

IN THE HIGH COURT AT CALCUTTA
Constitutional Writ Jurisdiction
APPELLATE SIDE

Present:

The Hon'ble Justice Tapabrata Chakraborty
&
The Hon'ble Justice Hiranmay Bhattacharyya

W.P.S.T 109 of 2019
Mitali Nandy & Others
versus
The State of West Bengal & Others

For the Petitioners : *Mr. Pratik Dhar (through v.c.),*
Mr. Ritwik Pattanayak,
Ms. Cardina Roy.

For the State Respondents : *Mr. Sirsanya Bandopadhyay (through v.c.)*
Mr. Arka Kumar Nag.

For the P.S.C. : *Mr. Pradip Kr. Roy (through v.c.),*
Ms. Shraboni Sarkar (through v.c.).

Hearing is concluded on : *17.09.2021.*

Judgment On : **8th October, 2021.**

Tapabrata Chakraborty, J.

1. The present writ petition has been preferred challenging an order dated 19th June, 2019 passed by the learned West Bengal

Administrative Tribunal in OA 659 of 2018 wherein the petitioner prayed for the following reliefs :

‘(a) Mandatory order do issue commanding the respondents, and their men agent and assigns to produce the record of the case including the Memo bearing No. 1963/3/BWD dated 13.07.2018, being annexure “A-12” herein, so that cognisable justice may be rendered by quashing the same;

(b) Mandatory order do issue commanding the respondents, and their men agent and assigns to confirm the benefits of exemption from appearing in the Departmental Examination, for being promoted to the post of Executive Engineer (Civil) as granted to the applicant.

(c) Mandatory order do issue commanding the respondents, and their men agent and assigns to promote the applicant to the post of Executive Engineer (Civil) upon fulfilling all the eligibility criteria for the promotion.’

2. The learned Tribunal rejected the prayers holding that the petitioner was not entitled to be exempted from appearing in the departmental examination on the date of his promotion to Assistant Engineer (in Short, AE) with retrospective effect from 21st November, 1994 as he was liable to pass the departmental examination at that relevant period for not crossing 52 years of age.

3. During pendency of the writ petition, the petitioner, namely, Bidyut Kumar Nandi (in short, Bidyut) expired on 12th January,

2020 and thereafter the present applicants, who are the heirs of the deceased, have been brought on record.

4. Mr. Dhar, learned senior advocate appearing for the heirs of Bidyut, submits that that having granted promotion to the post of AE with retrospective effect from 21st November, 1994 *vide* memo dated 28th March, 2018, the respondents had no jurisdiction to stop his increments with effect from 1st July, 2018 *vide* order dated 13th July, 2018 on a purported plea that he had not been granted exemption from passing the departmental examination. The said order had been passed on an erroneous premise in as much as there was no requirement to pass any departmental examination for continuance in the post of AE.

5. He contends that Bidyut fulfilled all the eligibility criteria under the recruitment rules for promotion to the post of AE in the year 1992 but such promotion was illegally withheld for more than a decade and ultimately granted by a memo dated 6th August, 2013 and in the midst thereof, Bidyut crossed the age of 52 years. Such illegality was subsequently rectified by the respondents themselves and Bidyut was granted retrospective promotion to the post of AE with effect from 21st November, 1994 *vide* order dated 28th March, 2018 with notional benefits. It would be explicit from the memo dated 15th June, 2018 that Bidyut had fulfilled all conditions for promotion to the post of Executive Engineer (in short, EE) but such promotion was illegally withheld on a purported plea that he had not obtained exemption from passing the departmental examination

being oblivious of the fact that it was an impossibility on the part of the petitioner to appear in any departmental examination for promotion to the post of EE in the year 1994 since he was granted promotion to the feeder post, being the post of AE, by a memo dated 6th August, 2013. In support of the arguments advanced, reliance has been placed upon the judgments delivered in the case of *Union of India and another -vs- Col.A.D. Nargolkar and Others*, reported in (2019) 13 SCC 723, *Gopi Chand Vishnoi -vs- State of UP and Another*, reported in (2006) 9 SCC 694, *Devendra Kumar -vs State of Uttaranchal and Others*, reported in (2013) 9 SCC 363.

6. *Per contra* Mr. Bandopadhyaya, learned advocate appearing for the State submits that as per the recruitment rules there are two requirements for promotion to the post of EE. An incumbent is required to complete six years of service as AE and has to pass the examination to be conducted by PSC. Bidyut willingly accepted his promotion to the post of AE in terms of the memo dated 6th August, 2013 knowing fully well that he cannot claim promotion to the post of EE as he had not passed the departmental examination. Thereafter he again accepted promotion with retrospective effect from 1994 knowing fully well that such benefits would not include exemption from appearing in the departmental examination. He has to opt to get the benefit of promotion to the post of AE either from 2013 or from 1994. Such option was granted to him by the learned Tribunal but he did not act. Law does not permit a person to both approbate and reprobate. This principle is based on the

doctrine of estoppel by election and a person may be precluded by his actions or conduct or silence when it is his duty to speak.

7. He argues that it was within the knowledge of Bidyut that he would not be getting promotion to the post of EE on the basis of retrospective promotion to the post of AE. However, he did not agitate the said issue and as such he is estopped from claiming the benefits pertaining to the post of EE. In support of the arguments advanced, reliance has been placed upon the judgments delivered in the case of *R.N. Gosain Vs. Yashpal Dhir*, reported in (1992) 4 SCC 683, *Cauvery Coffee Traders vs- Hornor Resources (international) Co. Ltd.*, reported in (2011) 10 SCC 420, *Ramchandra Shankar Jathar -vs- Madhukar Patil*, reported in 2002 SCC OnLine Bom 1167, *K.L. Grover -vs- Union of India*, reported in (1986) 2 SLR 556 (Del).

