

IN THE HIGH COURT AT CALCUTTA
CIVIL APPELLATE JURISDICTION

The Hon'ble **Justice Arijit Banerjee**
And
The Hon'ble **Justice Kausik Chanda**

F.M.A. No. 2223 of 2014
With
I.A. No. C.A.N. 1 of 2012
(Old No. C.A.N. 5558 of 2012)

AHASANUL HOQUE
-VERSUS-
STATE OF WEST BENGAL AND OTHERS

For the appellant :Mr. Arnab Ray, Adv.

For the State :Mr. Sirsanya Bandopadhyay, Ld. Jr. Standing Counsel,
Mr. Subhendu Sengupta, Adv.,
Mr. Arka Kumar Nag, Adv.

For the respondent :Mr. Uttiya Ray, Adv.
nos.2,3 & 5.

Hearing concluded on :24.12.2021

Judgment on :10.02.2022

Kausik Chanda, J.:-

The writ petitioner/appellant approached the learned Single Judge with a prayer for setting aside an order dated May 3, 2012, whereby the respondent no.4 had cancelled the promotion of the petitioner as Head Assistant of Bardhaman Zilla Parishad. Challenge was also thrown to the validity of an administrative instruction being memo no. 5418/PN/O/III/2A-38/03 dated November 20, 2006 issued by the Deputy Secretary to the Government of West Bengal relying upon which the order dated May 3, 2012 was issued.

2. The learned Single Judge dismissed the writ petition on the ground that the appellant was an employee of the State Government and as such the appellant should have approached the competent forum instead of “invoking its Constitutional writ jurisdiction” of this Court. The writ petition was disposed of granting liberty to the appellant to approach the competent forum for redressal of his grievance.

3. Before us the parties were *ad idem* that appellant was not an employee of the State Government since he was employed under a Zilla Parishad and he could not have approached the State Administrative Tribunal for redressal of his grievance. Accordingly, this Court has heard out the appeal on merit.

4. The writ petitioner/appellant was appointed as a Lower Division Assistant/Junior Grade Assistant under the Bardhaman Zilla Parishad. For the next promotional post of Head Assistant, a selection process was initiated by the staff recruitment committee of the said Zilla Parishad. An interview was

held amongst nine prospective candidates. The appellant scored the highest marks of 56 out of 75 total marks. The other two candidates who were immediately below the appellant in the merit list scored 50 and 49. On the basis of performance of the prospective candidates in the interview, the Zilla Parishad promoted the appellant to the post of Head Assistant by an order dated July 17, 2009, with effect from April 1, 2009.

5. As noted above, the appellant's promotion to the post of Head Assistant was cancelled by the respondent no.4 by an order dated May 3, 2012, on the ground that the said promotion was made in violation of memo no. 5418/PN/O/III/2A-38/03 dated November 20, 2006. It was observed in the said memo that 75 marks were allotted for the interview without prescribing any qualifying marks. The promotion of the appellant was done on merit-cum-seniority basis whereas memo no. 5418/PN/O/III/2A-38/03 dated November 20, 2006 stipulated that a test will be conducted only for the screening of the candidates and not for determination of seniority. It was further observed that in giving promotion to the appellant, the interview was arranged "to eliminate and determine the seniority of the prospective candidate." The Executive Officer, Burdwan Zilla Parishad was, further, requested to conduct a written examination of prospective candidates afresh with total marks of 50 (fifty) fixing qualifying marks at 15 (fifteen), only for the screening. Seniority of promoted candidate(s) was directed to be determined on the basis of seniority in gradation list.

6. In this appeal, on July 24, 2012, an interim order was passed whereby the order of the learned Single Judge as well as the order dated May 3, 2012, were stayed till the disposal of the appeal.

7. It is undisputed before us that the appellant worked in the said promotional post of Head Assistant till his superannuation. It is also not in dispute that till the last day of his service the appellant was accorded the pay scale and allowances of Head Assistant. However, due to the pendency of this appeal his retiral dues have not been released treating him as Head Assistant.

8. It has been submitted by Mr. Arnab Ray, learned advocate for the appellant, that the administrative order dated November 20, 2006, is de hors the West Bengal Panchayat (Recruitment and Conditions of Appointment of Employees of *Zilla Parishad*) Rules, 1997.

9. Mr. Ray argued that from the said Rules of 1997 it will be apparent that the method of recruitment for the post of Head Assistant was by promotion on the basis of merit-cum-seniority whereas the circular dated November 20, 2006, departed from the said principle of merit-cum-seniority. Merit took a back seat to seniority. Mr. Ray in this regard relied upon the judgments reported at **(1995) Supp 1 SCC 434 (*Sarat Kumar Dash v. Biswajit Patnaik*)** and **(2009) 7 SCC 311 (*Haryana State Electronics Development Corporation Limited v. Seema Sharma*)**.

