

(1988) 03 CAL CK 0045

Calcutta High Court

Case No: C.O. No. 4273 (W) of 1986

Miss Amiya Pradhan

APPELLANT

Vs

The Secretary, Govt. of West
Bengal and Others

RESPONDENT

Date of Decision: March 28, 1988

Acts Referred:

- Constitution of India, 1950 - Article 136

Citation: (1988) 2 CALLT 269

Hon'ble Judges: Paritosh Kumar Mukherjee, J

Bench: Single Bench

Judgement

Paritosh Kumar Mukherjee, J.

Two points are to be determined in the present writ petition as to whether despite of the selection and recommendation of the West Bengal Public Service Commission, the promotion of a Government servant can be denied on the plea of existence of Departmental Proceeding, by issuance of some sort of slip shod charges against the said employee, who is otherwise eligible for such promotion.

2. Secondly, this court has to determine whether the present writ petition has been rendered infructuous in view of the fact that the writ petition cannot be disposed of before actual retirement of the writ petitioner for no fault of the writ petitioner and whether any pecuniary relief can be granted to the petitioner in such circumstances.

3. The facts of the present writ petition are as follows:

The petitioner Miss Amiya Pradhan obtained B.Sc. (Hons.) in Nursing in the year 1953 from the College of Nursing, Delhi, and was appointed initially as a State Nurse in the Medical College Hospital at Calcutta, and was posted there on September 1953, and thereafter, promoted to the post of Sister Tutor in gust 1956, and joined S.S.K.M. Hospital on September 5, 1986, being transferred from Medical College. In the meantime, she obtained Master's Degree in Nursing Education from Indiana

University, U.S.A. in 1964, with scholarship. The petitioner was sent to the said University for obtaining the Master's Degree by the Government of West Bengal as well as the Government of India, as their nominee. The petitioner attended various seminars and workshop including one in Washington in the year 1964. In 1976, the petitioner was sent to NIHAIE Delhi to XIII Staff College course for Senior Health Administrators. The petitioner was also Member of West Bengal Nursing Council and was Vice-President. She was also a co-opted member of the Board of Studies attached the Council for Under-Graduate Studies in Medicine, Dental Science, Homoeopathy, etc., of Calcutta University. The petitioner also been appointed a Paper Setter for the B.Sc. (Hons.) Nursing, Calcutta University and as a Paper Setter and Examiner and Moderator for W.B.N.C. The petitioner had also been appointed the Indian Nursing Council Inspector by the President of India.

4. Thereafter, the petitioner was appointed as Deputy Assistant Director of Health Services (Nursing) through an interview of the Selection Board and joined the Directorate of Health Services (Nursing) on April 1, 1958, and thereafter, appointed temporarily to the post of Assistant Director of Health Services (Nursing) with effect from January 1, 1973, in the leave vacancy one Mrs. Pratima Das. The petitioner also worked temporarily the said post from the period June 20, 1980 to September 2, 1981, which was subsequently regularised by Order, dated March 1, 1982. there after, the petitioner was appointed in the said post by Order, dated December 31, 1982, and subsequently has been confirmed in the said post.

5. It is the case of the writ petitioner that while she was working as Deputy Assistant Director of Health Services, the petitioner was also directed to take over charges of the Deputy Director of Health Services, by an Order, dated July 1, 1977, issued by the Director of Health Services, being respondent No. 4.

6. On the basis of an advertisement made by the Public Service Commission, West Bengal, in The Statesman, dated March 10, 1984, for the post of Deputy Director of Health Services, the Petitioner applied for the said post and interview of the petitioner was held on June 18, 1984, before the Board of Interview duly constituted by the Public Service Commission, and the petitioner was "duly selected" in the interview and her candidature was recommended by the Public Service Commission, West Bengal, for the appointment to the post of Deputy Director of Health Services, but the appointment letter could not be issued, because this court passed an Order of injunction on the advertisement, dated March 10, 1984, in a writ petition filed by one Parul Roy alias Chatterji in C.O. No. 7295(W) of 1984. The present petitioner made an application for being added as party respondent before Mukul Gopal Mukherjee, J, and she was added as a party respondent. It has been made clear by His Lordship that the interim Order passed on June 15, 1984, and September 10, 1984, would have no manner of application in respect of the appointment to the post of Deputy Director of Health Services (Nursing), and the said Order would not prejudicially affect the petitioner .

