for the Respondent

Judgement

1. In the December Years of her career, she has been pursuing Justice for over a decade from the Authorities, whom she has served since the prime of her youth.
2. Yet, Justice has remained a teasing mirage for the petitioner owing to apathy of the Authorities compounded by years of long trail before an indifferent Tribunal.
3. Having been wronged at the hand of the authorities where her Seniority stood de-escalated, she had approached the Tribunal, which kept her in the tenterhooks for a decade and then abruptly rolled down the shutters over her face with a total misconception of her prayer.
4. It is in such trajectory that she has approached us.
5. We, in exercise of our Power of Judicial Review, are required to see as to whether we can retrieve her lost fortune.
6. Background facts necessary for the purpose of having a whole hog over the entire issue dates back to 19.11.1973 when the petitioner joined the West Bengal Police Directorate as a Clerk-cum-Typist and was deputed to the Enforcement Branch of the West Bengal Police. Subsequently, her services were shifted from the Enforcement Directorate to the Criminal Investigation Department on 01.09.1975 as

Typist.

7. It is at that point of time, the respondent No. 9 joined as a Typist on 14.05.1975. She was confirmed in the Post w.e.f. 01.06.1979 while the Respondent No.9 was confirmed in the same Post on 01.09.1980.

8. Thereafter, both the Petitioner and the Respondent No.9 was absorbed in the Category of Lower Division Assistant w.e.f. 01.08.1977 in the identical scale of pay, which both of them were drawing as Typist.

9. It is her case that appointment in the said Category was not a promotional Post and it was just a mere change in the Cadre by way of transfer. She was confirmed in the said Post w.e.f. 22.06.1981, while the respondent No.9 was confirmed in the said Post w.e.f. 02.10.1982.

10. Like a bolt from the blue, the respondent No.4 (Deputy Inspector General of Police, Criminal Investigation Department) by his Memo No. 245/12 dated 04.05.1998 (Page 75A of the Application) in an ex parte fashion declared respondent No.9 as senior to the petitioner in terms of Note (2) under Rule 4 of the West Bengal Service (Determination of Seniority) Rules, 1981. (annexure-P 11) (hereinafter referred to as the "said Rules"].

11. Since she was completely caught unaware of such a communique by the respondent No.4, as all along she was designated senior to respondent No.9 - she made a representation before the later (Annexure-P12).

12. But since the same did not melt any ice, she approached the Tribunal by way of taking out O.A. No. 778 of 2000.

13. A long wait of nine years. A passage of valuable time elapsed. A precious portion of the petitioner's life was kept in suspended animation till such time the Tribunal awoke from its slumber on 18.12.2008 and realised "..... there being no merit in the prayer of the applicant the same cannot succeed and the application is, therefore, dismissed but without any order as to costs."

14. She is now before us.

15. In support of her case, Shri Bhattacharyya, learned counsel has presented myriad points for our consideration.

16. Shri Bhattacharyya, has, at the first instance submitted that the order rescinding the petitioner from her seniority and the escalation of respondent No.9 by way of juxtaposing each other's Seniority by the Order dated 04.05.1998 passed by the respondent No.4, is absolutely an arbitrary exercise of power, as the same was done without affording any opportunity of hearing to the petitioner. This, seriously offends the principles of natural justice and is contrary to the doctrine of audi alteram partem.

17. Secondly, Shri Bhattacharyya submitted that the Panel by which the petitioner was designated senior to respondent No.9, is still in existence and without setting aside the same, the Respondent No.4 could not have arrived at the said conclusion.

18. Thirdly, Shri Bhattacharyya submitted it is absolutely strange that notwithstanding the representation made by the petitioner, the aforesaid order was passed by the Respondent No.4 on 04.05.1998 and the same remained unanswered, which, according to him, was a pure manifestation of the bias of the concerned Authorities.

19. So far as the question of her fate before the Tribunal, Shri Bhattacharyya placed before us the entire Order, which has been impugned and submitted that the Tribunal missed the very crux of the Matter and was lost in an erroneous conception with regard to the question of natural justice.

Per Contra:

20. Shri Samanta for the respondent No.9 has sought to scuttle all the points canvassed by Shri Bhattacharyya. According to Shri Samanta, the petitioner is guilty of suppressing the Affidavit filed on behalf of the State respondent before the learned Tribunal, which he annexed in his Affidavit (annexure R-9/1).

