

Binay Kumar Vs. Union of India (Uoi) and ors.

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Court : Delhi

Decided On : Jan-28-2003

Reported in : 2003(69)DRJ143

Judge : Mukundakam Sharma, J.

Acts : Service Law

Appeal No. : CW No. 6479/2002

Appellant : Binay Kumar

Respondent : Union of India (Uoi) and ors.

Advocate for Def. : Mukul Rohtagi, Addl. Solicitor General and ; Sanjay Jain, Adv. for Respondent No. 1 and ;

Advocate for Pet/Ap. : Shyamla Pappu, Sr. Adv.,; K.K. Rai and; R. Krishnaa Morthi

Disposition : Petition dismissed

Judgement :

Mukundakam Sharma, J.

1. The present writ petition was filed by the petitioner praying for issuance of a writ of mandamus directing respondent No. 1 to modify and/or rectify the order dated

7.8.2001 to the extent of deleting the word 'interchange' and by incorporating the word 'transfer' in its place in the said order to make it in conformity with the office memorandum dated 17.9.1975 (Annexure P-5) with a further direction to issue a fresh order making the appointment of the petitioner as Director (Personnel) in the National Hydro Electric Power Corporation Limited effective for a period of five years with effect from 7.8.2001 and also an order for revival of CWP No. 6094/2000.

2. The petitioner, while working as Director (Personnel) in the Power Grid Corporation of India Limited was suspended from service by order dated 1.10.1999. The petitioner challenged the said order in the writ petition filed by him, which was registered as CWP No. 6301/1999, which was dismissed by order dated 21.1.2000. Subsequently, however, after some negotiations between the parties the aforesaid order of suspension was revoked and he was proposed to be sent to the National Hydro Electric Power Corporation Ltd., the respondent No. 2 awaiting which he was ordered to be on compulsory waiting.

3. The petitioner challenged the aforesaid order directing him to be on compulsory waiting by filing a second writ petition, which was registered as CW No. 4654/2000. During the pendency of the said writ petition, the petitioner also withdrew his consent to his proposed transfer to respondent No. 2 in December 2000. In view of the changed position, the respondent No. 1 also proposed to alter the position and filed an affidavit proposing to place the petitioner again under suspension. Accordingly, the writ was dismissed as in-fructuous on 9.4.2001 while giving liberty to the respondents to pass a fresh order in terms of their affidavit dated 7.2.2001. However, thereafter the petitioner executed a fresh undertaking expressing his willingness for his proposed transfer to NHPC and for withdrawal of some of the cases filed by him. Consequent to the aforesaid position, a fresh order was passed by the respondents on 11.5.2001 putting the petitioner again on compulsory waiting pending finalisation of actions for placing his services with the respondent No. 2. The petitioner again filed a writ petition in this Court challenging the order dated 11.5.2001 putting him again on compulsory waiting, which was dismissed by the impugned order dated 29.5.2001. Being aggrieved by the same, the petitioner filed an appeal before the Division Bench of this Court, which was

registered as LPA No. 295/2001. While the aforesaid appeal was pending before the Division Bench, the parties entered into further negotiations pursuant to the Court's observations for ending the controversy mutually; The said petition was disposed to by this Court on 1.6.2001 by recording a detailed order. The said order of the Division Bench is annexed in the writ petition as Annexure P-2 and the operative portion of the said order reads as follows :

'Records shows that appellant and Chairman-cum-Managing Director of the Power Grid Corporation were engaged in running feud, generating this otherwise avoidable litigation and UOI was wanting to evolve a way out arrangement with appellant for smooth functioning of NPGC. It was in this scenario that it was deemed just and appropriate to put an end to the raging litigation by providing as under :

(i) Appellant shall furnish an undertaking on affidavit that he was willing and prepared to be transferred to NHPC and that he would not withdraw his officer any more and would remain in compulsory waiting till his proposal for such transfer materialised. He would also withdraw CWP 6094/2000 but if for some reason his proposed transfer to NHPC aborted, he would be entitled to revive this petition and to seek its disposal under law.

(ii) Respondents, on their part shall also be well advised not to press in service the new suspension order passed by them and to consider its recall/revocation in the face of the proposed settlement. It is hoped that they would heed the advice tendered by Additional Solicitor General, Mr. Muktil Rohtagi in this regard and give it due consideration and weightage to end this litigation for good.

