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W.P.A. 3794 of 2018

Sri Dumur Nayak @ Dumru Nayak
-vs-
The State of West Bengal & Ors.

Mr. Sankar Biswas

....for the petitioner.

Mr. Basudeb Gayen

....for the Baidyabati Municipality.

Mr. Jahar Lal De,
Mr. Shamim-UL-Bari

....for the State.

Petitioner has prayed for post facto approval of appointment in view of the Government Order dated 28th June, 2004 issued in the name of the Governor on behalf of the Department of Municipal Affairs, Government of West Bengal which relates to granting deemed approval in favour of the employees working in the municipalities in the State. It has been contended on behalf of the petitioner that he was first appointed with effect from 17th December, 1990 as Sweeper in Baidyabati Municipality (hereinafter referred to as the "said municipality") on temporary basis and subsequently he preferred a writ petition being C.O. 9662(W) of 1991 for his absorption in permanent vacancy and the same was disposed of by a coordinate Bench on 26th September, 1996 whereby leave was granted to the said municipality to absorb the petitioner in the permanent post

forthwith.

Pursuant to such order of the coordinate Bench dated 26th September, 1996 vide Office Order dated 13th January 1997 the Chairman of the said municipality appointed the petitioner in the post of Sweeper with effect from 1st January, 1997 subject to the approval of the State Government. Based on such appointment letter dated 13th January, 1997 petitioner was placed against the regular scale of pay which is applicable to the approved staff of the said municipality but the periodical increment of the petitioner based on some audit observation was stopped with effect from 1st July, 2010. It is the case of the petitioner that till date he is working as Sweeper of the said municipality therefore he is entitled to get the direction for post facto approval which was not granted in his favour which prompted him to file the second writ petition being W.P. 12215(W) of 2017 which was disposed of vide order dated 13th November, 2017 by another coordinate Bench directing the Director of Local Bodies, Government of West Bengal, being the respondent no.2 to take decision on grant of approval of the petitioner. Pursuant to such direction dated 13th November, 2017 passed by the coordinate Bench the Director

of Local Bodies passed order dated 29th December, 2017 thereby rejecting the prayer of the petitioner for sanction of post facto approval which is under challenge in the present writ petition.

Mr. Biswas, learned advocate appears on behalf of the petitioner and submits that the Chairman of the said municipality vide Letter dated 20th November, 2017 requested the respondent no.2 for approval of appointment of some of the staff of the said municipality enclosing the list of such staff wherefrom it appears that the name of the petitioner is appearing at serial no.17. In response to such approach being made by the said municipality respondent no.2 clarified the position vide Memo dated 23rd August, 2018 based on Government Order dated 28th June, 2004, this Court finds it apposite to quote such Memo dated 28th June, 2004 below:

*“Government of West Bengal
Department of Municipal Affairs
Writers’ Buildings
Kolkata –700001*

ORDER

No. 300/MA/O/C-4/1A-7/2000 dated, Kolkata the 28th June, 2004

WHEREAS it appears that a considerable no of appointments/promotions were made in a number of Urban Local Bodies against sanctioned vacancies holding erstwhile scale of Rs. 380-910/- and below during the period from 1.1.1986 to 13.07.1994

without obtaining prior approval of the Government and ;

WHEREAS in absence of approval of the Government the Urban Local Bodies are facing difficulties relating to the finalisation of pension cases of the retired employees;

NOW THEREFORE, the Government, after due consideration, is pleased to decide that the approval of the Government for such appointments/promotions for the aforesaid period, made against the vacancies in sanctioned posts of the concerned Urban Local Bodies, shall be deemed to have been accorded.

*By order of the Governor,
Sd/- D.K. Datta
Joint Secretary to the Government of West Bengal*

No. 300/1(65)/MA/O/C-4/1A-7/2000 dated, Kolkata the 28th June, 2004"

It has been contended on behalf of the petitioner that on offering clarification by the respondent no.2 as contained in Memo dated 23rd August, 2018 appointment of the petitioner is deemed to be approved and no further formal approval is required. In this regard, petitioner has also relied upon Government Order dated 28th June, 2004 issued by the Department of Municipal Affairs, Government of West Bengal.

In addition thereto, Mr. Biswas has also placed reliance on one unreported judgment of the Hon'ble Division Bench dated 19th March, 2021

passed on MAT 65 of 2021 (The Baidyabati Municipality & Ors. –vs- Swapan Chatterjee & Anr.) wherein the Hon'ble Division Bench upon placing reliance on the said Government Order dated 28th June, 2004 and the Memo dated 23rd August, 2018 issued by the respondent no.2 directed the concerned respondent authorities to sanction pension in favour of writ petitioner/respondent no.1 upon treating the said respondent no.1 as an approved staff of the said municipality.

It is further contended on behalf of the petitioner upon placing reliance on the judgment of the Hon'ble Division Bench, reported in (2010) 1 CAL LT 187 (HC) (Rabindra Nath Ghosh & Ors. –vs- The State of West Bengal & Ors.), the ratio of such decision does not apply in the case of the petitioner as it appears from paragraphs 3 and 13 of the said judgment which are confined to regularisation Circulars of the Labour Department and such Circulars have no manner of applications in case of sanction of post facto approval in favour of the staff working in the municipality.