7. In the meantime, the petitioner was surprised to receive a memorandum, dated February 18, 1985, issued by the Joint Secretary to the Government of West Bengal, Department of Health and Family Welfare, on the issue of issuing re-employment letter in respect of one Smt. Shefalika Mitra as Matron, Bhatpara State General Hospital, who had been granted re-employment by the petitioner in West Bengal Nursing Services for a period of another six months and in the said memorandum, the petitioner was asked to explain within 7 days as to why disciplinary proceedings shall not be taken against her for allegedly violating the principles of re-employment formulated by the Government Order in respect of Smt. Shefalika Mitra, a superannuated Grade-I Nurse of the West Bengal Nursing Service. The said Order has been annexed as Annexure "E" to the present writ petition, which is set out hereunder .

The undersigned is directed to refer to the order No. HNG/ S-1-1(I)/64/625, dated 8.6.81 wherein Smt. Sefalika Mitra, Grade 1(1) Nurse of West Bengal Nursing Service, last re- employed as Matron, Bhatpara State General Hospital, Bhatpara, 24-Parganas in terms of Govt. Order No. Estt/4218/HNG/S-1- 1(i)/64, dated 6.6.80 was granted by Smt. A. Pradhan, Asstt. Director of Health Services (Nursing), West Bengal, re-employment in West Bengal Nursing Service for a period of another 6 (six) months and was posted by the said Asstt. Director of Health Services (Nursing) on transfer to M. R. Bangur Hospital, Tollygunge, Calcutta, as Grade 1 (1) Sister by an Order issued under her signature for the Director of Health Services, West Bengal. In terms of the principle laid down by Govt. re-employment Order is to be issued by Govt. with the approval of the cabinet except in some specified cases, Smt. A. Pradhan, Asstt. Director of Health Services (Nursing), West Bengal, is, therefore, requested to please explain within seven days from the date of receipt of this Memo, by her why disciplinary action should not be taken against her for violating the principles of re-employment formulated by Govt. in the case of Sm. Shefalika Mitra, a superannuated Grade 1 (1) Nurse of the West Bengal Nursing Service.

8. It will appear from the said memorandum that the petitioner has been charged for violating the principles of re-employment formulated by the Government, in case of Sm. Shefalika a superannuated Grade I Nurse of the West Bengal Nursing Service.

9. In this context, the writ petitioner has annexed two Government Orders, one, dated May 16, 1978, and another, dated 2, 1979, which are annexed as Annexures "F" and "G" respectively. 3 Conditions for re-employment of Nurses have been laid down, namely:

- (i) the period of re-employment shall not exceed six months at a time ;
- (ii) the superannuated Nurse is declared to be physically fit and mentally alert for further service ;
- (iii) he/she has good record of service.

10. Thus, according to the writ petitioner, no cabinet Permission was required for giving nursing personnel re-employment as it would be evident from the memorandum, dated May 16, 1978, issued by the Respondent No. 3, the relevant portion of which is set out herein below:

After due consideration of the question the Governor has been pleased, to order that the members of the West Bengal Nursing Service who have retired till the date of issue of this Order but have not attained the age of 60 years and also those who will retire till 31.12.78 may be given re-employment upto their attaining the age of 60 years or till they are replaced by suitable substitutes whichever is earlier. Re-employment of individual nurses will be sanctioned subject to the following terms and conditions :

- (i) the period of re-employment shall not exceed six months at a time ;
- (ii) the superannuated nurse is declared to be physically fit and mentally alert for further service ;
- (iii) he/she has good record of service.

Such re-employment shall be given under formal orders issued in each case by Government in the Department of Health & Family Welfare. During the period of re-employment the nurse concerned would draw pay and allowance as admissible under the normal rules of re-employment.

11. According to the writ petitioner from the above three memorandum, it was made clear that no Government Order was in force to give benefit to a nursing staff for the period from January 1, 1979 to June 1, 1979 and January 1, 1980 to May 8, 1980, until the same was regularised by the aforesaid memorandum, dated June 2, 1979, and May 9, 1980. Re-employment to the retiring nursing personnel could be given. under the formal Order issued in each case by the Government in the Department of Health and Family Welfare. Therefore, according to the writ petitioner, it is needless to mention that no cabinet permission was required for giving nursing personnel the benefit envisaged under the memorandum, dated May 16, 1978 or June 2, 1979 and May 9, 1980.

