(1986) 07 CAL CK 0003

Calcutta High Court

Case No: C.O. No. 3845 (W) of 1985

Virendra Prosad		APPELLANT
	Vs	
Union of India and Others		RESPONDENT

Date of Decision: July 8, 1986

Acts Referred:

- Administrative Tribunals Act, 1985 - Section 14, 28, 29, 29(4)
- Constitution of India, 1950 - Article 136, 14, 16, 226, 309
- Payment of Bonus Act, 1965 - Section 33, 34(2)

Citation: 91 CWN 321

Hon'ble Judges: B.P. Banerjee, J

Bench: Single Bench

Advocate: S.C. Bose, A. Mitra and L. Gupta, for the Appellant; R.N. Sen and Uma Sanyal, for the Respondent

Final Decision: Allowed

Judgement

B.P. Banerjee, J.

Let this matter be treated as on day''s list as the matter is not appearing in the list by mistake. When the matter appeared in the list for delivering the judgment on July 4, 1986, Mr. Bhola Nath Sen, learned Counsel appearing on behalf of the respondent, produced before this Court for the first time a notification issued by the Department of Personnel and Training, Ministry of Personnel, dated the 2nd May, 1986 published in the Extra Ordinary Gazette of India, dated the 2nd May, 1986 and it appears from the said Gazette that ''Separate paging is given to this particular in order that it may be filled as separate compilation''. It appears from the said notification that the notification was issued in exercise of the power conferred by sub-section 2 of Section 14 of the Administrative Tribunals Act, 1985. The Central Government specified 12th day of May, 1986 as the appointed date on and from which the provision of sub-section 3 of Section 14 of the said Act should apply only

to Central. Board of Trustees constituted under the Employees Provident Fund and Miscellaneous Provision Act. 1932. On the basis of the said notification it was contended by Mr. Bholanath. Sen that this court has no jurisdiction to deal with or deliver judgment in this case as u/s 28 of the Administrative Tribunal Act, 1985 the power of the High Court in so far as the service matters of the Central Board of Trustees constituted under the Employees Provident Fund and Miscellaneous Act, 1952 had been taken away.

2. Mr. Somendra Chandra Bose, learned Advocate appearing on behalf of the petitioner, contended in the first place that the administrative Tribunal Act, 1985 did not contemplate transfer of a case in respect of which hearing was concluded by this Court and judgment was reserved for consideration by the court and in support of his contention, Mr. Bose pointed out the provision of Section 29 of the said Act which provides transfer of pending cases and pointed cut that in accordance with the provision of Section 29. Tribunal was to proceed to deal with such cases from the stage which was reached before it stood so transferred. In other words, Mr. Bose pointed out that after the hearing was concluded and the judgment was reserved by this court, there is no provision for transfer of the case. Transfer of the pending cases, according to Mr. Bose did not and could not include the matter which was finally heard and the court had reserved judgment before the issue of the Notification. ''Pending cases'' according to Mr. Bose, is the case which is pending for hearing and which has not been heard and the hearing was not concluded. Otherwise, in such a case the fallacy would be that in a particular case where the court had started delivering judgment and the judgment had not been concluded on a particular date, in that case, on the next date when the notification comes into force, the court will lose its power to pronounce the rest of the judgment. There may be cases where hearing was concluded and ordering portion was dictated in the court and the reaons are reserved as is usually done by this court. In such case, Mr. Bose pointed out that if the contention of the respondents in accepted, in that event a precarious state of affairs would prevail in the matter. M. Bose, further, relied upon the decision of the Supreme Court of India in the case of The State of Karnataka and Another Vs. Shri Ranganatha Reddy and Another, and pointed out that attempt should be made to save the law and not to declare it invalid and the constitutionality of the Act should be maintained. But, in this process a reading down of some of the provision of the Act was permissible if the same appears to be impracticable or will create confusion and doubts. At the same time, the spirit of the act should be kept and maintained. The question that calls for decision, in this case is that whether Section 29 of the said Act contemplates transfer of a case which has been finally heard and the court had reserved for judgment.

