Sarojendra Nath Bose Vs Chief Justice, High Court

Court: Calcutta High Court

Date of Decision: March 19, 1990

Acts Referred: Calcutta High Court Rules, 1960 â€" Rule 16, 6
Constitution of India, 1950 â€" Article 226
High Court Service Rules, 1960 â€" Rule 14(2)

Citation: (1994) 1 ILR (Cal) 216

Hon'ble Judges: Abani Mohan Sinha, J

Bench: Single Bench

Final Decision: Dismissed

Judgement

A.M. Sinha, J.
This petition under Article 226 of the Constitution of India is for issuance of a writ of Mandamus forbearing the

Respondents from giving any effect to certain orders dated April 22, 1988 and April 28, 1988 rejecting the claim for determining the Petitioner''s

seniority with effect from January 7, 1975, in the post of Upper Division Assistant which he has been holding at present. He has also prayed for

determination of his seniority with effect from January 7, 1975, in his present posting on the basis of second proviso to Rule 16 of Calcutta High

Court Rules, 1960. On that score he has also prayed for quashing and cancelling impugned orders dated April 22, 1988 and April 28, 1988, and

for injunction restraining the Respondents from giving effect to the impugned order and also from giving any further appointment and promotion to

the post of Superintendent, a post in the next higher cadre. He has obtained an interim order of injunction in this regard.

2. The Respondents have applied for vacating the interim order controverting the case and claim of the Petitioner on all points.

3. The Petitioner was appointed a Lower Division Assistant in the office of the Appellate Side of Calcutta High Court on June 20, 1961. He was

promoted to the post of upper Division Assistant in a leave uncancy on December 7, 1994. Thereafter- he was reverted. He was again promoted

against a regular vacancy in the post of Upper Division Assistant on probation from January 7, 1975. He worked in that post till January 21, 1976,

when he was reverted to the post of Lower Division Assistant. It is alleged by him that it was done as a penal measure. Again on July 29, 1976, he

was promoted to the post of Upper Division Assistant. In the meantime, however, as many as 14 persons, who were junior to him in the feeder

cadre, were promoted to the post of Upper Division Assistant. He made representations to the authorities for reckoning his seniority from January

7, 1975, when he was promoted to the post of Upper Division Assistant against a regular vacancy, but to no effect. So, he moved a writ

application (Matter No. 660 of 1987) in the original writ jurisdiction of this High Court. The matter was ultimately heard and dismissed by the

learned Judge, Shri Bhagabati Prosad Banerjee, on certain findings. His lordship was pleased to find that there was a break of Petitioner''s service

in the post of Upper Division Assistant from January 21, 1976 to July 27, 1976, as he was reverted to the lower post at that time and that his

seniority should be counted from a point from which there was no break in his service and his appointment to the post of Upper Division Assistant

from July 28, 1976, was a fresh appointment. He was further pleased to find that the cause of action for his case arose in 1976 when his claim for

promotion was rejected and that as no reason was disclosed for not moving the Court at the earlier stage, the petition should be held as not

maintainable at the belated stage. Before the judgment was signed by his lordship the Petitioner made further submission through his Counsel.

Upon such submission it was ordered that the judgment dated March 8, 1988, was passed without prejudice to the rights of the Petitioner to claim

seniority from the date when'' the Petitioner was promoted on regular basis and continued as such and the subsequent order was made part of the

earlier judgment dated March 8, 1988. The Petitioner has moved the present application as his representation for consideration of seniority in

terms of the judgment from January 7, 1975, since when he was appointed on a regular basis in the post of Upper Division Assistant was turned

down by the authorities.

4. The Respondents in their affidavit-in-oppos,ition have denied the case of the Petitioner on all material particulars. It has inter alia been stated that

the Petitioner suffered a judgment passed in earlier writ proceedings (Matter No. 660 of 1989) negativing his case on the ground of maintainability

and also on the findings that there was a break in his service from January 21, 1976 to July 28, 1976, on account of his reversion from the post of

Upper Division Assistant and that his service from July 28, 1976, should be deemed to be a fresh service. The Petitioner, it is stated, having not

challenged such decision in appeal is bound by it and is estopped from agitating the same cause over again in this writ proceeding. The further case

of the Respondents is that the appointment of the Petitioner to the post of Upper Division Assistant was on trial basis and on condition of his

successful performance and observance of punctuality in attendance of his office and that the appointing authority on getting unfavourable report on

these counts reverted him to the post of Lower Division Assistant. According to them, the rules relied upon by the Petitioner in support of his claim

are not attracted in his case. It is contended that the Petitioner was appointed on promotion as a probationer and he was reverted during the

period of probation not by way of discipline but by application of the terms and condition of probations and that as a probationer he is not required

to be dealt with under a disciplinary proceeding which applies to a permanent or a full-fledged employee.

