

Item No.3.

**IN THE HIGH COURT OF JUDICATURE AT CALCUTTA
CIVIL APPELLATE JURISDICTION
APPELLATE SIDE**

HEARD ON: 31.03.2022.

DELIVERED ON:31.03.2022

CORAM:

**THE HON'BLE MR. JUSTICE T. S. SIVAGNANAM
AND
THE HON'BLE MR. JUSTICE HIRANMAY BHATTACHARYYA**

**FMA 1089 OF 2021
WITH
I.A. NO.CAN 1 OF 2021
WITH
I.A. NO.CAN 2 OF 2021**

KOLKATA MUNICIPAL CORPORATION AND ORS.

VERSUS

CHIRANJIB ROY & ORS.

Appearance:-

**Mr. Alok Kumar Ghosh,
Mr. Arijit Dey**

.....for the appellants

**Mr. Partha Sarathi Bhattacharyya, Sr. Adv.,
Mr. Pradyot Kumar Nandi,
Mr. Raju Bhattacharyya**

.. for respondent no.1.

**Mr. Manas Kumar Kundu,
Mr. Sudip Sarkar**

... for the State.

JUDGMENT

(Judgment of the Court was delivered by T.S.SIVAGNANAM, J.)

1. This intra-Court appeal at the instance of the Kolkata Municipal Corporation and others is directed against the order dated 1st July, 2020 in W.P. No.27875(W) of 2016 filed by the first respondent herein. In the said writ petition, the first respondent sought for issuance of writ of mandamus to consider his representations dated 30th July, 2015 and 4th May, 2016 in accordance with law and to give him seniority and other benefits with effect from 18th July, 2000. The learned Single Bench by the impugned order did not grant the reliefs sought for in the writ petition taking note of the facts and circumstances of the case, more particularly, the order passed in an earlier writ petition filed by the first respondent in W.P. No.2003(W) of 2001 but directed the appellant / Municipal Corporation to treat the service of the first respondent in the post of Junior Assistant notionally with effect from the year 2000 and accordingly, fixed his pension as well as related superannuation benefits for regular disbursement on retirement. The correctness of such a direction has been challenged before us by the appellant / Municipal Corporation in this appeal.

2. We have elaborately heard Mr. Alok Kumar Ghosh, learned counsel appearing for the appellant/Municipal Corporation and Mr. Partha Sarathi Bhattacharyya, learned senior counsel appearing for the respondent no.1 and carefully perused the materials placed before us.

3. The following facts would be relevant for the purpose of considering the correctness of the direction passed in the writ petition. The earlier writ petition filed by the first respondent in W.P. No.2003(W) of 2001 was expressing a grievance against the appellant / Municipal Corporation in not appointing the first respondent to the post of Junior Assistant in scheduled caste category. The Court, after elaborately considering the facts took note of Section 4(2) of the West Bengal Schedules Castes and Scheduled Tribes (Reservation of Vacancies in Service and Posts) Act, 1976 (hereinafter referred to as "the Act") and held that in the event a scheduled caste candidate qualifies to an unreserved category, then the reserved quota can be availed of by the next successful candidate in such reserved category. The first respondent's case was that he was

the next successful scheduled caste category candidate and was entitled to be appointed in the reserved category.

4. The appellant / Municipal Corporation did not contest the legal position and the same has been so recorded by the learned Single Bench in the order dated 29th June, 2012. At that stage, a submission was made on behalf of the appellant / Municipal Corporation that there are vacancies available to consider the case of the first respondent for appointment in the scheduled caste category without disturbing the appointment already made. In this regard, written instructions were also placed before the Court. Taking into considering the said stand taken by the appellant / Municipal Corporation and noting that there are vacancies because out of the panel of 11 candidates, only 5 posts were filled up in the year 2000, the Court was of the opinion that the first respondent can be accommodated in one of such vacancies as a scheduled caste candidate without disturbing the appointment already made. Accordingly, a positive direction was issued to the appellant / Municipal Corporation to appoint the first respondent in the scheduled caste category in one of the available vacant posts in the said cadre in accordance with

law after complying with the necessary formalities within a period of eight weeks.

