

IN THE HIGH COURT AT CALCUTTA
CONSTITUTIONAL WRIT JURISDICTION
APPELLATE SIDE

WPA 11742 of 2013

Samar Kumar Das
Vs.
The Secretary, West Bengal State Electricity
Distribution Company Limited & Ors.

Ms. Lina Majumder
... For the petitioner

Mr. Sujit Sankar Koley
... For WBSEDCL

The petitioner is an employee of West Bengal State Electricity Distribution Company Limited (hereinafter referred to as “WBSEDCL”) formerly known as the West Bengal State Electricity Board. On or about 3rd February, 2011 the petitioner was served with a memo dated 29th December, 2010, bearing no.SSC/CF-642/1774, wherefrom he came to know that his eligibility for promotion has been deferred by three years and he will be again considered for promotion on 1st April, 2021. The petitioner was thereafter served with another memo dated 5th July, 2012, bearing no. DM/GARIA/APS/CPS/857 wherefrom he also came to know that he was not entitled to promotional benefit with effect from 7th September, 2008 for adverse grading in Performance Appraisal Report (PAR). The petitioner before and after receipt of the aforesaid memo made several representations, but the same, according to the

petitioner, were not considered. The petitioner, therefor, has approached this Court, inter alia, for quashing of the memo dated 29th December, 2010 and for not given effect to or further effect to the memo dated 5th July, 2012.

The petitioner says that he was never called for any interview for the purpose of promotion and nothing was made known to the petitioner about the rules and parameters to be considered for promotion prior to the petitioner being informed that his promotion has been deferred. The petitioner also alleges that the PAR for the respective years for promotion were also not given to him. The petitioner further alleges that though he was found unsuccessful for the promotion on the basis of assessment for the years 2007-2008 and 2008-2009 but was given promotion in the year 2010 for which it is obvious that the PAR for the said two years were considered. Although none of these points have been specifically taken in the writ petition but the same has been argued at the hearing.

The petitioner has relied on a judgment reported in AIR 2008 SC 2513 (Dev Dutt v. Union of India & Ors.) to contend that the "PAR" was never communicated to the petitioner for which the petitioner could not make any representation for reconsidering his assessment. This action on the part of the respondents, according to the petitioner, is arbitrary and unfair and, as such, the decision to defer petitioner's promotion as indicated in

the two memo respectively dated 29th December, 2010 and 5th July, 2012 be interfered with and the petitioner should be treated to have been promoted on 1st April, 2010 with retrospective effect from 7th September, 2008.

Although the petitioner suggests that the disciplinary proceedings initiated against him has earned the petitioner adverse remark for which the petitioner was held unsuccessful but the same has not been demonstrated by the petitioner either through his averment or at the time of final hearing of the writ petition. Records do not reveal that the disciplinary proceedings is the root cause of the petitioner's being declared unsuccessful for promotion.

The petitioner also submits that the disciplinary proceedings had been initiated on the allegation that the petitioner had misbehaved with his superior. The petitioner's superior who had a role in the PAR had given the petitioner adverse remark which has ultimately led to the petitioner being unsuccessful. The adverse remark according to the petitioner was given with *mala fide* intent to cause prejudice to the petitioner. After the petitioner was relieved of all the charges by the disciplinary authority, the petitioner says that no adverse remark could remain. The petitioner also alleges that non-supply of the PAR amounts to arbitrary act as held in Dev Dutt (supra) and, therefor, the act of declaring the

petitioner to be unsuccessful in getting promotion should be interfered with.

On behalf of WBSEDCL, it is submitted that under the prevailing promotional policy the petitioner was called on for suitability test on 12th November, 2009, thereafter again on 8th December, 2011 and finally on 19th November, 2014. The suitability test conducted on 12th November, 2009 was on the basis of the PAR for the years 2005-2006, 2006-2007 and 2007-2008. The petitioner could not secure the qualifying marks and, as such, his promotion was deferred. In the suitability test held on 8th December, 2011 the petitioner was again unsuccessful for which his promotion was deferred by a further year. The petitioner, however, was promoted to the post of Senior Sub-Assistant Engineer with effect from 1st April, 2010. In that view of the matter, when the petitioner was again considered in the suitability test on 19th November, 2014, the petitioner was already enjoying the promotion. The promotion order issued in 2010 contained a stipulation that the petitioner will continue to remain in his existing place of posting until further orders. As the petitioner was already promoted, a promotion order was issued after the suitability test conducted on 19th November, 2014 by modifying the promotion order of 2010 to regularize the petitioner's promotion.

After hearing the parties and considering the materials on record, it appears that the promotion is dependent on the policy and guideline of the employer i.e., WBSEDCL in the instant case. It is also now well-settled that no employee has right to get promotion but has the right to be considered for promotion. In the instant case, the petitioner was considered for promotion but was found unsuccessful. The petitioner is assailing such decision. The interference to such policy matter, particularly with regard to the giving or refusing promotion, is seldom interfered with. The scope of interference is also limited. Unless it is demonstrated that the promotion policy is contrary to the law of the land or the employee has been victimised with a *mala fide* intent, there can be no interference. In this context we may refer to the judgment reported in 2011(10) SCC 121 (Hardev Singh vs. Union of India & Anr.).

Assuming without admitting that the marks obtained by the petitioner were not made known to the petitioner during 2010-2012, but the fact remains that the petitioner was promoted from 1st April, 2010 which the petitioner accepted. The said promotion was regularized in 2014 which has also been accepted by the petitioner. The marks obtained by the petitioner was admittedly made known on being disclosed with the affidavit-in-opposition filed by WBSEDCL on or about 9th September, 2016. Holding that non-supply of

PAR to be arbitrary by applying the ratio laid down in Dev Dutt (supra) may re-open the question of seniority after lapse of a reasonable period which is likely to disturb the settled position from 2008-2009 which is not justifiable in service matters as held in 1998 (2) SCC 523 [B.S. Bajwa vs. State of Punjab & Ors.] However, considering the fitness of the case I hold that the petitioner on being promoted with effect from 1st April, 2010 should be treated to have been promoted on regular basis from that date and should be given all consequential benefits if not already given.

In the light of the discussion as made hereinabove, I do not find any reason to specifically interfere with the memos dated 29th December, 2010 and 5th July, 2012 but grant the petitioner, the relief as aforesaid.

The writ petitioner is, accordingly, disposed of without any order as to costs.

Urgent photostat certified copy of this order, if applied for, be given to the parties, upon compliance of necessary formalities.

(Arindam Mukherjee, J.)