8. He further submits that all the judgments cited by Mr. Dhar are distinguishable on facts since in those cases benefits were initially denied as departmental proceeding was pending or there were adverse entries in the service records. It was only after the proceeding was dropped and the adverse entries were expunged, the incumbent was granted the benefits but in the instant case Bidyut was not granted promotion to the post of EE since he did not fulfil the recruitment criteria.

9. Indisputably, Bidyut was initially granted promotion to the post of AE *vide* order dated 6th August, 2013. He accordingly joined the said post on 26th August, 2013. Subsequently, the respondents

themselves found that Bidyut was entitled to such promotion with effect from 21st November, 1994 and accordingly he was granted retrospective promotion *vide* memo dated 28th March, 2018. It, thus, emerges that Bidyut's promotion was illegally withheld on and from 21st November, 1994 to 26th August, 2013. Had Bidyut been promoted to the post of AE in the year 1994 by an order passed contemporaneously, the respondents could have insisted that Bidyut can be given promotion to the post of EE only if he passes the departmental examination. However, such promotion from 1994 was given by the respondents in the year 2018 and as such it would be an absurdity to suggest that he was liable to pass the departmental examination at that relevant period (1994) for not crossing 52 years of age. In the year 1994 Bidyut was not even an AE and he could not have passed the examination in anticipation that he would be granted retrospective promotion to the post of AE with effect from the year 1994 through issuance of an order in the year 2018. The respondents having granted such promotion belatedly cannot now take advantage of their own fault and deny the fruits of such retrospective promotion to the petitioner. Thus the exemption as provided in the memo dated 25th August, 2004 squarely applies in respect of the Bidyut. It would also be explicit from the memo dated 15th June, 2018 that the Chief Engineer proposed for promotion of Bidyut to the post of EE since he fulfilled the required criteria including seniority and no vigilance case was also pending against the petitioner.

10. The respondents, in our opinion, had no jurisdiction to stop the petitioner's increments with effect from 1st July, 2018 *vide* order dated 13th July, 2018 issued by the EE, Burdwan Division on a purported plea that Bidyut had not been granted exemption from passing the departmental examination. The learned Tribunal erred in law in affirming such decision being oblivious of the fact that there was no requirement to pass any departmental examination for continuance in the post of AE. The EE, Burdwan Division also had no jurisdiction to act contrary to the order dated 28th March, 2018 passed by the Special Secretary granting retrospective promotion and the consequential incremental benefits to the petitioner with effect from 21st November, 1994.

11. Grant of such retrospective promotion to the post of AE with effect from 21st November, 1994 does not create or engraft any legal fiction to the effect that Bidyut cannot get exemption from participating in the departmental examination as he was liable to pass the departmental examination at that relevant period for not crossing 52 years of age. In our opinion, the learned Tribunal misdirected itself and sought for any option from Bidyut to choose whether he wants to get the benefit of promotion to the post of AE from 21st November, 1994 or from 26th August, 2013. Bidyut could not have been asked to exercise such choice since the respondents themselves initially granted promotion belatedly from 26th August, 2013 and upon realisation of such mistake granted promotion from 21st November, 1994 by an order dated 28th March, 2018. Bidyut cannot be held responsible for such irregularity on the part of the

respondents and the respondents cannot take advantage of their own wrong. The findings of fact, as arrived at by the learned Tribunal, do not stand supported by the materials on record.

12. It would be explicit from the memo dated 15th June, 2018 that the Chief Engineer proposed for promotion of Bidyut to the post of EE since he fulfilled the required criteria including seniority. No vigilance case was also pending against the petitioner. The only ground on which such promotion was kept in abeyance was that the Bidyut had not obtained exemption from participating in the departmental examination. As we have already held such ground towards denial of promotion to be unsustainable, the consequential benefits need to be extended. Judiciary has a very strong sense of justice and it works to maintain social justice and fairness. Equity regards as done, which should have been done and it would be the bounden duty of this Court to put an end to the protracted long agony suffered by the litigant.

13. Fairness and reasonableness are paramount issues for administrative action. Law is not absolute logic but handmaid of current social facts of life. As a model employer the State Government must conduct itself with high probity and candour and ensure that its employees do not succumb to the procedural rigmarole particularly when the claim pertains to pensionary benefits.

14. Accordingly, the impugned order dated 19th June, 2019 passed by the learned West Bengal Administrative Tribunal in OA

659 of 2018 is set aside and quashed. The respondents are directed to treat Bidyut to have been promoted to the post of EE with effect from 15th June, 2018 and to notionally re-fix his pay in the scale of EE and calculate his pensionary benefits and disburse the same in favour of the heirs of Bidyut, in accordance with law and subject to compliance of necessary formalities. The actual benefits shall include gratuity, all arrears of pension with effect from the date of retirement till the date of demise of Bidyut and also the benefits of family pension. The entire exercise shall be completed within a period of eight weeks from the date of communication of this order.

15. The writ petition being W.P.S.T 109 of 2019 is disposed of.

16. There shall, however, be no order as to costs.

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

18. All parties shall act on the server copies of this order duly downloaded from the official *website* of this Court.

(Hiranmay Bhattacharyya, J.)

(Tapabrata Chakraborty, J.)