3. It appears from the statement of object and reasons of the Act that the Administrative Tribunal was established ''To deal with exclusively with service matters would go long way in not only reducing the burden of various courts and thereby giving them more time to deal with other case expeditiously, but would also

provide to the persons convered by the Administrative Tribunals speedy relief (emphasis supplied) in respect of their grievances''. Further Section 29(4) of the said Act provides that after the case is transferred, the Tribunal would start from the stage which was reached before such transferor from any earlier stage or de novo as the Tribunal may deem fit. Considering the statement of objects and reasons of the Act and the provision of section 29 of the said Act, it is made abundantly clear that the transfer of cases contemplated are those cases which had not been finally heard, but were simply pending. If the contention of Mr. Bholanath Sen, learned Counsel appearing on behalf of the respondent is accepted, in that event in a matter like this, when after a prolonged hearing the court reserved judgment, in that event the Tribunal had only to deliver judgment without hearing the case and without knowing the arguments made by the parties. There may be a case where the court had started delivering judgment and the judgment has not been concluded at the end of the day and on the next morning such a notification is issued taking away the jurisdiction of the court, in that event, the Tribunal had to complete the judgment or in the alternative had to hear the case de novo and in that case he declared object of the act namely speedy relief to the litigant would be completely frustrated and made nugatory and that such an interpretation of Section 29 of the said Act could not be given by any stretch of imagination. It was held by the Judicial Committee in the case of Secretary of State v. Mask & Company, reported in AIR 1947 PC 78 and was observed that " It is settled law that the exclusion of the jurisdiction of the Civil Court is not be readily inferred, but such exclusion must either be explicitly expressed or clearly impied". It is also well settled that even if the jurisdiction is so excluded, the Civil Court have jurisdiction to examine into case where the provision of the Act have not been complied with or this statutory tribunal has not acted in conformity with the fundamental principles of judicial procedure. In the case of Viscount Simonds Pyx Granite Company Limited v. Ministry of Housing, and Local Government, reported in 1960 AC 260 at page 286 it was held that '''It is a principle not by any means to be whittled down that the subjects'' recourse to Her Majesty''s Courts for determination of his rights is not to be excluded except by clear words". The Supreme Court of India in the case of Dhulabhai and Others Vs. The State of Madhya Pradesh and Another, after considering various case laws on the point laid down the principles regarding the ouster of the jurisdiction of the court and came to the conclusion that an exclusion of the jurisdiction of the Civil Court should not be readily inferred unless of the condition applied. The case laws cited above lay down that the exclusion of the jurisdiction of the court should not be readily be inferred unless a statute had clearly and in no uncertain term provided for such exclusion and even if the jurisdiction of Civil Court had been barred in any statute, the court had the limited power of judicial review. If these be the principles regarding ouster of jurisdiction of Civil Court, in that event, the position of the High Court under Article 226 of the Constitution of India must be stronger than that of the Civil Courts. At the same time we have to remember that in this case we are deciding a very important question whether the jurisdiction of the High Court under article 226 of

the Constitution of India should be treated to have been excluded in a matter like this under the provision of sections 28 and 29 of the said Act.

4. Article 323A of the Constitution of India provides that ""'Parliament may by law provide for adjudication or trial by Administrative Tribunals of disputes and complaints with respect of recruitment and conditions of service of persons appointed, but public service and/or any legal or such authority within the territory of India or under the control of the Government of India or of any corporation, owned or controlled by the Government.

5. So within the scope of article 323A of the Constitution relating to recruitment and condition of service of persons can only be decided by a tribunal. But, in the instant case, the grounds of challenge of the petitioner in the writ petition is the violation of Article 14 and 16 of the Constitution of India and further challenge was that the petitioner had become the victim of arbitrary and malafide action on the part of the respondents who are guilty of abuse of powers. The petitioner also challenged the validity and/or the applicability of the Rules framed under article 309 of the Constitution of India. On the plain reading of article 323-A of the Constitution of India, it does not appear to me that the grievances of the petitioner which are the subject matter of the instant writ application can be dealt with and/or disposed of by the tribunal. It is not necessary to make a final pronouncement on this question. But, in my view, if it was the intention of the Parliament that a case which has been finally heard and judgment was ready for the delivery, the same had to be transferred to the tribunal as the High Court had no Jurisdiction to deliver judgment, in that event, a specific provision should have been made in this behalf. After the hearing is concluded, it cannot be said that the case is pending and the word ''pending'' in the instant case in the context of the reasons and object of the impugned Act cannot be given a wider meaning and to include a case whether the case has been finally heard and the judgment was reserved. From the scope and object of the Act and from Sections 28 and 29 of the said Act, such an intention as claimed by the respondents, of the Parliament could not be inferred. In this connection, reference was also made by the learned Counsel appearing on behalf of the Petitioner to the case of Jalan Trading Co. (Private Ltd.) Vs. Mill Mazdoor Union, where the provisions of Section 33 and 34(2) of the Payment of Bonus Act, 1965 was under challenge. The said two section provided that the provisions of Payment of Bonus Act could be applicable to disputes which was pending immediately before the 29th May, 1965 regarding payment of bonus. The Supreme Court in this case observed and struck down the provisions of Section 33 and 34(2) of the Payment of Bonus Act, 1965 on the ground that in respect of some previous years, a dispute might be pending in respect of one industry whereas in respect of the other, the dispute for the particular previous year was not pending and that in case of pending disputes if the provision of the said Act was made applicable, in that event, the same should be arbitraty and discriminatory. At page 708 the Supreme Court observed that the application of the Act retrospectively therefore depends upon the mere