12. According to the writ petitioner, no permission of the Cabinet was necessary in case of granting re-employment to Sm. Shefalika Mitra, who was a Matron of Bhatpara General Hospital and attained the age of superannuation on January 31, 1980, and even after her superannuation in absence of any Order whatsoever granting re-employment from February 1, 1980, she was allowed to continue in her existing post by the Local Administration from February 1, 1980. There was no express permission either from the Director of Health Services, and this fact has been fully narrated by the inter-departmental notes, which has been set out at pages 83 and 84 of the writ petition, which is set out here under :

The explanation submitted by Smt. Sefalika Mitra was then placed before the D.H.S. in May 1981 and the D.H.S. had then consented to give her re-employment for a period of 6 months in another institution, not as a Matron but as a Sister, on compassionate grounds. The explanation submitted by her was not found to be satisfactory by the D.H.S. This also could be observed from the notes and orders of D.H.S. & Jt. D.H.S. on the page 30 of the note sheet.

Sm. Sefalika Mitra was re-employed as a Sister at M. R. Bangur Hospital, Calcutta vide this Dts. Order No. HNG/S-1-1(I)/641 625, dt. 8.6.81 and joined on 1.8.81. This was done in anticipation of Govt. Order, as in cases of other nurses. She reached the age of 60 years on 31.1.82 and no further re-employment could be granted to her. But unfortunately, her case was not placed before the Department for necessary Govt. Order, for her last 6 months re-employment period from 1.8.81 to 31.1.82 due to oversight.

As the incumbent concerned is having difficulties for regularisation of the service in absence of Govt. Order, for the last re-employment period, the file is resubmitted, with the requests to issue the requisite order at an early date for regularisation. The omission is deeply regretted.

Submitted to D.H.S.

Sd/-

16/8/83

Sd/-

19.8.83

D.D.H.S.(NSG) Director of Health Services & Family Planning.

13. In the premises, according to the writ petitioner, the charge-sheet contained in the memorandum, dated May 21, 1985, issued by the respondents for holding enquiry under Rule 10 of West Bengal Services (Classification, Control and Appeal) lies, 1971, against the writ petitioner Amiya Pradhan, Assistant rector of Health Services (Nursing) , West Bengal, in respect of charge that she has issued an irregular order under her. signature .Director of Health Services, West Bengal, re-employing Smt. Shefalika Mitra, former Grade-I (i) Nurse of the West Bengal Nursing Service, last re-employed as Matron, Bhatpara State General Hospital, 24 Parganas, for another period of 6 months as Sister at M. R. Bangur Hospital, Tollygunge, was nothing but to with hold grant of promotion to the post of Deputy Director of Health Services (Nursing) to which she was otherwise eligible. This writ petition has been moved before this court on April 16, 86, praying, inter alia, issue of appropriate writ in the nature of Mandamus commanding the respondents to cancel and/or withdraw and/or rescind the purported charge sheet contained in memorandum, dated May 21, 1985, issued by the respondent No. 1 and also to give

promotion and/or appointment with retrospective effect from June 1, 1983, to the post of Deputy Director of Health Services (Nursing) and also commanding the respondents to fix the Petitioner's pay at a proper stage and/or level, in accordance with law when U. C. Banerjee, J. passed directions for affidavits and recorded that in spite of service of notice of the application, no one appears on behalf of the respondent Nos. 1 and 4.

14. Thereafter, it appears, another direction was given by His Lordship on May 19, 1986, in the presence of Mr. Alok Ghosh, learned Advocate who appeared for the State, that affidavit-in- opposition be filed within June 10, 1986, and reply to be filed by me 13, 1986, and hearing was fixed on June 16, 1986.

15. The writ petition was further taken up for hearing on June 23, 1986, August 29, 1986, and several days thereafter but could not be disposed of before actual retirement of the writ petitioner.

16. The matter was mentioned before me on November 13, 1987, and the matter was heard on several days.

17. During the hearing, a point was taken by the court that "no relief" can be given upon this writ petition, which has become "infructuous", in view of the Division Bench judgment of this Court in the case, of [Secretary to the Government of West Bengal, Home Department and Others Vs. Ram Chandra Choudhury](#), whereupon an application for amendment has been made which was "allowed by me on February 24, 1988.

18. Mr. Sanjoy Bhattacharya, learned Advocate followed by Mrs. Chandrima Bhattacharya appearing on behalf of the petitioner submitted that the respondents in fact by issuing the charge sheet on the "flimsy ground" stated as aforesaid, had denied the legitimate promotion to the writ petitioner and did not fix the petitioner's pay as "Deputy Director", with a mala fide motive and, as such, this court may pass necessary direction, to fix the pay accordingly, as if there was "no charge sheet", on the date of retirement of the writ petitioner and, as if, the petitioner has been granted promotion to the post of Deputy Director of Health Services (Nursing), on the basis of the recommendation of the Public Service Commission.

