

(2005) 09 CAL CK 0051

Calcutta High Court

Case No: Writ Petition No. 1184 of 2005

Sri Sekharsree Banerjee

APPELLANT

Vs

The Tea Board and Others

RESPONDENT

Date of Decision: Sept. 23, 2005

Acts Referred:

- Tea Act, 1953 - Section 31, 31(1), 31(2), 49, 49(1)

Citation: (2006) 1 CALLT 628

Hon'ble Judges: Jyotirmay Bhattacharya, J

Bench: Single Bench

Advocate: Partha Sengupta, Sumanta Biswas. P.S. Sinha and Kavita Pandey, for the Appellant; A.K. Banerjee and Arunava Sarkar for the Respondent Nos. 1 to 4 and 6 to 8 and Saumya Majumdar, for the Respondent No. 5, for the Respondent

Final Decision: Allowed

Judgement

Jyotirmay Bhattacharya, J.

The validity and/or legality of the order dated 29th April, 2005 passed by the Chairman of the Tea Board, an establishment constituted under the Tea Act, 1953, being a part of annexure "P-24" to this writ petition at page 151, is under challenge in this writ petition.

2. The promotion which was given to the petitioner to the post of Senior Accounts Officer was withdrawn by the said order, resulting reversion of the petitioner to the post of Accounts Officer. Simultaneously Mr. Biswas, the respondent No. 7, was promoted to the said post on account of his seniority.

3. The erroneous fixation of seniority of the petitioner and the private respondent Nos. 5, 6 and 7 amongst other employees in the same cadre of Accounts Officer vide seniority list published on 17th April 2003, has also been challenged by the petitioner in this writ petition.

4. A declaration has also been sought for in this writ petition for declaring that the Judgment and/or order passed in W.P.No. 8 of 1998 (S.N. Dhar v. Tea Board and Ors.) is not binding upon the petitioner.
5. Mr. Partha Sengupta, learned Senior Advocate, appearing for the petitioner, submitted that the petitioner was not made a party to the aforesaid writ petition and as such, the right of the petitioner cannot be affected by any order passed in connection therewith.
6. Mr. Sengupta, in his usual fairness, ultimately submitted that the petitioner however cannot challenge conveniently the fixation of seniority of the petitioner and the private respondent Nos. 5, 6 and 7 in this writ petition, inasmuch as such fixation was made by the concerned authority pursuant to the order passed by the learned single Judge of this Hon'ble Court in W.P.No. 8 of 1998 (S.N. Dhar v. Tea Board and Ors.) which was subsequently affirmed in appeal by the Division Bench of this Court on 13th October 1999 in A.P.O.T No. 684 of 1999 (Tea Board and Ors. v. Sankar Narayan Dhar and Ors.).
7. Mr. Sengupta further submitted that the right of a stranger who is adversely affected by any adjudication of the Court to challenge any order of the Court in appeal, is also recognised in law, As such, Mr. Sengupta submitted that instead of entering into the said dispute regarding erroneous fixation of seniority, as aforesaid, leave may be granted to the petitioner for challenging the order passed in the earlier writ-proceeding before the appropriate forum.
8. In this regard, I make it clear that the disposal of this writ petition in either way will not prevent the petitioner from challenging the alleged erroneous fixation of seniority before the appropriate forum provided however he is otherwise entitled to do so in accordance with law.
9. In fact, Mr. Sengupta restricted his submission to the propriety of the order dated 29th April 2005 passed by the Chairman of the Tea Board being annexure T-24" to this writ petition at page 151.
10. Before entering into the disputed question of facts and law, let me record the facts which are admitted by the parties hereunder.
11. Admittedly, the petitioner as well as the private respondent Nos. 5, 6 and 7 were all eligible candidates for consideration for promotion to the post of Senior Accounts Officer. It is also an admitted fact that the petitioner as well as the said private respondent Nos. 5, 6 and 7 were all considered by the departmental promotion committee in its meeting held on 14th December 2004 for selection of candidate for the post of Senior Accounts Officer.
12. Undisputedly the petitioner was found to be much more meritorious than that of the private respondent Nos. 5, 6 and 7, by the said departmental promotion committee which recommended the name of the petitioner for such promotion to

the concerned by following the selection process, viz., merit-cum-seniority, as per the Recruitment and Promotion Rules relating to various categories of post under the Board carrying pay scales the maximum of which does not exceed Rs. 1,300/- per month.

