(1991) 08 CAL CK 0021

Calcutta High Court

Case No: F.M.A.T. No. 3064 of 1989

Kamal Kanti Chatterjee and Others		APPELLANT
	Vs	
Board of Trustees of The Port of Calcutta and Others		RESPONDENT

Date of Decision: Aug. 2, 1991

Acts Referred:

- Constitution of India, 1950 - Article 311

Citation: 96 CWN 305

Hon'ble Judges: Ajoy Nath Ray, J; A.M. Bhattacharjee, J

Bench: Division Bench

Advocate: Nirmal Mitra, Abhijit Choudhury and Tapati Ghosh, for the Appellant;Ajoy Kumar Mitra for the Port Trust, Aloke Kumar Banerjee and Tulsidas Roy, for the Respondent

Judgement

Ajoy Nath Ray, J.

Five (Writ Petitioners) appellants, who were on deputation from 1.3.1985 serving as vigilance watches under the first respondent, are originally of (he provincial police force. The deputation was initially for 3 years, but the appellants continued on de facto deputation from 1.3.1988 for about a year and a half; the request of the second respondent, who is (he secretary of (he Port, made, a little belated though it was, to the Home department (Police) (Paper Book, p. 33) on 17.9.88, for extension of the appellants period of deputation by a further year from 1.3.88 did not produce (he desired result Instead, on the order of the Chairman, Port, another request was made and granted; this was the conditional release, by Order of the Governor, permitting the appellants to be absorbed permanently in the Port service. One of these release Orders dated 5.11.88 is at p. 31 of the paper book, and the other is referred to in the letter of the-third respondent, (who is the Chief Vigilance Officer) dated 5.8.88 (P. 129). The appellants wanted to be absorbed in port service and

made written requests to the third respondent to that effect (Pp. 121-128). On the brink of permanent absorption, the appellants were repatriated. Why ? The third respondent has given two reasons - (i) no extension Order of deputation came on expiry of 1.3.88; (ii) in view of the appellants'' present performance, they are not suitable; letter of 11.9.89 at p. 89. The second respondent''s communication of 29.8.89 (p. 35) contains no reasons for repatriation. There is no repatriation sought for by the Chairman himself, who initialed the absorption possibility.

2. On 5.10.89 the writ failed in limine in the Court below but we have looked into the affidavit of the first three respondents filed in the appeal Court stay proceedings. The fourth respondent, the state of West Bengal, has filed no affidavit, but has stated through counsel that the appellants were released for the express purpose of absorption in the Port services. By two protective Orders of the appeal Court, dated 5.10.89 and 27.2.90., the port authorities have been directed to keep five ports of vigilance watchers vacant and the appellants have been permitted to join police duty without prejudice.

3. The third respondent has repealed his two reasons in another letter of his, dated 12.10.89 (p. 133); but he says here wrongly that the. W.B. Government conveyed their no objection to the absorption in the Port service, on (he prayers of the appellants; the second respondent''s letter of 5.8.88 (p. 129) clarifies that on the other hand, it was the Chairman who had cause the request to be sent. In fact, the appellants had not petitioned the State, but the third respondent himself.

4. Do we then say, following Ratilal B. Soni and others Vs. State of Gujarat and others, and as suggested by Mr. Ajoy Kumar Mitter appearing for the respondents that there is no right of a deputationist to be absorbed, and that is an end of the story ? Or do we examine further the matter, as appearing for the appellants Mr. Nirmal Mitter said we should, on the unassailed basis that the appellants found their port service to be on better terms, and that two of their colleagues have actually been absorbed ? (Pp. 37-41. esp. paras 13,15).

5. The short one page judgment of Soni''s case no doubt affirms the position that a person on deputation has no right to be absorbed in the deputation post. But that gets us nowhere. A person also does not have a right to be awarded a government contract: yet, under today''s law government contracts may have to be awarded to the lowest bidder, so that the government may not be held guilty of arbitrary action. So also, a deputationist may have to be absorbed in the deputation post, not because he has any right to it, but because a non-absorption on the part of the government would be unsustainable as, being, say, irrational and wholly unreasonable.

6. As soon as the appellants were released by Order of the Governor, the port authorities were placed in a position of privilege, to absorb, or not to absorb the appellants in port service.

7. Today public body may be successfully sued not only in a duty-.right situation, but also, under appropriate circumstances in a privilege-no-right situation as well. This is because the Courts enjoin equality in a myriad situations, and thus, though the person aggrieved has no classical right, yet the public body is so ordered as to raise the impression as if a right is being enforced. The highest tenderer has no right to be awarded the contract; the state has a privilege to choose its contracting partner; but even there, ceteris paribus, the lowest tenderer must be chosen. See Km. Nelima Misra Vs. Dr. Harinder Kaur Paintal and others, where the mere privilege situation is examined, and it is said that even in such a situation, irrelevant considerations and irrational actions are forbidden, on paid of the administrative action being quashed.

8. For these words, duty, right, privilege, no-right, we can usefully refer to the Fundamental Legal Conceptions of Hohfeld, and especially to the useful chart given in the beginning of part-III. A person is commonly said to have a privilege, or a mere privilege, when, very strictly, he should perhaps be said to have reached the possibility of receiving the benefit of a privilege of granting the benefit or not, really reposes, not with the prospective recipient, but with the grantor, usually a public body.