19. To the objection raised by the Court that the writ petition has been rendered infructuous, Mr. Bhattacharya has submitted that as the petitioner has amended the writ petition during the hearing, before the learned trial Judge, in view of the observations made by the Division Bench in the case of State of West Bengal V. Ram Chandra Chowdhury, the petitioner is entitled to get relief as the Division Bench in the said judgment in paragraph 7 observed as follows :

The respondent should have amended the petition, for the learned Judge said that the relief in respect of arrears of pay and pensions was claimed on the footing that

he was never reverted from the post of Deputy Superintendent of West Bengal Police. But not having done so, I do not know how such a relief can be given to him today from 1958 until 1972 at the date of hearing in this Court. In the appeal, the respondent never took any steps to amend the petition. A petition for amendment was filed in this Court when the hearing of the appeal was proceeding and when we had indicated that this was the main difficulty of the respondent.

20. Mr. Bhattacharya submitted that in that case before the Division Bench, a petition for amendment was filed at the hearing of the appeal, but here the application for amendment for "payment of arrear salary" has already been made in the writ petition and in terms of the observations of the Division Bench of this Court, during the hearing, additional grounds have been taken, being grounds (w), (x) and (y), that is, the petitioner is entitled to be treated as "permanently appointed" in the post of Deputy Director Health Services (Nursing) with effect from June 1, 1983, and accordingly is entitled to all pensionary benefits as Deputy Director Health Services (Nursing), the petitioner is entitled to refixation of her pension and gratuity, treating her to be as the Deputy Director of Health Services (Nursing) from June 1, 1983, till her date of retirement, that is, August. 31, 1986, with all arrears in connection thereto and the petitioner is entitled to all the benefits in accordance with law, treating her to be the Deputy Director of Health Services (Nursing), which has been incorporated in terms of the order of this Court, dated February 24, 1988.

21. When the matter was further heard, Mr. Bhattacharya relied on a judgment reported in [State of Gujarat Vs. S. Tripathy and Others](#), , State Gujarat vs. S. Tripathy and others, on the issue, as to whether notion can be withheld, only on the ground of existence of departmental proceedings or any report filed by Vigilance Commission .In paragraph 4 of the said judgment, Chinnappa Reddy, J, king for the court observed as follows :

Shri Tripathy, who, we must say, argued his case with ability, drew our attention to the confidential reports in great detail, as also to other relevant records. He submitted that the so-called allegations which ,were referred to the Anti-Corruption Bureau and the Vigilance Commission were frivolous, that the mere pendency of the investigations and enquiries should not have been allowed to stand in the way of his promotion, that in fact other officers were promoted notwithstanding the pendency of enquiries against them and that the instructions of the Central Government did not permit the Chief Secretary to make the remarks that he did merely because some investigations or enquiries were pending against him. We are not now concerned with the question of the interpretation of the Government of India's instructions regarding the writing of confidential reports or the nature of the allegations which were referred to the Anti-Corruption Bureau at the Vigilance Commission. We are clear in our minds that no justifiable grounds have been made out warranting an interference under Art. 136 of the Constitution with the conclusion of the High Court that there was no material to warrant overlooking the

respondent for promotion to the Selection Grade and super time scale.

22. In this context, reference may be made to the order, dated September 26, 1984, passed by the Division Bench of this Court in which myself was a party sitting with M. M. Dutta, J, (as His Lordship then was) in F.M.A.T. No. 2824 of 1984 in the case of Union of India vs. T. D. Karamchandani, the Division Bench after hearing both the parties, confirmed the interim Order granted in favour of the writ petitioner and observed that the appellants, being the Customs Authorities should not take into consideration the pending disciplinary proceeding for the purpose of giving promotion to the writ petitioner, T. D. Karamchandani. In that case, earlier the Division Bench directed the customs authorities to consider the candidature of the petitioner for promotion in accordance with law, but in order to deny the promotion, a slip shod charge sheet was issued just to deny the promotion, as in this case.

23. In reply, to the question raised by this court as to whether any mandatory relief with consequential benefit can be granted, Mr. Bhattacharya has relied on a decision of the Supreme Court reported in [Y. Ramanjaneyulu Vs. State of A.P. and Others](#), wherein in paragraph 9 of the said judgment, D. A. Desai, J, speaking for the court held "that the appellant could be eligible for promotion from 1965. But this is not the lone case and if the court grants him the relief as claimed by him, though he has sought relief after a very long unexplained delay, it would create chaos in the service and many promotions and reversions will have to be effected. According to Mr. Ram Reddy, it is a case in which monetary compensation would be more than adequate. There is considerable force in this submission. As pointed out earlier, though undoubtedly the appellant made number of representations, he moved for an effective relief as late as 1977. We are, therefore, not inclined to disturb the existing promotions and postings by holding that the appellant was entitled to promotion way back in 1975. In this background, the appellant is entitled to some monetary compensation."