(iii) Pursuant to withdrawal of the suspension order Respondents and their all concerned functionaries shall take all necessary steps to process and finalise appellant's transfer to NHPC and pass requisite orders in this regard under law within two months from filing of affidavit by Appellant.

(iv) Meanwhile Appellant shall be entitled to all benefits as Director which is given to him under rules.'

4. Subsequent to the aforesaid disposal, the Government of India processed the records and it was suggested that the services of the petitioner be interchanged with Mr. A.I. Bunet, Director (Personnel), National Hydroelectric Power Corporation Ltd. on grounds of compassion and administrative interest and that their appointments shall be restricted to the balance tenure. The Appointment Committee of Cabinet approved the aforesaid proposal . after recording that the proposal of interchange of the petitioner with Mr. A.I. Bunet, Director (Personnel), NHPC with effect from the date of taking over charge of respective posts for the balance period of their respective tenures of their initial appointment/extended appointment stood approved. Consequently, the order dated 7.8.2001 was issued. The petitioner also complied with the aforesaid order and joined NHPC by submitting his joining report and assumed on 9.8.2001 the charge of the office of the Director (Personnel) of respondent No. 2. On 24.12.2001, the petitioner for the first time submitted a representation to the respondents contending, inter alia, that in terms of guidelines issued by the Govt. of India on 17.9.1975 his appointment to the post of Director (Personnel) in the respondent No. 2 should have been for a fresh period of five years commencing from 7.8.2001 and not for the remaining period as is ordered by the respondent in the order dated 7.8.2001 and accordingly the word 'interchange' be substituted by the word 'transfer' by modifying the letter issued on 7.8.2001. As the respondent No. 1 did not comply with his request the present writ petition is filed in this Court praying for the aforesaid reliefs.

5. Ms. Shyamla Pappu, Senior Advocate appearing for the petitioner, during the course of her submissions took pains to take me through the contents of the orders of the Division Bench of this Court in the LPA No. 295/2001 and also through the contents of the circular dated 17.9.1975. I have already extracted above the relevant portion of the order of the Division Bench of this Court. The relevant part of the circular dated 17.9.1975 is extracted below for proper understanding of the contention of the senior counsel appearing for the petitioner.

'.....Two issues have been raised in connection with such appointments. These are:

(i) Whether the transfer of the incumbent of a Top Post to another Top Post within the same complex of holding subsidiary companies or between the companies under the control of the same Administrative Ministry ; requires the approval of the Appointment Committee of the Cabinet ; and

(ii) Whether such a transfer would amount to fresh appointment with a fresh tenure of five years from the date of appointment to the new post.

2. These issues have been examined by the Public Enterprises Selection Board in consultation with the Department of Personnel and Administrative Reforms. Selection to Top Posts are made strictly with reference to the job requirements and the qualifications and experience need can differ materially from post to post. It follows that each appointment to a Top Post by transfer ; be it within a holding company or from one Corporation to another under the control of one Administrative Ministry, is to be made with specific reference to the requirements of that post. Each such appointment will, therefore, be considered as a fresh appointment requiring the approval of the Public Enterprises Selection Board or the appropriate Selection Committee constituted in accordance with the procedural laid down by the Public Enterprises Selection Board as well as the concurrence of the Appointments Committee of the Cabinet. The tenure of appointment in these posts will also count afresh from the date of appointment to the new post.

3. Ministry of Industry and Civil Supplies etc., are requested to note this future guidance.

6. In the light of the records including the aforesaid circular and also the order of the Division Bench of this Court, it was submitted by the learned senior counsel for the petitioner that respondent No. 1 is bound by the circular dated 17.9.1975 and, therefore, it could not have departed from the mandate of the said circular so as to use the word 'interchange' in place of 'transfer' thereby restricting the tenure of the service of the petitioner for the remaining term and not giving a full tenure of five years from the date of his joining the respondent No. 2, which, according to the senior counsel appearing for the petitioner, is illegal and without jurisdiction and is, therefore, required to be rectified by issuing a proper direction as prayed for in this Writ petition.