Per contra, Mr. De, learned advocate representing the State respondents has defended the decision of the respondent no.2 as contained in impugned reasoned order dated 29th December,

2017. According to the State respondents the petitioner was not appointed on substantive basis in the year 1990 rather his appointment was on daily wage basis and subsequently the appointment made by the said municipality in favour of the petitioner was not against the sanctioned post therefore it is submitted that considering the nature of appointment of the petitioner he has no right to get the benefit of post facto approval in the post of Sweeper in the said municipality. On application of Government Order dated 28th June, 2004 it has been submitted by Mr. De that such Government order does not apply in the case of the petitioner since the said order is confined to those staff of the municipality who were appointed in between 1st January, 1986 to 13th July, 1994 that too in respect of the scale of pay of Rs.380-910/- and below which was sanctioned in favour of the staff who were appointed within the said period.

Mr. Gayen, learned advocate appears on behalf of the Baidyabati Municipality and has submitted that case of the petitioner for approval was forwarded vide letter dated 20th November, 2017 to the respondent no.2 and the same was clarified by the respondent no.2 vide Memo dated 23rd August, 2018 that no approval is required in

view of Government Order dated 28th June, 2004. However, in the same breath he has further submitted that till date no such approval has been accorded by the respondent no.2 in respect of the service of the petitioner.

This Court has heard the learned advocates appearing for the parties and perused the relevant documents available on record.

On perusal of the impugned order dated 29th December, 2017 passed by the respondent no.2, it appears that one of the grounds for rejecting the case of the petitioner was decision of the Hon'ble Division Bench passed on Rabindra Nath Ghosh (supra) wherein three Circulars of the Labour Department were declared *ultra vires*. But this Court fails to comprehend as to why such decision of the Hon'ble Division Bench in Rabindra Nath Ghosh (supra) is applicable in present case where issue relates to sanction of post facto approval in favour of the writ petitioner who happens to be a staff of the said municipality and whose case can be considered in terms of the Government Order dated 28th June, 2004. Such Government Order dated 28th June, 2004 of the Department of Municipal Affairs, Government of West Bengal was not considered by the Hon'ble

Division Bench in Rabindra Nath Ghosh (supra) therefore the decision of Rabindra Nath Ghosh (supra) has no manner of application in the present case.

This Court has also considered the unreported judgment of the Hon'ble Division Bench dated 19th March, 2021 passed in Baidyabati Municipality (supra) wherein the Hon'ble Division Bench upon placing reliance on the Government Order dated 28th June, 2004 and the letter of the respondent no.2 dated 23rd August, 2018 directed the concerned respondent authorities to process the pension case of one of the employees of the said municipality who was respondent no.1 in the appeal being MAT 65 of 2021 upon granting necessary approval on his appointment.

In consideration of the facts narrated by the Hon'ble Division Bench in Baidyabati Municipality (supra), it appears that the petitioner is to some extent similarly circumstanced like Swapan Chatterjee since both the petitioner and said Swapan Chatterjee were recommended by the Chairman of the said municipality for approval vide letter dated 20th November, 2017. In the list appended to said letter dated 20th November, 2017 contained names of staff of the municipality.

Petitioner's name was appearing at serial no.17 whereas Swapan Chatterjee's name was appearing at serial no.2. In response to such letter of the Chairman of the said municipality it was clarified by the respondent no.2 in his Memo dated 23rd August, 2018 no approval of the Director is required in respect of the service of the staff who were enlisted in the said letter dated 20th November, 2017 in view of the Government Order dated 28th June, 2004.

On consideration of the impugned order of the respondent no.2 dated 29th December, 2017, it appears that the respondent no.2 did not consider such letter of the municipality dated 20th November, 2017 whereby approach was made to the respondent no.2 for grant of approval in favour of some of the staff of the said municipality and the clarification made by the respondent no.2 vide Memo dated 23rd August, 2018 in response to such letter of the said municipality dated 20th November, 2017.

It appears to this Court that while taking decision on the right of the petitioner to grant approval/post facto approval of his service, respondent no.2 is required to take decision on consideration of his Memo dated 23rd August, 2018

and the Government Order dated 28th June, 2004 which has not been done in the present case.

In such view of the matter the reasoned order of the respondent no.2 dated 29th December, 2017 is set aside and the respondent no.2 is directed to revisit the issue and pass a reasoned order taking note of Memo dated 23rd August, 2018 of the respondent no.2 and the Government Order dated 28th June, 2004 after granting opportunity of hearing to the petitioner and a representative of the Baidyabati Municipality. Such exercise shall be carried on by the respondent no.2 within a period of ten weeks from the date of communication of this order and the order to be passed by the respondent no.2 shall be communicated to the petitioner within one week thereafter.

Respondent no.2 while taking such decision in terms of the order passed by this Court today shall rely upon the decision of the Hon'ble Division Bench dated 19th March, 2021 passed on MAT 65 of 2021, Baidyabati Municipality (supra).

With the above direction, the writ petition stands disposed of.

However, there shall be no order as to costs.

Urgent photostat certified copy of the order, if applied for, be given to the parties, upon usual undertakings.

(Saugata Bhattacharyya, J.)