5. The first respondent accepted the order as such and in terms of the directions issued therein, the appellant / Municipal Corporation issued an order of appointment dated 30th July, 2012 containing various conditions and more particularly, that the appointment was purely temporary for a period of one year during which period the first respondent will be on probation of one year and thereafter his service will be made permanent and confirmed after two years subject to satisfactory service and fulfilling other criteria as required under the service regulations.

6. The first respondent accepted the terms of appointment without any demur and joined the post on the very same day. The first respondent continued to work in the said post and in the year 2016, the present writ petition was filed seeking for a direction to consider his representations dated 30th July, 2015 and 4th May, 2016.

7. The learned Single Bench thus has accepted the fact that since the direction issued in the earlier writ petition was without disturbing the appointments of the five candidates, the question of accommodating the first respondent with retrospective effect from the year 2000 was not legally feasible. However, taking note of the fact and more particularly, that the appellant / Municipal Corporation did not contest the legal position qua the effect of Section 4(2) of the Act, thought it fit to direct the appellant / Municipal Corporation to notionally give effect to the appointment of the first respondent with effect from the year 2000 and accordingly, fixed his pension and other related superannuation benefits. The consequence of such a direction has to be looked into and whether such a direction was permissible.

8. Admittedly, the first respondent was not appointed in the year 2000. The five appointments made in the year 2000, were not set aside and were left undisturbed. Thus, if the first respondent is to be treated as to be notionally appointed from the year 2000, there should not only be an existing vacancy but the vacancy should have been filled up, which was not done as

only five vacancies out of panel of 11 vacancies were filled up. The appellant / Municipal Corporation has given certain reasons as to why 11 vacancies were not filled up largely due to the financial constraints. Therefore, to notionally push back the date of appointment of the first respondent to a date on which he was not borne in the cadre is not permissible under service jurisprudence.

9. As mentioned earlier, in the earlier writ petition though a larger relief was sought for by the first respondent, the Court though set down the legal position with regard to the effect of Section 4(2) of the Act did not go into the correctness of the five appointments, which were made in the year 2000 but took note of the submission of the appellant / Municipal Corporation, which was clearly in the nature of a concession and issued a direction to appoint the first respondent in the scheduled caste category in the available vacant post in said category in accordance with law after complying with the necessary formalities. Therefore, the direction issued was to act in accordance with law, which has been done by the appellant / Municipal Corporation by appointing him with effect from 2012.

10. Therefore, by way of second round of litigation, the first respondent cannot seek to undo the effect of the appointments of the five candidates, who were appointed in the year 2000, nor he can seek to set the clock back to a position when he was not in service of the appellant / Municipal Corporation.

11. Therefore, we are of the view that the direction issued by the learned Single Bench to notionally grant benefits from the year 2000 for the purpose of fixing the pensionary benefits does not merit acceptance.

12. The problem now faced by the first respondent is that on his retirement, he would not be eligible to get full pension in terms of the circular dated July 10, 2009, which pertains to revision of pensionary benefits of the employees of Kolkata Municipal Corporation consequent on the Revision of Pay, 2009. Clause A(ii) of the said circular states that linkage of full pension of 33 years of qualifying service as per the Calcutta Municipal Corporation Employees (Death cum Retirement Benefits) Regulation, 1982 shall be dispensed with. It further states that once an employee of the appellant / Municipal Corporation

has rendered a minimum qualifying service of 20 years, pension shall be paid at 50% of the last basic pay drawn. For the employees of Kolkata Municipal Corporation, who at the time of retirement have rendered qualifying service of 10 years or more but less than 20 years, proportionate reduction shall be made while calculating the amount of pension. The first respondent was appointed on 30th July, 2012. He has completed 10 years of service in July, 2022 and would be completing 20 years of service in July, 2032. The first respondent's date of retirement is 31st October, 2031 as the first respondent would be completing 60 years of service on 14th October, 2031. We find that the first respondent has been relentlessly fighting a battle for vindicating his rights having been a member of marginalised section of the society to whom benefit of this special enactment has been extended by the Government.