21. According to Shri Samanta, as the Petitioner was placed on her own request in the new Cadre, she will automatically be in the bottom Seniority and as the respondent No.9 being Senior to her in age and is due to superannuate before her obviously, she has an edge in respect of Seniority in terms of Note (2) under Rule 4 of the said Rules.

22. Learned Senior Government Advocate endorsed the views of Shri Samanta and placed before us a Division Bench decision of this Court in The Calcutta Municipal Corporation & Ors. v. Rukshana Anjum, reported in 2008 (2) CLJ (Cal)887 on the principle that since no other order could have been passed except the one which has been arrived by the respondent No.4 - the Petitioner was not required to be heard and such exercise adopted by the respondent No.4, which has peeved her, cannot be said to have breached the principles of natural justice.

23. Affidavits have been exchanged between the parties.

24. In the light of the various contentions raised at the Bar and the materials that we have perceived, we would now be required to look into the Order of the learned Tribunal affirming the exercise adopted by the respondent No.4 in annexure P-11.

25. We have to do so in exercise of our Power of Judicial Review. The same is absolutely narrow and constricted. We have to see through the entire conspectus of the scenario through a narrow key-hole (read Power of Judicial Review).

26. It is by now a trite position of by way of several decisions of the Summit Court that the scope of Judicial Review is limited to the deficiency in decision making

process and not the decision and the Court should not interfere with the same unless it is illogical or suffers from procedural impropriety and shocking to the conscience of the Court. [See : [Damoh Panna Sagar Rural Regional Bank and Another Vs. Munna Lal Jain,](#)].

27. We are conscious of the fact that our powers for the exercise of the Judicial Review of the order passed by the Tribunal has to be absolutely circumspective and limited to the extent as indicated above. Yet, in the process we cannot adopt an attitude, which would be so sterile that to snuff out Justice like a flickering flame in the wind of and reasoning.

28. Factual matrix leading to filing of this application have been looked into by us hereinabove. We are *prima facie* of the view that once the petitioner has accrued a right, it was incumbent upon the respondent No.4 to at least have given a right of hearing before rescinding her Seniority.

29. While it is true that a wrong cannot be allowed to be perpetuated and it is also equally true that the Petitioner cannot be permitted to reap harvest of a wrong but the fact remains there is no iota of materials to suggest that she was designated senior to respondent No.9, not by way of any wrong or error apparent on the face of records maintained in the office of respondent No.4 and other functionaries, which has persuaded respondent No. 4 to realise its folly and suddenly set the records right, that too in a fashion seen by us in annexure P-11.

30. As in our view the principle of *audi alteram partem* has been clearly offended, which we will set out down the line, we feel there could have been another finding, had the petitioner been heard. Obviously, the exercise adopted by the respondent No.4, is arbitrary. It is amenable to the Power of Judicial Review.

31. The same, though vested before the Tribunal was not made good use of; instead on the basis of a wrong reading of the decision of the Supreme Court [Aligarh Muslim University and Others Vs. Mansoor Ali Khan,](#) the impugned view was taken by the learned Tribunal, which is also equally erroneous and requires our interference.

32. The learned Tribunal has proceed on the premises that the decision taken by the respondent No.4 could have been the sole decision leaving no other option before him. As such, the necessity of hearing the petitioner was redundant.

33. In our opinion this is not so. It is not a case where a Life Convict comes up in Criminal Appeal and submits that he has not been heard on the point of Sentence; although, it was the minimum Sentence which the Court could have given.

34. It would be necessary to keep in mind the point canvassed by the Petitioner with regard to the fact that it was neither a case of initial appointment nor it was a transfer on promotion or change of the Cadre on her own request.

35. Note (2) under Rule 4 of the said Rules reads as follows:

4. Determination of seniority, of direct recruits -

" "

"(1)....."

"(2) Where the inter-se seniority amongst several persons has not been determined prior to the coming force of these rules, such seniority shall, on the coming into force of these rules, be determined on the basis of actual date of their joining. When the date of joining of all such persons is the same, seniority shall be determined on the basis of date of birth, person retiring earlier being adjudged as senior. When the date of birth is the same, seniority shall be determined on the basis of total marks obtained by each in the examination, passing of which is the qualification prescribed for recruitment to the particular post, cadre or grade."

36. In our reading, here the question is not of the inter se Seniority not having been determined prior to the coming into force of the said Rules, which would entitle the respondent No.9 to be placed on the grade of Seniority by virtue of her earlier date of birth - but as the petitioner was transferred from the Enforcement Directorate to the Criminal Investigation Department under the West Bengal Police Directorate, obviously, Sub-Rule (3) of Rule 7 of the said Rules would apply.