5. The parties have conceded that the application for variation or vacation of the rule and order of injunction should be heard along with the main

petition.

6. Mr. Sarkar, the learned Advocate representing the Respondents, has raised a preliminary point and urged that the petition is barred by principle

of res judicata as the Petitioner''s case was dismissed with a definite finding that his application was not maintainable on account of the unusual

delay in moving the Court after lapse of 11 years since 1976 when his representation for determination of seniority in the post of Upper Division

Assistant with effect from January 7, 1975, when he was appointed on regular basis was turned down by the learned Chief Justice. The Petitioner

admittedly suffered such judgment without preferring an appeal. The learned Advocate representing the Petitioner, has on the other hand urged that

the judgment dated March 8, 1988 (Annex. X of the Respondents'' affidavit-in-opposition) should be read with the further order dated March 23,

1988, which lays down that the earlier judgment dated March 8, 1988, was passed without prejudice to the rights of the Petitioner to claim

seniority from the date when the Petitioner was promoted on regular basis and continued as such. It is also laid down in the subsequent order that

the said order should be treated as part of the judgment dated March 8, 1988, and be incorporated in the said judgment and order. So it is

contended that the decision as supplemented by subsequent decision gives the Petitioner a right to agitate for determination of his seniority in the

post of Upper Division Assistant since the time of his appointment on regular basis and also on continuous basis, as expressed in the earlier

judgment and has given a right to move the Court under Article 226 of the Constitution. There is difficulty in imple-meriting the said judgment in

view of the clear order of dismissal of the case of the writ Petitioner claiming seniority. There is also a clear finding in the judgment that there was

break of Petitioner''s service in the post of Upper Division Assistant and that his service in the said post with effsct from July 28, 1976, was a fresh

appointment and that as such his claim for reckoning seniority from the date of initial appointment having lost continuity should be rejected. The

certified copy of the judgment has not been produced but it appears from the plain copy of such judgment as contained in Annexs. "X" and "Y" of

the Respondents" affidavit-in-opposition that instead of July 28, 1976, it has been typed in the copy of the judgment that the appointment of the

Petitioner in the post of Upper Division Assistant with effect from July 20, 1976, should be treated as fresh appointment. Be that as it may, this

Court is not competent to review or revise the earlier judgment. The Petitioner should have approached the Court which passed the judgment for

such review, revision or clarification, for the purpose of implementation of judgment and order. Even if a harmonious construction is given to the

original and the supplementary judgment passed in the earlier proceeding, it would be found that such judgment and order could not be

implemented by the authority in view of the clear dismissal of the Petitioner"s claim for seniority and also in view of clear and definite finding that

the service of the Petitioner in the post of Upper Division Assistant with effect from July 20, 1976 (or precisely June 28, 1976) was a fresh

appointment having no continuity from before or from January 7, 1976, as claimed by the Petitioner in the present proceeding. It has been held by

successive dscisions of the Supreme Court that where a petition under Article 226 of the Constitution is dismissed on merits, it operates as res

judicata and bars a fresh petition under Article 226 of the Constitution Daryao and Others Vs. The State of U.P. and Others, See also P.D.

Sharma Vs. State Bank of India, and Tilokchand and Motichand and Others Vs. H.B. Munshi and Another,

7. In a recent decision of our High Court in Mayurakshi Gramin Bank v. K. K. Sarkar and Ors. 1990 (1) Cri. L.J. 1 (p. 1, para. 9) it has been

held by the Division Bench:

A judgment pronounced by the Court is final. No departure from the principle is justified even in the writ jurisdiction. No attempt by way of an

application for clarification and/or direction could or should be encouraged to upset the decision already rendered in the writ petition. Upsetting a

final judgment is impermissible particularly when by the eventual order no clarification of previous order is made, nor any reason is assigned for the

new order.

This applies squarely to the facts of the present case. No further order or direction could be invited in a subsequent proceeding made before the

Court to upset the decision and finding already made in an earlier proceeding between the parties.

8. Next it has been urged by Sri Sarkar that the second proviso to Rule 6 of the Calcutta High Court Service Rules, 1960, is not attracted to the

case of the Petitioner in view of the fact that he was appointed on probation or on trial and during such period no disciplinary proceeding is

required to be initiated for terminating his service on probation or reverting him from such service to his lower post or ending the period of

probation. It has been well-established that a probationer is a person who has been appointed on trial and has no right to the post held by him.