13. It is also an undisputed fact that promotion was given to the petitioner to the post of Senior Accounts Officer on officiating basis vide Office Order dated 15th December 2004.

14. Dispute started when Suresh Chandra Biswas, the respondent No. 7 herein, submitted a representation before the Chairman, Tea Board against the aforesaid order of promotion dated 15th December 2004, which according to him, was passed in violation and/or supersession of the order dated 8th February 2002 issued by the Department of Personnel and Training, Government of India (in short D.O.P.T).

15. According to the said respondent, the selection for promotion to the said post should have been made strictly in terms of the D.O.P.Ts order dated 8th February 2002 which prohibits supersession in selection for promotion.

16. On consideration of the said representation of the respondent No. 7, the promotion which was given to the petitioner to the said post was recalled by the concerned authority by an order dated 7th March 2005 and thus the petitioner was reverted back from the post of Senior Accounts Officer to his substantive post of Accounts Officer and Mr. Biswas, being the seniormost candidate in the feeder post, was selected for the said appointment.

17. The said order which was passed by the concerned authority on 7th March 2005 without giving any opportunity of hearing to the petitioner, was however set aside by this Court in the earlier writ petition being W.P.No. 599 of 2005 (Sri Sekharsree Banerjee v. Tea Board and Ors.) on the ground of violation of principle of natural justice. It was, however, made clear therein that the said order will not prevent the authorities concerned from taking any step in accordance with law, after giving the petitioner an opportunity of hearing.

18. Pursuant to the said order passed by this Court in the earlier writ petition, the Chairman of the Tea Board heard the parties including the petitioner and thereafter passed the impugned order on 29th April 2005.

19. Mr. Sengupta submitted that the promotion to the post of Senior Accounts Officer is guided by the Recruitment and Promotion Rules relating to various categories of post under the Board carrying pay scales, the maximum of which does not exceed Rs. 1,300/- per month (hereinafter referred to as the said Rules) which was framed by the Central Government in exercise of the powers conferred upon the Central Government by Sub-section (1) read with Clause (d) of Subsection (2) of Section 49 of the Tea Act; 1953.

20. By referring to the relevant part of the said Rules. Mr. Sengupta pointed out that promotion to the post of Senior Accounts Officer which is a hundred percent promotional post, is to be determined by selection from the accounts officer with minimum three years service as such. How a promotion is to be given by selection, has also been clarified in Rule 10 (i) which is as follows:

10(i) "Promotion by selection" shall mean selection on merit irrespective of seniority of service and merit shall include and mean an employees' performance at an oral and/or a written test as may be prescribed from time to time, the report on his conduct and work and academic qualifications and experiences of a particular work.

21. Mr. Sengupta thus submitted that when the statutory Rules, framed by the Government in exercise of its power under any Act of Parliament, prescribes a particular procedure to be followed for selection of candidate for a promotional post, such prescription having its statutory force, should be followed strictly by the concerned authority.

22. Mr. Sengupta further submitted that the executive instruction which has no statutory force cannot override the Rules framed by the Government in exercise of the power under any Act. Mr. Sengupta further contended that when admittedly there is no conflict between the statutory Rule and the administrative instructions, then there cannot be any valid earthly reason for withdrawal of the promotional order which was given in favour of the petitioner in consonance with the statutory Rules on a plea that the administrative instructions prohibits supersession in selection for promotion.

23. By referring to the Office Memorandum issued by the Deputy Secretary to the Government of India, Ministry of Personnel, Public Grievances and Pensions Department of Personnel and Training on 8th February, 2002 on the subject - procedure to be followed by departmental promotion committees (D.P.C.S), Mr. Sengupta submitted that the said guidelines which were issued for the Central Government employees, have no application to the employees of the Tea Board who are not Central Government employees. Mr. Sengupta further pointed out that even assuming that the said guidelines were issued for other statutory authorities, still then the said guidelines cannot be made applicable to the employees of the Tea Board ipso facto unless the extant service rules/ recruitment rules are suitably amended so as to appropriately incorporate the mode of promotion as selection by merit and selection-cum-seniority, as the case may be.