7. Mr. Mukul Rohtagi, Additional Solicitor General, appearing for respondent No. 1, submitted that the memorandum dated 17.9.1975 is not applicable to the case of the petitioner in view of the peculiar facts and circumstances of this case. He also submitted that the Division Bench of this Court, while passing order dated 1.6.2001 in LPA No. 295/2001, never intended to give to the petitioner the benefit of fresh five years of service from the date of his joining as Director (Personnel) in respondent No. 2, He also submitted that in the present case the interchange of the petitioner with Mr. A.I. Bunet, Director (Personnel), NHPC was made on the ground of compassion and administrative interest and taking into consideration the peculiar facts of the case. He also submitted that the post of Director (Personnel), NHPC was headed by Mr. A.I. Bunet and the movement of the petitioner from POWERGRID to NHPC necessitated the simultaneous movement of Mr. A.I. Bunet, Director (Personnel), NHPC to POWERGRID and the word 'interchange' in the order dated 7.8.2001 was used in this context. He also took me through the counter affidavit to explain the circumstances why the petitioner was required to be put on compulsory waiting and as to why the word 'interchange' was used. He has also drawn my attention to the fact that the order dated 7.8.2001 was issued with the approval of the competent authority and that the said order specifically specified that the interchange of the petitioner with Mr. A.I. Bunet, Director (Personnel) was to take effect from the date of taking over charge of respective posts for the balance period of their respective tenures of their initial appointment/extended appointment. It was also brought to my notice that the petitioner also complied, with the aforesaid order and joined NHPC without raising the issue of his tenure on 9.8.2001 and it was only on 24.12.2001 that the petitioner submitted a representation raising the said issue, which clearly exhibits that the same was an afterthought.

8. In the light of the aforesaid submissions of the counsel for the parties, I have considered the records. The petitioner was placed under suspension by the Ministry of Power under order dated 1.10.1999 and charge sheet was also issued on 29.10.1999. The petitioner then filed a writ petition in this Court challenging the aforesaid order of suspension. The said writ petition was dismissed by this Court. In the meantime in terms of the appointment order of the petitioner, the performance of petitioner was reviewed in consultation with Public Enterprises

Selection Board (PESB) after expiry of the first year to consider his continuance or otherwise in the post of Director (Personnel), POWERGRID for the balance period of tenure. The PSEB did not recommend the confirmation of the petitioner. However, after considering the representation submitted by the petitioner and on grounds of compassion and administrative interest, the competent authority decided to drop the disciplinary proceedings initiated against him and to revoke the suspension order and an order to this effect was issued on 9.8.2000 keeping the petitioner under compulsory wait till the proposal for his transfer to NHPC was approved by the competent authority. The petitioner challenged the aforesaid order of keeping him on compulsory wait in the second writ petition being CW No. 4654/2000 on the ground that the same was prejudicial to his interest. However, as affidavit was filed in the said case by the respondents contending, inter alia, that in view of the changed circumstances and in view of the plea taken up by the petitioner, it has decided to cancel the order of withdrawing the order of suspension against the petitioner and to proceed with disciplinary proceeding initiated against him. In view of the said affidavit, the writ petition was dismissed as infructuous on 9.4.2001 while granting liberty to respondents to pass a fresh order in terms of their affidavit dated 7.2.2001. Even thereafter the petitioner submitted his willingness for his proposed transfer to NHPC, which culminated into the order dated 11.5.2001 by the respondents putting the petitioner again on compulsory waiting pending finalisation of his proposed transfer to NHPC. The said order was also challenged in this Court by filing CW No. 3536/2001 challenging the order dated 11.5.2001 putting him on compulsory waiting, which was dismissed by the second order dated 29.5.2001, which resulted in filing the appeal before the Division Bench pursuant to which the order dated 1.6.2001 was passed by the Division Bench recording its observations therein. In terms thereof, the order dated 7.8.2001 was passed whereby the President had interchanged the petitioner with Mr. A.I. Bunet with effect from the date of taking over charge of respective posts for the balance period of their respective tenures of their initial appointment/extended appointment. The operative portion of the order reads as under :

'3. The President is pleased to interchange Shri Binay Kumar, Director (Personnel), Power Grid Corporation of India Limited with Shri A.I. Bunet Director

(Personnel), National Hydroelectric Power Corporation Limited, with effect from taking over charge of respective posts for the balance period of their respective tenures of their initial appointment/extended appointment.

4. Further orders, if any, in the above context, will be issue separately.'

9. Before issuance of the aforesaid order, approval of the ACC was obtained, which had approved the interchange of the petitioner with Mr. A.I. Bunet, Director (Personnel) to be effective from the date of taking over charge of respective posts for the balance period of their respective tenures of their initial appointment/extended appointment. In terms of the aforesaid decision, the order dated 7.8.2001 was issued. Pursuant to the aforesaid order the petitioner joined his duties and submitted his joining report and assumed charge of the Director (Personnel) of the respondent No. 2 on 9.8.2001 without any protest or demur as against the aforesaid stipulation in his appointment order dated 7.8.2001. He worked in the said post without any grievance for a period of four months where after he submitted his representation on 24.12.2001 raising the disputes as raised in the present petition relying on the contents of the office memorandum dated 17.9.1975.