Union Territory of Tripura, Agartala Vs. Gopal Chander Dutta Choudhury,

9. In the earlier decision both the parties have relied upon the decision of the Supreme Court in Baleshwar Dass and Others Vs. State of Uttar

Pradesh and Others, The learned Advocate for the Petitioner submits that for the purpose of seniority the continuous service either"" in permanent

or temporary capacity or in officiating capacity should be taken into consideration, and if the service is found to be continuous from the date of the

Petitioner"s appointment in the post of Upper Division Assistant on and from January 7, 1975, it will not be disturbed by the facts of his reversion

from his period of probation which is admittedly found to be for more or less about six months and his reversion shall not bo deemed to be a

reduction in rank in terms of second proviso to Rule 16 of Calcutta High Court Service Rules, 1960. This proviso as stated earlier would only be

attracted if the Petitioner was subjected to any disciplinary proceedings as contemplated in Rule 16. There is nothing on record to indicate that the

Petitioner was ever subjected to any disciplinary proceedings during his period of probation. As the Petitioner was a probationer, it is not

necessary to initiate a disciplinary proceedings in terminating or in ending the period of probation or in reverting him from the period of probation.

In the present case, it is found from the records of the High Court that the Petitioner was at first jjromoted on probation for six month"s subject to

the report of his successful performance of observance of punctuality in attendance and that the report was not favourable in this regard when it

was called for at the end of six months. The learned Chief Justice, as the appointing authority in spite of such facts in his discretion extended the

period of probation on similar terms for a further period of six months. At the end of that six months it was also found by the learned Chief Justice

on the report of the department that there was no improvement on the part of the Petitioner on this account. Then the learned Chief Justice

reverted him to the post of Lower Division Assistant, i.e. the feeder post which he held before his promotion to the post of Upper Division

Assistant on probation. It is also admitted case that the Petitioner was appointed on a regular basis from July 28, 1976. Now the only question

before this Court is if the period of officiation or of probation of the Petitioner prior to his appointment on July 28, 1976, should be taken into

consideration for the purpose of determination of his seniority. The Supreme Court in the decision cited above while laying down the rule of taking

into consideration of continuous service of an employee for the purpose of determination of seniority, has made an exception to the applicability of

these rules that the order of appointment in a substantive capacity is the significant starting point for reckoning seniority. It is observed:

If the appointment is to a post and the capacity in which the appointment is made is of indefinite duration, if the Public Service Commission has

been consulted and has been approved, if the tests prescribed have been taken and passed, if probation has been prescribed and has been

approved one may well say that the post was held by the incumbent in a substantial capacity.

10. In the present case it is not disputed that the Petitioner was on probation in promotion at first instance for a period of six months from January

7, 1975, on trial basis and that after the expiry of that six months the then learned Chief Justice, the appointing authority extended the period of

probation for a further period of six months on the same terms and condition and that on the expiry of the second term of probation of six months,

the learned Chief Justice by an order dated January 20, 1976, reverted him to the post of Lower Division Assistant. In paragraph 2 of the

application for vacating the order of injunction filed by the Respondents it has categorically been stated that by an order dated July 28, 1975, the

first period of probation for six months was extended for another six months subject to the condition that the case of his retention to the post of.

Upper Division Assistant would be considered after obtaining the report on the expiry of six months and that the Petitioner was duly informed of

such condition by the then Deputy Registrar on July 30, 1975. In para. 3 of the said application it is further mentioned that after the expiry of six

months on July 28, 1975, the question of further retention of the Petitioner to the post of Upper Division Assistant was taken up for consideration

by the appointing authority and that on the basis of the report of the Superintendent under whom the Petitioner worked that the punctuality and

regularity of the writ Petitioner in attendance was not satisfactory, he was reverted to the post of Lower Division Assistant by an order dated

January 20, 1976, after due consideration by the concerned authority.

11. The writ Petitioner in para. 5 of the affidavit-in-reply has stated that he does not admit the allegation in paras. 2 and 3. It appears that he has

made a general denial without specifically controverting the clear fact as made out by the Respondents in paras. 2 and 3 of the application for

vacating the order of injunction. In paragraph 5 he further says that he relies on official records which are in the custody of the Respondents in this

regard. The official record has been produced before this Court. It appears that the Petitioner was informed of the decision and the fact of

rejection of his representation for counting his seniority from January 1975. This record clearly supports the categorical stand of the Respondents.