9. On this principle, we must quash the repatriation orders/requests (Pp. 35, 89 of the paper book) of the second and the third respondents, reading them together. The two reasons for repatriation are bad on the face. When absorption permanently is in issue, and when release orders for absorption have come from the parent service, of what use or necessity can an extension of the deputation order be? Even that extension Order of deputation would have expired on 1.3.89 had it come at all; so, of what use would it be in August or September ''89 when repatriation was Ordered? It is a clear case of being guided by an irrelevant consideration.

10. The second reason is irrational and perverse. There is no material for it. The appellants'' deputation service was not only blemishless, but they earned cash awards (Pp. 23,24). No report, complaint or proposed action against them is seen anywhere. Secret reports against the appellants are mentioned in the affidavit of the third respondent (p. 107, at para 12). Our administrative law has no friendship with vague allegations of secret reports.

11. If no reasons had been given for repatriation, the same order might have been less assailable in a Court. But what of that ? More often than not, truth will out and justice vindicate itself even in this very imperfect world of the law.

12. The port authorities thus had a privilege to absorb or not to absorb the appellants, who, in their turn, could either become the recipients of that privilege or not. The situation founds the basis which, in today''s legal context, is sufficiently firm to support a constitutional action. The matter of conferment of the privilege being vitiated by an irrelevancy and an irrationality, the port authorities must reconsider the matter in a proper way. Since I think that the repatriation Orders dated 29.8.89

and 11.9.89 respectively at pages 35 and 89 of the paper book are bad in law, the same are quashed and thus the question of absorption is still open. The Chairman, of the first-respondents, shall take a decision in this matter, and order absorption of the appellants as vigilance watches, unless, for grounds to be recorded in writing, there are good reasons to the contrary; the process of absorption or appointment, or refusal of absorption, must be completed within eight weeks hereof. The interim Orders of the appeal Court dated 5.10.89 and 27.2.90 shall continue for a period of twelve weeks from date. Liberty to mention after the Chairman''s decision, in case of necessity.

13. The appeal and the writ petition succeed to the above extent. No Order as to costs.

A.M. Bhattacharjee, J.

14. As the presiding Judge in this Bench, I have virtually overruled brother Ray when he insisted that as a matter of formal propriety and judicial decorum, this note of mine should precede his Judgment. His is the governing Judgment in this case and I am only adding few words while concurring in the Order proposed by him. We have, of late, and rightly too, started discarding mere formalities, as in our view, it is the substance that must count and must take precedence over mere form. Since it is brother Ray''s Judgment which is disposing of the appeals, I would require much stronger reasons that what could be advanced by brother Ray to pursuade me to agree with him that a note of mine invariably precede. In fact, my decision to come out with my note after Ray, J., is to demonstrate my whole-hearted disagreement with the so called rule of convention or practice, to which Ray, J., has very emphatically advised me to adhere.

15. Recall or repatriation simpliciter of a deputationist to his substantive post is obviously not dismissal or removal within the meaning of Article 311 and cannot also, in law, amount to reduction in rank within in the meaning of that Article. It is merely an Order of reversion back, which again, in law, cannot involve him in any adverse civil consequence, even though, in fact, he may lose some privileges or benefits available to him during deputation. However comfortable, attractive and alluring the terms and conditions of the deputation may be, the deputationist has no right to the post or any justiciable claim to be absorbed therein. This position emerges clearly from the leading decision in Parsottam Lal Dhingra (AIR 1958 SC 25), rendered more than three decades ago, and the decision in Ratilal B. Soni and others Vs. State of Gujarat and others, referred to by brother Ray and relied on by the learned Counsel for the Respondents, also affirms that position.

16. While no one has any right to any post, until appointed, every one, if otherwise qualified, has a right to be considered therefore and any unreasonable exclusion of such a one consideration, may vitiate the appointment. But a deputationist, however until released or agreed to be released by the authority under whom he holds his

substantive appointment, may not have any right in law, to be considered for substantive appointment to the post he holds on deputation. He may, be considered and, if found suitable, may also be appointed to the post held on deputation, provided the employer of his substantive appointment chooses to release him. But otherwise, a deputationist, while on deputation with his substantive appointment elsewhere, has no Justiciable right even for consideration for substantive appointment to the post held on deputation. The leading employer must have the right to recall, and the borrowing authority must have also the authority to move for repatriation of the deputationist and unless this much is conceded, smooth running of the administration would receive a serious" joint.

17. But temporary Civil servants also have no right to the post, and yet the law is settled beyond all doubts that their services also cannot be terminated on the ground of any misbehavior or incapacity, without giving them reasonable opportunity of being heard. By parity of reasons, therefore, it has got to be accepted that while a deputationist may be called back without assigning any reason, yet once it appears that such recall or repatriation is on the ground of any alleged fault or the like, the deputationist must also be given all reasonable opportunities to meet the allegation as otherwise the Order shall fail. That apart, brother Ray has also clearly demonstrated that while the first ground of recall appears to be irrelevant, the second one does not appear to have any foundation on the materials now on record. The Order of recall must accordingly be set aside, as directed by brother Ray and as directed further, the Chairman must consider the question of the appellants being absorbed in accordance with law in the light of the observations contained in the Judgment of Ray, J., Law apart, it would be unjust and even immoral not to consider their cases, when the lending Government have agreed to release them for such consideration and absorption. By the way, how I wish that I could unreservedly agree with brother Ray that "truth will out and justice vindicate itself", "Satyameva Jayate Nanritam", and "Yato Dharmastato Jaya". But I would only say, that we must endeavour to ensure that Law co-exists, wherever and whenever possible, with justice and morality.