10. Counsel appearing fro the petitioner submitted that respondent No. 1 could not have departed from the mandate of the office memorandum and curve out an exception in the case of the petitioner by using the word 'interchange' in place of 'transfer'. The aforesaid circular was issued as far back as 17.9.1975. There is nothing on record to show under what circumstances the aforesaid circular came to be issued. In paragraph 3 of the said circular, however, it was specifically stated that the Ministry of Industry and Civil Supplies etc. were requested to note the guidelines as stated in paragraphs 1 and 2 for future guidance. One of the subjects that is dealt with in the said circular is whether the transfer of the incumbent of a Top Post to another Top Post between the same complex of holding subsidiary companies or between the companies under the control of the same Administrative Ministry ; requires the approval of the Appointment Committee of the Cabinet and whether such a transfer would amount to fresh appointment with a fresh tenure of five years from the date of appointment to the

new post. As indicated therein it is agreed that the aforesaid memorandum was issued after the said issued was examined by the Public Enterprises Selection Board in consultation with the Department of Personnel and Administrative Reforms. It was stated in the said memorandum that selection to top posts are made strictly with reference to the job requirements and the qualifications and experience need can differ materially from post to post and that each appointment to a top post by transfer is to be made with specific reference to the requirements of that post and in that case such appointment shall be considered as a fresh appointment requiring the approval of the Public Enterprises Selection Board or the appropriate Selection Committee constituted in accordance with the procedure laid down by the Public Enterprises Selection Board as well as the concurrence of the Appointments Committee of the Cabinet. The tenure of appointment in these posts would also count afresh from the date of appointment to the new post. The said circular, therefore, states that in all such cases where such approvals are made in ordinary case on the basis of job requirement and the qualifications and experience, which is need based, the appointment by way of transfer would be treated as a fresh appointment from the date of the new posting.

11. However, in the present case it is established that the interchange of the petitioner with that of the Director (Personnel), NHPC was made in view of special circumstances by way of compassion and the administrative need. The posting was not a new posting as is envisaged under the circular dated 19-7-1975 as it was made clear that the interchange is being ordered between the petitioner and Mr. A.I. Bunet, Director (Personnel), which will take effect from the date of taking over change of respective posts for the balance period of their respective tenures of their initial appointment. When the aforesaid recommendation was made, the same was approved by the Appointment Committee of the Cabinet and in terms, thereof, the appointment letter also clearly stipulated the said terms, which was accepted by the petitioner without any protect or reservation. therefore, in the facts and circumstances of the present case, the circular dated 17.9.1975 has no application. This case was independently treated and it has no relevance and bearing to the memorandum dated 17.9.1975. The High Court while passing the order dt. 1.6.2001 did not mean to lay down any guideline or direction regarding the tenure or length of service of the petitioner in the respondent No. 2. There is

no reference to the circular/memo dt. 17.9.1975 in the order of the High Court and, therefore, it cannot be said that the High Court used the word 'transfer' to mean a fresh tenure of service of five years which should be given to the petitioner. Besides, the petitioner having joined the said post on the aforesaid clear stipulations knowing fully well the implications thereof and having worked there for four months without raising any objection, cannot turn back and take up a plea that the use of the word 'interchange' is wrong and the word 'transfer' was the right word and that he is entitled to work with the respondent No. 2 for a fresh period of five years from the date of his joining, as it is a fresh tenure appointment. The said plea, in my considered opinion, is not available to the petitioner on the ground of waiver and acquiescence. If the petitioner was not satisfied with the wordings used in the said order and if he had any reservation, he could have declined to join the post as he has been taking up pleas and filing writ petitions in this Court even on the use of the word 'compulsory wait', which is established from the records. The petitioner was given a package which was accepted without any reservations, which is clear from his joining report. The petitioner was fully aware of the implications of the use of the word 'interchange' and that his appointment is only for the balance period of his tenure. Having clearly understood and having joined the post and working in it, he cannot seek for the reliefs as sought for in this petition. Such a plea is not available to the petitioner.

12. In view of the aforesaid discussion, I find no merit in this petition. The petition stands dismissed.