

(2007) 03 CAL CK 0061

Calcutta High Court

Case No: A.P.O. No. 80 of 2005 and W.P. No. 142 of 2003

Managing Director, Food
Corporation of India and Others

APPELLANT

N.K. Dey and Another

Vs

RESPONDENT

Date of Decision: March 29, 2007

Acts Referred:

- Constitution of India, 1950 - Article 14, 16, 21, 300A
- Food Corporation of India Staff Regulations, 1971 - Regulation 59(4)

Citation: 111 CWN 866 : (2007) 113 FLR 629

Hon'ble Judges: Tapan Mukherjee, J; Ashim Kumar Banerjee, J

Bench: Division Bench

Advocate: Kamal Chattopadhyay, for the Appellant; Bharati Ghosh, for the Respondent

Final Decision: Allowed

Judgement

Ashim Kumar Banerjee, J.

The respondent No. 1 was appointed as Senior Assistant Manager in Food Corporation of India Limited (hereinafter referred to as FCI) the appellant above named in the year 1972. While applying for the said post he described himself as SC Candidate. Throughout his service carrier he enjoyed such benefit until it was discovered that he did not have appropriate scheduled caste certificate.

The executive committee of the Board of Directors of the FCI terminated his service with effect from November 16, 1978 on the basis of a vigilance report. The respondent No. 1 approached Delhi High Court while by judgment and order dated November 12, 1982 the order of termination was set aside coupled with a direction to reinstate him in service. Accordingly, the said respondent was reinstated in service with effect from January 20, 1983.

2. The FCI initiated an appropriate disciplinary proceeding. The respondent/writ petitioner approached this Court by filing the writ petition being the second writ

petition challenging the disciplinary proceeding. The same was disposed of by judgment and order dated May 13, 1992 by directing the concerned authorities to complete the disciplinary proceeding within two months from the date of the said order.

3. The authority thereafter removed from service by an order dated June 19, 1992 which gave rise to the third writ petition being Matter No. 2069 of 1992. The learned Single Judge by judgment: and order dated May 10, 1995 set aside the order of removal and directed his reinstatement. The authority reinstated him in service and he completed his service tenure and retired in 2002. He was paid all retiral benefits.

4. Just on the eve of his retirement the said respondent started making a claim for arrear salary for the period 1978-83 and immediately after retirement he approached this Court by filing his fourth writ petition, *inter alia*, claiming back wages for the period November 11, 1978 to March, 1983. He also prayed for quashing of the decision of the authority dated May 21, 2002 and May 23, 2002 by which his claim was denied by the FCI. FCI contested the claim by filing affidavit. Learned Single Judge heard and disposed of the writ petition by judgment and order dated December 18, 2003 which is impugned in this appeal.

The learned Judge held that order of reinstatement would automatically give right to the incumbent to claim back wages. His Lordship allowed the writ petition, however, directed payment of 50% of the back wages.

The said respondent also preferred an appeal against part of the judgment and order by which his partial claim was denied by His Lordship. The said respondent, however, did not pursue his appeal and as such the same stood dismissed for default.

The instant appeal was heard by us on the above mentioned dates.

Mr. Kamal Chattpadhyay, learned Counsel appearing for the FCI/appellant contended that the respondent/writ petitioner was not awarded any back wages by Delhi High Court while reinstating him in service. He did not make any complain during his service tenure. The second and third writ petitions were filed by the respondent/ writ petitioner without making any claim on account of the back wages. Hence, right, if any, of the respondent/ writ petitioner to claim back wages stood waived by his conduct. He further contended that payment of back wages was not a matter of course. In this regard he relied upon two Apex Court decisions reported in *Managing Director, ECIL, Hyderabad and Ors. v. B. Karmakar and Ors.* 1993 (67) FLR 1230 (SC-FB) : 1993 (1) SCC 727 and [Banshi Dhar Vs. State of Rajasthan and Another](#).

Opposing the appeal Ms. Bharati Ghosh, learned Counsel appearing for the respondent/ writ petitioner contended that the order of reinstatement was passed by the Delhi High Court after holding that the authority was not entitled to dismiss

him from service without initiating any disciplinary proceeding. Hence, such order of reinstatement would ipso facto give right to the writ petitioner to claim back wages during the period when he suffered the order of dismissal which was set aside by the Delhi High Court. She also submitted that the second and third writ petitions were on a different aspect as he thereby challenged the disciplinary proceeding and its result. She also drew our attention to the documents wherefrom it would show that claims were made in November, 2001 followed by a reminder in January, 2002.