24. Mr. Sengupta contended that the recruitment and/or promotional rules of the Tea Board has not been modified by the concerned authority in accordance with the instructions given by the Deputy Secretary to the Government of India in the office memorandum dated 8th February 2002. According to Mr. Sengupta, in the absence of such modification of the promotional rules, the Government instructions cannot be made applicable to the employees of the Tea Board ipso facto.

25. Thus, Mr. Sengupta submitted that the impugned order which was passed by applying the instructions contained in the office memorandum dated 8th February 2002 by the Government of India, without amending the extant service Rules, cannot be sustained.

26. Mr. Sengupta ultimately concluded by submitting that when admittedly the petitioner is much more meritorious than the private respondent Nos. 5, 6 and 7, promotion which was given to the petitioner by way of selection as per the aforesaid Rules, should not have been disturbed by following the instructions issued by the Government contained in office memorandum dated 8th February 2002 which has no application to the employees of the Tea Board who are not Government employees.

27. Mr. Alope Banerjee, learned Advocate, appearing for the Tea Board, submitted that in view of the provision contained in Section 31(1) and Section 31(2), of the Tea Act of 1953, the Tea Board has to follow the instructions given by the Central Government.

28. Section 31(1) of the said Act provides that all acts and proceedings of the Board shall be subject to the control of the Central Government which may cancel, suspend or modify, as it thinks fit, any action taken by the Board. Sub-section (2) of Section 31 of the said Act provides that the Board shall carry out such direction as may be issued to it from time to time by the Central Government for the efficient administration of the Act.

29. Mr. Banerjee thus submitted that in view of the aforesaid provisions of the Tea Act, the concerned authority had no other option but to follow the Government instruction while considering the representation of the respondent No. 7.

30. Mr. Saumya Majumdar, learned Advocate, appearing for the respondent No. 5, who is the present incumbent in the said post after the retirement of Mr. Biswas, the respondent No. 7, also supported the impugned order by taking almost a similar stand which was taken by Mr. Banerjee, as aforesaid.

31. Mr. Majumdar, however, tried to introduce a new challenge with regard to the lack of eligibility of the petitioner for his consideration for the concerned promotional post, but ultimately failed, as the foundation of such challenge is absent in his client's affidavit-in-opposition.

32. Let me now consider the submissions of the learned Counsel of the respective parties in the facts of the instant case.

33. The admitted facts of the case which were recorded hereinabove, show that the petitioner was not only eligible for consideration for the said promotional post but also he was considered along with the other eligible candidates, viz., the private respondent Nos. 5, 6 and 7 and was ultimately selected for such promotion on merit-cum-selection basis which is the mode prescribed for such selection under the

extant selection rules.

34. The concerned authority, however, withdrew the said promotional order and replaced the petitioner by the respondent No. 7 by following the guidelines contained in the office memorandum issued by the Central Government on 8th February 2002 which prohibits supersession in selection for promotion. The said office memorandum prescribes that only seniority will be counted for such promotion by giving a go-bye to the merit.

35. Thus, the entire dispute in this writ petition hinges upon the determination as to whether the Government guidelines contained in the office memorandum issued by the Central Government on 8th February 2002 is applicable to the employees of the Tea Board who are not Central Government employees, or not.

36. Admittedly the said office memorandum was issued for the Central Government employees. The petitioner is not a Central Government employee. The petitioner is an employee of the Tea Board which is an establishment constituted under the Tea Act, 1953. The recruitment and the promotion of the petitioner is guided by the recruitment and promotion rules relating to various categories of posts under the Board carrying pay scales the maximum of which does not exceed Rs. 1.300/- per month. Such rule was framed by the Central Government in exercise of the power u/s 49 of the Tea Act, 1935. Thus, the rules so framed by the Central Government carry with it the statutory force. Such statutory rule cannot be overridden by administrative instructions given by the Government.

37. On perusal of the office memorandum dated 8th February, 2002 issued by the Government of India being annexure "R-5/15" at page 64 of the affidavit-in-opposition affirmed by the respondent No. 5, particularly Clause 6 thereof, it appears that the instructions given in the said office memorandum do not apply even to the Central Government service in the absence of amendment of the relevant service rules and/or recruitment rules of various services/posts/ grades in Central Government offices, in the light of the instructions contained in the said Government memorandum.