It is not disputed that the Petitioner was initially allowed to officiate as Upper Division Assistant in a leave vacancy with effect from December 7,

1974, and that he was allowed to officiate as Upper Division Assistant in the regular vacancy from January 7, 1975, on probation at the first

instance for six months and then for the second term for six months. The learned Advocate for the Petitioner has submitted that the Petitioner has

now given up his claim for seniority against his appointment in leave vacancy But it is contended that his seniority should be counted from January

7, 1975 when he was appointed on promotion in probation against a regular vacancy. In support of the claim reference is made to High Court

Service Rules, 1960. My pointed attention has been drawn to Rule 14(2) which says that an employee in Class HI of the High Court service, shall

on promotion to a post in that class, be on probation for a period of one year unless otherwise ordered by the appointing authority. The learned

Advocate has also referred to second proviso to Rule 16 which says:

Provided further that the reversion of a person, promoted on probation on his being found not fit for confirmation shall not be deemed to be

reduction in rank. Rule 16 prescribes the penalties to be imposed upon the members of High Court Service in Classes I, 11/ III and IV. The

second proviso lays down that even if a member of the service is reverted to a lower post his period of reversion shall not be deemed to be

reduction in rank, although if he is not found fit for confirmation. In other words the period of reversion will not stand as a bar to the continuance of

a member of a service in his substantive rank. The entire rules have not been produced before me. In my view Rule 16 which has been relied upon

by the Petitioner in this case would only be applicable in case of imposition of penalty in pursuance of any disciplinary proceeding initiated against

any member of the service of the High Court in Classes I, II, III and IV. Nothing has been produced before this Court by the Petitioner to indicate

that ever the Petitioner was subjected to any disciplinary proceeding. The learned Advocate representing him has referred to the xerox copy of the

affidavit-in-opposition filed on behalf of the Respondent in Matter No. 660 of 1987 where in para. 9 it is stated that he was reverted to the post of

Lower Division Assistant with effect from January 21, 1976, as a disciplinary measure. This expression "disciplinary measure" cannot amount to

disciplinary proceeding as contemplated in Rule 16 of High Court Service Rules, 1960. For disciplinary proceeding is a comprehensive procedure

starting from calling for explanation, notice of showing cause, formation of charge, conducting of an enquiry and termination of proceeding with

definite finding of guilt or innocence of the persons subjected to such proceedings. The'' term ''disciplinary measure'' as used in the affidavit in

question appears to have been made loosely. The relevance of the statement in such affidavit cannot also deserve any attention in the present case

in view of the fact that on consideration of such affidavit-in-opposition and the relevant pleadings of the parties in Matter No. 660 of 1987 the

learned Judge dismissed the application of the writ Petitioner. He cannot therefore be allowed to refer to the statement of such affidavit-in-support

of his case over again. Besides, the Petitioner as a probationer, as stated earlier, cannot have a right or claim to a post on probation. It is not either

necessary to subject a probationer to a disciplinary proceeding for terminating or reverting his period of probation. The decision in Baleswar Das''s

case (Supra) clearly points out that the probation prescribed should be approved before it may be said that a member of. the service held a post

in substantive capacity. In the present case the period of probation was not approved by the then learned Chief Justice as the appointment of the

Petitioner was made for six months on probation at the first stage on trial basis and his period of probation was extended for a second term of six

months on the same terms, and condition and on the expiry of the second term his probation was disapproved and he was reverted to the lower

post.

12. The Petitioner, therefore, having not been retained in the regular post or substantial post from January 7, 1975, onwards as claimed by him and

he having been reverted to a lower post for about six months from January 21, 1976 to July 28, 1976, cannot claim the benefit of seniority on the

basis of continuous officiation from the date of his initial promotion in the post of Upper Division Assistant with effect from January 7, 1975, as

there was a clear break in such service. And that was the finding in the earlier proceeding. It was found that his appointment from July 28, 1976,

should be counted as fresh service and his seniority should be counted from such date onwards provided there is no break in such service.

13. Thus, the application cannot stand on Law as well as on merits. It is, therefore, rejected on contest without costs. The rule is discharged. All

interim orders are vacated. Learned Advocate representing the Petitioner''s pray for stay of operation of the judgment and order for two weeks.

Hence as regard to the facts and circumstances of the case, I am not inclined to grant stay. Accordingly, such prayer is rejected.

14. All parties to act on signed copy of the operative portion of the judgment on the usual undertaking.