24. Mr. Alok Kumar Ghosh, learned Advocate appearing on behalf of the respondents relied on the affidavit-in-opposition affirmed on behalf of the respondents by one Nanigopal Sengupta, Assistant Secretary to the Government of West Bengal on June 10, 1986.

25. It will be necessary for me to refer to paragraph 14 of the said affidavit which dealt with the allegations made in paragraph 23 of the writ petition. In the said paragraph, the deponent had merely denied the statements made in paragraph 23 of the writ petition but at the same time, admitted clearly that some Government orders might have taken "post facto sanction", depending on circumstances of cases concerned.

26. Thus, the deponent had admitted that the writ petitioner has not done any unprecedented act or committed such an irregularity, for which charge sheet can be issued and departmental proceeding can be initiated.

27. In paragraph 26 of the writ petition, the writ petitioner asserted that the petitioner never acted beyond her jurisdiction and had acted as per orders of the competent authority and she made it clear that the explanation submitted by Sm. Mitra was satisfactory and she (the petitioner) was not in favour of re-employment of Sm. Mitra, and the petitioner has asserted that the Director of Health Services has passed an order in the file that Mitra was not fit for re-employment as a "Matron" in the same institution and that she may be given re-employment as a Sister in some other institution for a period of 6 months.

28. This inter-department note has been annexed as Annexure "N-1" which has been already referred to herein above and it goes to show that the petitioner has been penalised and the respondents have found the petitioner as a "scape-goat ", although lately such re-employment has been ratified by the Director of Health Services, to favour Sm. Shefalika Mitra.

29. At the hearing of the writ petition, I wanted to know. Mr. Ghosh as to what prompted the respondents to give re-employment and as to what steps have been taken against Mitra, who had actually pretended to act, without any valid , of re-employment and when Sm. Mitra continued to sign in the Register " forcibly ", without the permission of the Superintendent Mr. Ghosh appearing for the respondents, could not give satisfactory answer to the court.

30. In the affidavit, however, dealing with paragraph 26, the Assistant Secretary had merely referred to the record and craved to Annexures "N-I" and "C" for its true scope.

31. As such, this court has to decide as to what prompted the respondents to issue further re-employment order, ultimately in favour of Sm. Mitra and what prompted the respondents to charge sheet and initiate the departmental proceedings, for issuing formal re-employment order, when the said formidable Shefalika Mitra continued to function and against whom no action was taken. It just reminds us the story of Essop"s Fables.

32. In my opinion, mala fide becomes patent, because of the statements made in paragraph 16, where the Assistant Secretary has merely denied the assertions made in paragraph 26 of the petition.

33. In my view, the allegations of mala fide by the writ petitioner have been "proved beyond all reasonable doubt " and my opinion, just in order to deny the benefit of promotion to the writ petitioner , in the post of Deputy Director of Health Services (Nursing), such charge sheet has been issued although when Mr. Justice Mukul Gopal Mukherjee has clarified the interim order passed by His Lordship and observed that it would not stand in the way in the matter of granting promotion to the petitioner as stated hereinabove .

34. Further, in my view, the denial made by the Assistant Secretary in paragraph 18 of the affidavit to the effect, who had no personal knowledge, that the disciplinary proceeding is as a result of intrigue against the petitioner cooked up to over-shadow the petitioner's last phase of career in the office, as such, cannot stand.

35. Accordingly, the plea raised in the affidavit and the contentions of Mr. Ghosh in this regard cannot be accepted, because of the attending circumstances of this case. It is now well settled that Court can go behind the order to look into the motive. In this case, in my opinion the motive of issuing charge sheet, was only to deny the promotion to the writ petitioner, at the fag end of her life.

36. In the result, in my view, the writ petition is entitled to succeed.

37. The petitioner is entitled to be treated as permanently appointed in the post of Deputy Director of Health Services (Nursing) with effect from June 1, 1983, and accordingly is entitled to all pensionary benefits, as Deputy Director of Health Services (Nursing). The petitioner is entitled to refixation of her pension and gratuity treating her to be as the Deputy Director of Health Services (Nursing) with effect from June 1, 1983, till her date of retirement, that is August 31, 1986 with all arrears in connection thereto within a period of 3 months from communication of this order, as if, there was no charge sheet issued against the writ petitioner.

38. The application is disposed of, as above.

39. There will be no order as to costs.