10. Mr. Ray has, further, argued that an Act prevails over the statutory rules and the rules prevail over executive instructions. An executive instruction

cannot override any statutory provisions or any executive order having statutory force. Mr. Ray has, further, submitted that the said clarificatory instruction dated November 20, 2006, in effect supplanted Rule 4(VII)(b) of the West Bengal Panchayat (Recruitment and Conditions of Appointment of Employees of *Zilla Parishad*) Rules, 1997, by altering the eligibility of promotion from merit-cum-seniority to seniority-cum-merit or seniority-cum-suitability.

11. According to Mr. Ray, the executive instruction dated November 20, 2006, cannot be sustained in the eye of law since the same is repugnant or contrary to the West Bengal Panchayat (Recruitment and Conditions of Appointment of Employees of *Zilla Parishad*) Rules, 1997, insofar as the appointment procedure for Head Assistant is concerned.

12. Mr. Sirsanya Bandopadhyay, learned advocate representing the State, submitted that the promotion in question had been given in an illegal manner and, therefore, the appellant cannot have any right on the basis of such illegal appointment. By referring to the score-sheets of the relevant interview, Mr. Bandopadhyay has submitted that the recruiting authority did not prescribe any minimum qualification on the basis of which the candidate was to be selected for the promotional post. Mr. Bandopadhyay suggested that since there was no qualifying marks prescribed by the recruiting authority, the selection process is vitiated. It has been, further, submitted that judging the merit without any written test but solely on the basis of interview is not tenable in the eye of law.

13. Mr. Uttiya Ray, learned advocate appearing for the Zilla Parishad submitted that there has been no illegality in the recruitment procedure. The recruitment was made in terms of the West Bengal Panchayat (Recruitment and Conditions of Appointment of Employees of *Zilla Parishad*) Rules, 1997. The appellant/writ petitioner served as the Head Assistant till his retirement. He further submitted that at the relevant point of time there was no practice to maintain annual confidential report of an employee working under the Bardhaman Zilla Parishad. Therefore, it was decided by the selection committee to adjudge merits of the candidates by way of an interview.

14. The difference between a selection process on the basis of merit-cum-seniority and seniority-cum-merit has been delineated by the Supreme Court in a number of decisions. The term “merit-cum-seniority” has been explained by the Supreme Court in the judgment reported at **(1995) Supp 1 SCC 434** (***Sarat Kumar Dash v. Biswajit Patnaik***) in the following manner:

“8. In case of merit-cum-suitability, the seniority should have no role to play when the candidates were found to be meritorious and suitable for higher posts. Even a juniormost man may steal a march over his seniors and jump the queue for accelerated promotion. This principle inculcates dedicated service, and accelerates ability and encourages merit to improve excellence. The seniority would have its due place only where the merit and ability are approximately equal or where it is not possible to assess inter se merit and the suitability of two equally eligible competing candidates who come very close in the order of merit and ability. Under those circumstances, the seniority will play its due role and calls it in aid for consideration. But in case where the relative merit and suitability or ability have been considered and evaluated, and found to be superior, then the seniority

has no role to play. In our view the PSC has evolved correct procedure in grading the officers and the marks have been awarded according to the grading. It is seen that the four officers have come in the grading of 'B'. In consequence, the PSC had adopted the seniority of the appellants and Panda in the lower cadre in recommending their cases for appointment in the order of merit."

15. We may refer to a judgment of the Supreme Court reported at **(2011) 3 SCC 422 (*Haryana State Warehousing Corporation v. Jagat Ram*)** wherein the Supreme Court noted a series of judgments explaining the principle of seniority-cum-merit. It has been held as follows:

"45. Thus it is the settled position that the criterion of seniority-cum-merit is different from the criterion of merit and also the criterion of merit-cum-seniority. Where the promotion is based on seniority-cum-merit, the officer cannot claim promotion as a matter of right by virtue of his seniority alone. If he is found unfit to discharge the duties of the higher post, he may be passed over and an officer junior to him may be promoted. Seniority-cum-merit means that, given the minimum necessary merit required for efficiency of administration, the senior, though less meritorious, shall have priority in the matter of promotion and there is no question of further comparative assessment of the merit of those who were found to have the minimum necessary merit required for efficiency of administration. For assessing the minimum necessary merit, the competent authority can lay down the minimum standard that is required and also prescribe the mode of assessment of merit of the employees. Such assessment can be made by assigning marks on the basis of appraisal of performance on the basis of service record and interview and prescribing the minimum marks which would entitle a person to be considered for promotion on the basis of seniority-cum-merit.