accident of pendency immediately before May 29, 1965 of an industrial dispute regarding all bonus relating to any accounting year not earlier than the year ending on any date in 1962. If there be any such dispute pending immediately before the date on which the Act becomes operative and establishment would be governed by the provision of the full-fed formula and will be liable to pay bonus if there be adequate profits which would justify payment of bonus. If, however, a. dispute is pending immediately before May 29, 1965, the scheme of the Act will apply not only for the year for which a dispute is pending, but even in respect of subsequent years, assuming that the classification is founded on some intelligible differentia Which defines an establishment from other establishments, the differentia has no rational relation to the objects sought to be achieved by the Statutory provision viz. of ensuring therefore two establishments similarly consist having no dispute pending relating to bonus to the employee and workmen in a particular year would be liable to be dealt with duly if in respect of previous year convered by Section 33. There is a dispute pending between the employer and workmen in one establishment, there is no such dispute pending in the other. In the instant case, if the judgment was delivered before the appointed date, in that event, there will be no question of any transfer of the case as claimed by the respondents. In the case of delay on the part of the court to pronounce judgment the court''s jurisdiction to deliver judgment, in my view, could not be taken. That would be contrary to the concept of justice and a litigant should not be made to suffer because of the delay on the part of the court to pronounce judgment. After the hearing is concluded, judgment is resrved for consideration and judgment is made ready, such a judgment can be pronounced by the successor in office and if the case is treated to be pending, in that event a successor could not pronounce the judgment. Further, in a pending case, if a party dies, the question of substitution arises, but in a case where hearing was concluded and the court reserved judgment and if the party dies before the pronouncement of judgment, the judgment is not at all affected. All these things go to show that as soon as the hearing is concluded and judgment is reserved, it cannot be said that the case is a mere pending case which requires to be disposed of by the Tribunal.

6. In Article 323A(1) the Constitution of India provided for constitution of an Administrative Tribunal to decide and complaints with respect to recruitment and conditions of service (emphasis supplied) of persons appointed to public services and posts etc. But, u/s 14 of the administrative Tribunal Act, 1985 it was provided that the jurisdiction of such Tribunal, inter alia, shall be in relation to all service concerning and pertaining to the service of such member (emphasis supplied) person or civilian in connection with the affairs on of the Union or of any State or any local authority within the territory of India or under the control of India of any Corporation owned or controlled by the Government. So, it is clear that the powers and jurisdiction of such Administrative Tribunal as provided in the said Act is much broader and wider than the limits prescribed by the Constitution of India and as such the provisions of Section 14 of the said act in so far it purports to confer more

power or jurisdiction to such Tribunal than permissible under article 323A of the Constitution of India, is void and could not be exercised by the Tribunal.

7. The necessity of establishing such an Administrative Tribunal was long felt in this country and it will certainly be beneficial to the public servants. Chinnappa Reddy, J. of the supreme Court observed as far back as in year 1980, in the case of Harjeet Singh v. Union of India, reported in AIR 1980 SC 1225 that "In these appeals we have once again to consider career conscious competing claims to seniority which appear so much to deminate the lives and careers of our civil servants that a large bulk of the cases in this court relate to the resolution of problems arising out of such claims. So much of our time is taken up in discovery the precise facts of these intricate problem that we wonder whether constitution of a fact-finding administrative tribunal who should invariably be approached in the first instance will not better served the cause of successful administration. An administrative tribunal possessing the necessary expertise and familiarity with administrative procedures and rules may be able to deal with the problems in a statutory way. At least the facts will be found and the relevant rules will be known. Thereafter, aggrieved parties may approach the courts for further relief within he confines of Article 226 and Article 32 of the Constitution of India."

8. Now the jurisdiction of the High Court have been taken away and the matters can only be decided by the Tribunal, subject to the intervention of the Supreme Court under Article 32 and 136 of the Constitution of India. As it is not necessary in this case to decide whether the jurisdiction of the High Court under Article 226 of the Constitution even though wider than Article 32 of the Constitution, to enforce not only fundamental rights but other rights destroying the basis structures of the Constitution of by keeping the Tribunal beyond the jurisdiction of the High Court and not made subject to any judicial review by the High Court. I am not expressing any opinion on this issue. In any event, the object of the Tribunal is to make speedy disposal of service cases and to reduce burden of the High Court in various cases. In the instant case, this court after a prolonged hearing, reserved judgment and made the judgment ready, but due to suspension of the petitioner which was brought to the notice of this court the judgment could not be delivered and immediately after the writ application in which the said suspension was challenged, was disposed of by U.C. Banerjee, J. the matter was taken up for delivering judgment and when the judgment was about to be delivered it was drawn to the notice of this court to the notification of the Central Government, dated 2nd May, 1986, which was not hitherto drawn to the notice of this court by the respondents even though it was the duty of the respondents to draw the attention of this court about such notification for consideration earlier. But, it appears that respondent sat over the matter with the intention to cause a surprise on this court. Be, that as. it may, the respondents'' stand is malafide'' though apparently innocuous. It is contended that this matter should be treated to be ''pending case'' within the meaning of Section 29 of the said Act. This will clearly amount to making and/or converting a case in respect of which