38. Clause 6 of the said office memorandum is set out hereunder as follows:

6. Ministries/Departments are requested to give wide circulation to these revised instructions for general guidance in the matter so that immediate steps are taken to amend the Service Rules/ Recruitment Rules of various services/posts/grades so as to appropriately incorporate the mode of promotion as "selection" (in accordance with these instructions) in place of "selection by merit" and "selection-cum-seniority" (as was hitherto prescribed by the aforementioned O.M. dated March 27, 1997) as the case may be. The powers to amend Service Rules/Recruitment Rules in this regard are delegated to the Ministries/Departments. Do P&T need not be consulted to carry out the required amendments.

39. Admittedly the Recruitment and Promotional Rules of the Board which is applicable to the petitioner, has not been amended suitably in the light of the instructions contained in the aforesaid Government office memorandum dated 8th February 2002.

40. As such, even assuming that such Government instructions contained in the said office memorandum is applicable to the Board in view of Section 31 of the said Act, still then I hold that the said instructions contained in the aforesaid Government memorandum ipso facto cannot be applied unless the relevant Recruitment and/or Promotional Rules are suitably amended in the light of the instructions contained in the aforesaid office memorandum.

41. Thus, I hold that the concerned authority acted illegally by passing the impugned order by following the instructions contained in the aforesaid Government memorandum dated 8th February 2002, which is not applicable to the employees of the. Board for the reasons, as aforesaid.

42. Admittedly the petitioner was selected for the said post by following merit-cum-seniority method which is a mode prescribed under the extant Recruitment and Promotional Rules. When merit-cum-seniority is the criterion for promotion, seniority loses its importance. Thus, the reversion of the petitioner from the promotional post to his substantive post and substitution of the respondent No. 7 in the place of the petitioner by following the seniority only cannot be sustained.

43. Before concluding, I must consider the other submission of Mr. Majumdar who submitted that even the merit of the eligible candidates was not considered by the departmental promotional committee properly as neither any oral nor any written test was taken for assessing the performance of the said eligible candidates. Mr. Majumdar referred to the relevant provision of the extant Rules wherein the mode of promotion by selection has been specified. By referring to the said Rules, Mr. Majumdar submitted that assessment of the performance of the employee at an oral and/or written test is prescribed in the said Rules, but the said prescription has not been followed by the concerned authority in the process of assessment of merit of the candidates. Mr. Majumdar contended that neither any oral test nor any written test was taken for such assessment.

44. It is no doubt true that Rule 10(i) of the said Rules as set out above prescribes a mode for selection of the eligible candidate for such promotion on merit at an oral and/or written test as may be prescribed from time to time. But that is not the only mode prescribed under the Rules, as pointed out by Mr. Majumdar. An alternative mode has also been prescribed in the said Rules for assessment of the merit of the respective candidates. Under the said mode, merit of the respective candidate can be ascertained from the report on his conduct and work and academic qualifications and experiences of a particular work.

45. Here in the instant case assessment of the merit of the respective candidates was made by adopting the alternative mode, as aforesaid. As such, I do not find any illegality and/or irregularity on the part of the departmental promotional committee for adoption of the said alternative mode for assessing the merit of the candidates for selection to the promotional post. In any event, such a challenge also does not find any place within the four corners of the pleading or the respondents. As such, further consideration of the said point in details, is not needed herein.

46. Thus, I find no merit in the aforesaid submission of Mr. Majumdar.

47. The impugned order passed by the Chairman dated 29th April, 2005 at page 151 of this writ petition thus stands quashed. Accordingly, the concerned authority is directed to restore the promotion of the petitioner to the post of Senior Accounts Officer which was given to the petitioner vide office Memo No. 206/2004 dated 15th December 2004, forthwith together with all consequential benefits arising out of such restoration,

48. Needless to mention here that the promotion which was given to the respondent No. 5 herein after the retirement of the respondent No. 7 in supersession of the petitioner's entitlement to the said post, also stands quashed consequently.

The writ petition thus stands allowed. There will be, however, no order as to costs.

Later:

After passing of this Judgment, a prayer was made by the learned Counsel appearing for the Tea Board as well as the respondent No. 5 for stay of the operation of the Judgment and order passed in this writ petition. Such prayer was also opposed by the learned Advocate appearing for the petitioner.

Considering the submission of the learned Advocates for the respective parties, I direct that the operation of the Judgment and/or order passed in this writ petition shall remain stayed for a period of one week from date.

Urgent xerox certified copy of this order be supplied to the parties, if applied for, upon compliance of all formalities.