46. The concept of "seniority-cum-merit" postulates the requirement of certain minimum merit or satisfying a benchmark previously fixed and, subject to fulfilling the said requirement, promotion is based on seniority. There is no further assessment of the comparative merits of those who fulfil such requirement of minimum merit or satisfy the

benchmark previously fixed. On the other hand, the principle of “merit-cum-seniority” puts greater emphasis on merit and ability and seniority plays a less significant role. Seniority is given weightage only when merit and ability are more or less equal among the candidates considered for promotion.”

16. The principles of seniority-cum-merit and merit-cum-seniority are, therefore, different. In case of the former, emphasis is given on seniority while in the case of the latter, merit is the determining factor. We need to advert to the facts of the present case keeping in mind the aforesaid proposition relating to merit-cum-seniority and seniority-cum-merit.

17. Indisputably, the procedure for appointment of Head Assistant in a Zilla Parishad is governed by the West Bengal Panchayat (Recruitment and Conditions of Appointment of Employees of *Zilla Parishad*) Rules, 1997, which were framed in exercise of the power conferred by Section 224 of the West Bengal Panchayat Act, 1973.

18. The relevant part of the said recruitment rules is set out as here under:

“VII. Head Assistant

- | | |
|---------------------------|---|
| (a) Scale of pay | : Rs.1420-45-1555-55-1720-65-2305-75-3130. |
| (b) Method of recruitment | : By promotion from amongst the Upper Division Assistants and the Accountants selected on the basis of merit – cum – seniority. |
| (c) Appointing authority | : Executive Officer.” |

19. The appellant was promoted following the aforesaid recruitment procedure. By the impugned order dated May 3, 2012, the Department of Panchayats and Rural Development cancelled the promotion of the appellant. The said direction was given in view of the administrative order dated November 20, 2006. The circular reads as follows:

“Government of West Bengal
Department of Panchayats & R.D.
Panchayat Wing
Jessop Building
63, Netaji Subhas Road, Kolkata-1”

No. 5418/PN/O/III/2A-38/03

Dated: 20.11.2006

From: Dy. Secy. to the Govt. of West Bengal.

To : The Commissioner of Panchayats & R.D., West Bengal.

Sub : Clarification regarding filling up the posts in the P.R. Bodies from promotion quota on merit cum seniority basis.

The undersigned is directed to say that in case of promotion for the employees of Panchayati Raj Bodies on merit cum seniority basis the following procedure will be adopted. A qualifying marks will be fixed at first and a list of candidates securing the qualifying marks will be prepared and according to the position of the candidates in their original gradation list promotion will be awarded to the candidates according to their position in the said list. The test is only for screening of candidates and not for determining their seniority in the promotional post. Seniority of promoted candidates will be determined taking into account the existing gradation list of the candidates in the feeder posts. In case of determining inter se seniority of candidates belonged to two separate feeders date of joining in the feeder cadre will be the index of seniority.

Sd/-
Dy. Secy. to the Govt. of West Bengal.

No.5418/1(450)/PN/O/III/2A-38/03 Dated: 20.11.2006

Copy forwarded for information and necessary action to the:

1. Executive Officer of Zilla Parishad, _____(All).
2. Additional Executive Officer, _____Mahakuma Parishad.
3. District Panchayat & R.D. Officer, _____(All).
4. B.D.O. & Ex-Officio Executive Officer, _____
Panchayat Samiti, P.O. _____, Dist _____(All).

Sd/-
Dy. Secy. to the Govt. of West Bengal.”

20. The aforesaid administrative circular provided for fixing a qualifying marks at first and to prepare a list of selected candidates on the said basis. Thereafter, amongst the said candidates, promotion was to be given on the basis of seniority indicated in the gradation list. The test was to be conducted only for the purpose of screening of the candidates and not for determining the seniority in the promotional post. Therefore, the said administrative circular dated November 20, 2006, made the merit of a candidate a secondary factor and the seniority of the candidate became the prime factor to be considered. This is a clear departure from the rule of merit-cum-seniority as explained by the Supreme Court in the judgments quoted above.