hearing was concluded and the judgment was on the process of preparation, to a simple pending case and send it to the tribunal for disposal or in other words to destroy a completed structure made by one architect and hand over the empty site to another architect for its rebuilt for speedy construction. Such a view would be destructive of the concept of justice and contrary to the very object of the said Act. In this case, the petitioner had to retire on superannuation on 31st July, 1986 and no court or tribunal could finally dispose of the matter within that period. From that point of view, it would be nothing but mockery of justice to tear off the judgment and to send the case to Tribunal as a pending case for speddy disposal.

9. In my view, the provision of Section 29 of the said Act could not be construed to mean that the writ petition which was finally heard and in which judgment was ready, should be treated as a mere pending writ application which is required to be transferred to the Tribunal for speedy disposal. Lord Reid observed in the case of Black Clawson International Limited v. Papierwork Waldhof Aschaffenburg, A.G., reported in (1975) 1 All. E.R. 810 at page 815 that "There is a presumption which can be stated in various ways. One is that in the absence of any clear indication to the contrary, Parliament can be presumed not to have altered the common law farther than was necessary to remedy the ''mischief''. Of course, it may and quite often does go farther. But, the principle is that if the enactment is ambiguous, that meaning which relates the scope of the Act to the mischief should be taken rather than a different or wider meaning which the contemporary did not call for".

10. In my view every Act and every provision of enactment thereof, shall receive such construction and interpretation as will best insure the attainment of the object of the Act and of such provision of enactment according to its true intent, meaning and spirit. Accordingly, the word other proceeding pending before any court or other authority immediately before the date with effect from which jurisdiction is conferred on a Tribunal shall stand transferred on that date to such Tribunal does not and cannot mean a case where hearing was concluded before that date and the judgment was in the process of preparation. Any other contrary construction or interpretation will lead to a plain and clear contradiction of the apparent purpose of the Act and will lead to a wholly unreasonable result. Before I conclude, I think that It worth mentioning in this case the observation made by Lord Denning in Eddia v. Chichester-Constable, reported in (1969) 2 All. E.R. 912 that "I know this means that we in this court are filling in a gap, left, by the legislature - a course which was frowned on some years ago. But, I would rather the courts fill in. a gap than wait for Parliament to do it. Goodness knows when they would get down to it. I would apply the principle which I stated in Seaford Court Estates Ltd. v. Asher a judge should ask himself this question, : If the makers of the Act had themselves come across this ruck in the texture of it how would they have straightened it out? He must then do as they would have done. A Judge must not alter the material of which it is woven, but he can and should iron out the creases." That is exactly done in this case. H.W.R. Wade in his book on Administrative Law (Fifth Edition) at page 598, stated that

"Many statutes provide that some decision shall be final. That provision is a bar to any appeal. But the Courts refuse to allow it to hamper the operation of judicial review. As will be seen in this and the following sections, there is a firm judicial policy against allowing the rule of law to be undermined by weakening the powers of the court. Statutory restrictions of judicial remedies are given narrowest possible construction, sometimes even against the plain meaning of the words. This is a sound policy, since otherwise administrative authorities and tribunals would be given uncontrolable power and could violate the law at will. ''Finality is a good thing but justice is a better''." In order to eliminate unnecessary and u3/43/43/4n called for hardship to the litigants and in the absence of any specific provision for debarring the court from pronouncing a judgment either in the Article 323A or under the provision of the said Act I am constrained to hold that this court''s power to deliver judgment in respect of matters which were finally heard long before the appointed date had not been suspended or taken away. Such an interpretation could not also been given in view of the fact that Article 39A of the Constitution of India provides that the State shall secure for the operation of the legal system to promote justice. Of course, this is one of the Directive Principles of the State Policy. But, this is a thing we have to remember and that if the contention of the respondent are accepted, in that event, it would not secure and promote justice whereas it will clearly amount to doing injustice to a party for no fault of his and the court must apply the reading down rule provision so as to secure justice and not injustice. In the result, the objection of Mr. Sen is overruled and I am of the view that this Court''s jurisdiction to deliver judgment which was heard before the appointed date had not been and could not be taken away by the impugned Act.