13. Soon after the selection was done in the year 2000, the first respondent has approached this Court and filed the writ petition. However, the writ petition was disposed of only on 29th June, 2012 and was pending on the file of this Court. Obviously, the first respondent cannot be blamed for the

pendency of the matter. Though, the first respondent has been agitating his non-selection on legal grounds and such submission found acceptance before the learned Single Bench while disposing of the writ petition by order dated 29th June, 2012, while granting the relief, did not grant the full relief sought for by the first respondent i.e. not disturbing the appointments of those five candidates.

14. At that stage, the appellant / Municipal Corporation offered to appoint the first respondent in an available vacancy for scheduled caste category. This concession was taken note of, placed on record and direction was issued to appoint him. Even at that stage, the first respondent could have still contested the matter stating that the reliefs sought for by him in the writ petition should be granted. Presumably, having been frustrated and on account of the long drawn litigation, he accepted the appointment offered to him in the year 2012. It would be relevant to mention that when the writ petition was disposed of, the learned Single Bench took note of Section 4(2) of the Act and found that the selection, which was done in the year 2000 was in infraction of the said provision. The legal

position was not disputed by the appellant / Municipal Corporation and it has been so recorded in the order dated 29th June, 2012. If such be the case, this Court is of the considered view that the first respondent should be dealt with in a more reasonable manner.

15. It is true that after accepting the appointment in the year 2012 and after completing the period of probation in the year 2015, he submitted representations. Since representations were not considered, he approached this Court and filed the second writ petition.

16. In the earlier paragraphs of this judgment, we have held that the direction issued by the learned Single Bench is not permissible under law. Nevertheless, we find that the first respondent has been put in a very disadvantageous position inasmuch as his length of service will fall short of by about nine months while calculating 20 years of service. Thus, we are of the view that it is a fit case where the appellant / Municipal Corporation should exercise its power and relax the condition insofar as the first respondent is concerned so as to

declare that the first respondent would have the eligible qualifying service of 20 years for the purpose of computation of full pension in terms of regulations. We have held so taking note of the peculiar facts and circumstances of the case and also that the legal position, which was pointed out by the learned Writ Court in the first round of litigation was accepted by the appellant / Municipal Corporation.

17. Even at that stage, had the appellant / Municipal Corporation did not make a concession to offer an appointment, in all probabilities, the learned Writ Court would have allowed the writ petition and quashed the appointments of those five candidates. Therefore, the appellant / Municipal Corporation cannot seek to take a benefit after having not complied with the statutory provisions.

18. Therefore, we find that the case on hand is one of the rarest of rare cases where the appellant / Municipal Corporation should relax the condition regarding length of service of the first respondent for the purpose of computation of 20 years of service.

19. In the result, the writ appeal is allowed and the direction issued by the learned Single Bench is set aside and we direct the appellant / Municipal Corporation shall relax the shortfall in the length of service of the first respondent while calculating 20 years of services to enable the first respondent to draw full pension in terms of the regulations.

20. This direction shall be complied with by the appellant / Municipal Corporation within a period of three months from the date of receipt of the server copy of this judgment and order which however, shall take effect on the date when he attains 60 years. The decision shall be communicated to the first respondent.

21. We make it clear that this direction has been issued taking note of the peculiar facts and circumstances of the case and the same should not to be treated as a precedent.

22. The appeal and the connected applications are disposed of.

23. No costs.

24. Urgent photostat certified copy of this order, if applied for, be furnished to the parties expeditiously upon compliance of all legal formalities.

(T.S. SIVAGNANAM, J)

I agree.

(HIRANMAY BHATTACHARYYA, J)

NAREN/PALLAB (AR.C)