21. Such departure by way of a clarificatory administrative order was impermissible.

22. It has been held in the judgment reported at **(1989) 1 SCC 175 (Union of India v. Somasundaram Viswanath)** that the norms regarding

recruitment and promotion of officers belonging to the civil services can be laid down either by a law made by appropriate legislature or by rules made under proviso to Article 309 of the Constitution of India or by means of executive instructions issued under Article 73 of the Constitution of India. In the case of civil services under the Union of India and under Article 162 of the Constitution of India and in the case of civil services under the State Governments, if there is a conflict between the executive instructions and the rules made under the proviso of Article 309 of the Constitution of India, the rules made under proviso to Article 309 of the Constitution of India will prevail and if there is a conflict between the rules made under proviso of Article 309 of the Constitution of India and the law made by the appropriate legislature, the latter will prevail.

23. The aforesaid judgment was followed in a subsequent judgment reported at **(1989) 2 SCC 541 (*Paluru Ramkrishnaiah v. Union of India*)**. It was held that an executive instruction can make a provision only with regard to a matter which is not covered by the rules and such executive instructions cannot override any provision of the rules.

24. The said principle has been reiterated in the judgment reported at **(2008) 4 SCC 720 (*Government of Andhra Pradesh v. P. Laxmi Devi (Smt)*)** in the following words:

“**34.** In India the grundnorm is the Indian Constitution, and the hierarchy is as follows:

- (i) The Constitution of India;
- (ii) Statutory law, which may be either law made by Parliament or by the State Legislature;

(iii) Delegated legislation, which may be in the form of rules made under the statute, regulations made under the statute, etc.;

(iv) Purely executive orders not made under any statute.

35. If a law (norm) in a higher layer in the above hierarchy clashes with a law in a lower layer, the former will prevail. Hence a constitutional provision will prevail over all other laws, whether in a statute or in delegated legislation or in an executive order. The Constitution is the highest law of the land, and no law which is in conflict with it can survive. Since the law made by the legislature is in the second layer of the hierarchy, obviously it will be invalid if it is in conflict with a provision in the Constitution (except the directive principles which, by Article 37, have been expressly made non-enforceable)."

25. The statutory source of the West Bengal Panchayat (Recruitment and Conditions of Appointment of Employees of *Zilla Parishad*) Rules, 1997, is West Bengal Panchayat Act, 1973. Section 224 of the said Panchayat Act, 1973 provides as follows:

“224. Power to make rules.– (1) The State Government may, after previous publication, make rules for carrying out the purposes of this Act.

(2) In particular and without prejudice to the generality of the foregoing powers, such rules may provide for all or any of the matters which under any provision of this Act are required to be prescribed or to be provided for by rules.

(3) All rules made this Act shall be published in the *Official Gazette* and shall, unless some later date is appointed by the State Government, come into force on the date of such publication.

(4) All rules made under this Act shall be laid for not less than fourteen days before the State Legislature as soon as possible after they are made and shall be subject to such modification as the State Legislature may make during the session in which they are so laid. Any modification of the said rules made by the State Legislature shall be published in the *Official Gazette*, and shall, unless some later date is

appointed by the State Government, come into force on the date of such publication.”

26. Therefore, the West Bengal Panchayat (Recruitment and Conditions of Appointment of Employees of *Zilla Parishad*) Rules, 1997 has statutory force.

27. The administrative instruction dated November 20, 2006, itself makes it clear that the same was issued by way of a clarification regarding filling up the post from promotion quota in the local bodies on merit-cum-seniority basis. The respondents in an attempt to clarify the recruitment rules, 1997 could not have substantially altered the recruitment procedure in question by converting criteria of merit-cum-seniority into seniority-cum-merit.

28. We are of the opinion that the appellant was rightly promoted in terms of the West Bengal Panchayat (Recruitment and Conditions of Appointment of Employees of *Zilla Parishad*) Rules, 1997, on the basis of merit-cum-seniority and the order dated May 3, 2012, whereby the Zilla Parishad was directed to follow seniority-cum-merit, was illegal.

29. In view of the aforesaid discussion, we allow the appeal. The administrative instruction being memo no. 5418/PN/O/III/2A-38/03 dated November 20, 2006 issued by the Deputy Secretary to the Government of West stands quashed. Consequently, the order dated May 3, 2012, issued by the OSD and Ex Officio Deputy Secretary to the Government of West Bengal is also set aside. The respondents will release all the retiral dues including the pension of the appellant along with arrears on the basis of the last pay drawn by the appellant as the Head Assistant. Such payments should be made within

a period of two months from the date of communication of this order to the concerned Authority.

30. Accordingly, the appeal being F.M.A. No. 2223 of 2014 and the application being I.A. No. C.A.N. 1 of 2012 (Old No. C.A.N. 5558 of 2012) are disposed of.

31. Urgent certified website copies of this judgment, if applied for, be supplied to the parties subject to compliance with all the requisite formalities.

I agree.

(Arijit Banerjee, J.)

(Kausik Chanda, J.)