5. On a query made by this Court Ms. Ghosh contended that there was no misdescription or misdeclaration made by the respondent/writ petitioner. He belongs to "Sanatani Caste" and accordingly described himself as "SC".

6. We have perused the pleadings before the learned Single Judge. We have also called for the records pertaining to the third writ petition being Matter No. 2069 of 1992 and perused the same. The respondent No. 1 admittedly described himself as SC and despite such misdeclaration he was allowed to work till his last date of retirement. The authority initially dismissed him from service without any disciplinary proceeding. Delhi High set aside the order of dismissal and asked the corporation to reinstate him in service. Accordingly, he was reinstated and was proceeded with departmentally. The disciplinary authority removed him from service again. Challenging the order of removal the respondent/writ petitioner approached this Court again and was successful therein. The authority, however, did not proceed any further and allowed him to retire on the date of his natural superannuation.

Delhi, High Court reinstated him in service in 1983 without giving any direction for back wages for the period November, 1978 to 1983. The respondent/writ petitioner did not approach Delhi High Court for any clarification and/or modification. Second and third writ petitions were moved before this Court where also this Court did not give any such direction for payment of back wages.

7. The prayers in Matter No. 2069 of 1992 are set out below:

(a) A declaration declaring the Regulation 59(4) of the Food Corporation of India (Staff) Regulations, 1971 bad, void, illegal and is ultra vires the provisions of Articles 14, 16, 21 and 300A of the Constitution of India.

(b) A writ of and or in the nature of Mandamus commanding the respondents, each one of them, their servants and agents and or subordinates and/or assigns to rescind, cancel and/or withdraw the impugned order of dismissal issued in June, 1992 being Annexure "K" to this petition and further commanding them to forbear from giving any effect or further effect to and/or acting or further acting or continuing to act on the basis of and or pursuant to the purported order of dismissal issued in June, 1992 being Annexure "K " to this petition in any manner whatsoever.

(c) A writ of and/or in the nature of certiorari directing the respondent each one of them, their servants and agents and/or subordinates and or assigns to transmit the entire record of the case forming, the basis of the impugned order of dismissal being Annexure "K" to this petition, to this Hon'ble Court and to certify them and no being so certified quash the same including the order of dismissal passed in June, 1992.

(d) A writ of and or in the nature of prohibition prohibiting the respondents from giving any effect to and/or acting or further acting or continuing to act on the basis of and/or pursuant to the impugned order of dismissal passed some time in June, 1992 being Annexure "K" to this petition, in any manner whatsoever.

(e) Rule Nisi in terms of prayers (b), (c) and (d) as above.

(f) An interim order of injunction restraining the respondents, each one of them, their servants and agents and/or subordinates and /or assigns from giving any effect or further effect to and/or acting or further acting or continuing to act on the basis of and/or pursuant to the impugned order of dismissal passed in June, 1992 being Annexure "K" to this petition in any manner whatsoever.

(g) Ad-interim order in terms of prayer (i:) as above.

(h) An such further order or orders and/or direction or directions as to your Lordships may seem fit and proper.

8. On perusal of the prayers quoted supra it would appear that in the said writ petition, the writ petitioner did not make any prayer for back wages.

We are of the view that the right to claim back wages stood waived by the respondent/writ petitioner. Moreover, such claim, if any, is hit of the principles of constructive res judicata. The learned Single Judge did not consider the subject issue from this angle. His Lordship was perhaps not correct in observing that when an incumbent is reinstated in service back wages is a matter of course. The recent decision in the case of Vanshi Dhar (supra) would show that there is no hard and fast rule which can be laid down in regard to grant of back wages and each case has to be determined on its facts.

9. In the instant case the respondent/writ petitioner described him as SC candidate while entering in service. He availed of all benefits as Scheduled Caste till the vigilance could find out such irregularity. He was dismissed from service. His order of dismissal was set aside. He was removed from service after a regular disciplinary proceeding. The said order was also set aside by this Court. He was allowed thereafter to complete his service tenure. He was regularly paid his service benefit. He is now enjoying his retiral benefit. He did not make any contemporaneous claim for back wages. In any event, such claim being not made hi the earlier proceedings debarred him to make it in the fourth writ petition after his retirement.

The appeal succeeds and is allowed.

The order of the learned Single Judge is quashed and set aside.

There would be no order as to costs.

Urgent xerox certified copy would be given to the parties, if applied for.

Tapan Mukherjee, J.

I agree.