37. This was never considered. Neither by the respondent No.4, nor by the Tribunal. While considering the prayer of the petitioner we can look into such facts for the limited purpose of assessing her prayer. In this context we may profitably refer to paragraph 30 of the decision of Supreme Court in [State of U.P. and Another Vs. Johri Mal](#), The Supreme Court in paragraph 30 of the said decision held: "that while exercising power of judicial review the Court is more concerned with the decision making process than the merit of the decision itself." It was further held in the said paragraph ".....But while exercising and scrutinizing the decision making process it becomes inevitable to also appreciate the facts of a given case as otherwise the decision cannot be tested under the grounds of illegality, irrationality or procedural impropriety. How far the Court of judicial review can reappreciate the findings of facts depends on the ground of judicial review."

38. Reference may also be made to the decision of the Supreme Court in [Delhi Development Authority, N.D. and Another Vs. Joint Action Committee, Allottee of SFS Flats and Others,](#).

39. That apart another aspect of the matter, which disturbs us is the tenor of the order passed by the respondent No.4 in Annexure-P11. It was as if, a mere flat of a dictator which does not have any rhyme or reason but simply the dictator of a closed mind.

40. The decision arrived without at least penning down some reasons, is no decision at all. The Supreme Court in [State of Meghalaya and Others Vs. Mecken Singh N. Marak](#), held : "..... Failure to give reasons amounts to denial of justice"."

41. Even though in a different context attributing it for an appellate. For a, the Supreme Court in [Chairman, Disciplinary Authority, Rani Lakshmi Bai Kshetriya Gramin Bank Vs. Jagdish Sharan Varshney and Others](#), has held :

The purpose of disclosure of reasons, as held by a Constitution Bench of this Court in S.N. Mukherjee v. Union of India, is that people must have confidence in the judicial or quasi judicial authorities. Unless reasons are disclosed, how can a person know whether the authority has applied its mind or not? Also, giving of reasons minimises the chances of arbitrariness. Hence, it is an essential requirement of the rule of law that some reasons, at least in brief, must be disclosed in a judicial or quasi-judicial order, even if it is an order of affirmation.

42. As such, the decision arrived at by the respondent No.4 without giving an audience to the petitioner, was clearly in a colourable exercise of power. Had the same been nourished with a hearing, certainly, a different view was possible.

43. The Tribunal foreclosed the entire issue by way of a wrong reading of the decision of the Supreme Court in Aligarh Muslim University (supra). The Supreme Court in the said decision has held: "..... "useless formality" theory is to be noted as an exception" and in the ultimate analysis "it may depend on the facts of a particular case."

44. As such, the Tribunal by way of applying the said test as a straight jacket formula, has misdirected himself in a complete fashion.

45. The decision referred to by the learned Senior Govt. Advocate in Calcutta Municipal Corporation & Ors. v. Rukshana Anjum (supra) also has no manner of application in the instant case.

46. As a fall out of the aforesaid situation we have no hesitation to come to the conclusion that recasting of the Seniority of the Petitioner done by the respondent No.4 without giving any opportunity of hearing to her and placing respondent No.9 over her had was consequent to an erroneous exercise of power, which had been subsequently ratified by the learned Tribunal in a mechanical fashion. Wrong reading of the said Rules resulted in such miscarriage of Justice.

47. Now what to do? Adopting the conventional formula by way of citing our limited scope of Judicial Review, we can send the Matter back again for decision before the appropriate Authority. Perhaps, it would be easiest possible task for us.

48. But would that be Just Justice? In the process can we restore to the Petitioner her lost twelve years before the Tribunal and the years, which she has left behind before the Respondent No.4 where her Petition is still pending disposal ?

49. Justice should not be the product of automation. It should be tempered with human element. Before us, is a petitioner, who is now in the Sunset years of her career where she has been wronged due to erroneous reading of the said Rules.

50. It would not be Just Justice to remand the matter. Instead, we feel, we should put an end to her agony once we have found that she has been wronged.

51. Let us rectify the wrong here and instead of franchising the same to another Forum, which in our view; would only perpetuate the agony of this helpless petitioner, who in the process would superannuate by the time the respondent and the Tribunal feels it is time to respond and come to any conclusion-dispose of this application with the following direction:

Accordingly we quash the Order passed by the learned Tribunal in O.A. No. 778 of 2000 ratifying the Order passed by the Respondent No.4 in Memo No. 245/12 on 04.05.1998 and restore the lost Seniority of the Petitioner.

Parties to bear their own costs.