

IN THE HIGH COURT AT CALCUTTA
CIVIL APPELLATE JURISDICTION

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

M.A.T. No. 1038 of 2019

SUBIR NAG
-VERSUS-
NAZRUL ISLAM AND OTHERS

For the appellant : Mr. Rabilal Maitra, Sr. Adv.,
Mr. Debabrata Roy, Adv.,
Mrs. Karabi Roy, Adv.,
Mr. Souvik Mondal, Adv.,
Ms. Sarbani Mukhopadhyay, Adv.

For the respondent no.1/writ petitioner : Mr. Debabrata Saha Roy, Adv.,
Mr. Indranath Mitra, Adv.,
Mr. Subhankar Das, Adv.

For the State respondents : Mr. Rajarshi Basu, Adv.,
Mr. S.T. Mina, Adv.

For the Nadia Zilla Parishad : Mr. Amitava Chaudhuri, Adv.,
Mrs. M. Chaudhuri, Adv.,
Mr. N. Roy, Adv.

Hearing concluded on : 24.03.2022

Judgment on : 07.04.2022

Kausik Chanda, J.:-

The dispute between the appellant and respondent no.1 revolves around an appointment to a promotional post namely, Head Assistant under the Nadia Zilla Parishad.

2. The relevant undisputed facts may be summarised as follows.
3. The appellant was initially appointed as a Lower Division Assistant on July 3, 1990. Thereafter he was promoted as an Upper Division Assistant with effect from July 2, 2008. The respondent no.1 was appointed as a Lower Division Assistant on November 17, 1999, and he was also promoted as an Upper Division Assistant with effect from the same date. In the gradation list, however, the appellant was placed above respondent no.1 on the basis of his seniority as per the initial date of appointment.
4. The relevant Zilla Parishad, thereafter, initiated the proceedings for the appointment of Head Assistant, which was the next promotional post from Upper Division Assistant.
5. When the admit cards were issued to the prospective candidates, it was mentioned therein that the recruitment will be in terms of the notifications no.2247/PN/O/3R-2/96 dated 20th May 1997 and no.3734/PN/O/III/2E-62/09 dated 3rd July 2012 of P&RD Department, Govt. of W.B.
6. In terms of the said circular dated July 3, 2012, a written test was held wherein the appellant scored 20 marks out of 50 and respondent no.1 scored

31.5 marks. Despite scoring above the appellant, the Zilla Parishad issued an appointment letter to the appellant on the basis of a clarification dated May 2, 2017, from the Panchayat & Rural Development Department advising the Zilla Parishad to promote the appellant “owing to seniority in terms of this Department’s Order No.3734/PN/2E-62/09 dated 03.07.2012.”

7. Respondent no.1, thereafter, filed this writ petition seeking his appointment to the post of Head Assistant. Following an interim order passed in the said petition the appointment of the appellant to the said promotional post was not given effect to.

8. The learned Single Judge by the order impugned dated April 17, 2019, allowed the writ petition relying upon a judgment passed by another learned Single Judge of this Court in **WP No.15909(W) of 2013 (Chinmoy Dey v. The State of West Bengal)** and directed to promote the respondent no.1 with consequential benefits.

9. The relevant part of the judgment rendered in **Chinmoy Dey** case is quoted below:-

“The above observation is germane in the facts of the instant case since the only point raised by the private respondent no.6 as well as the North 24- Parganas Zilla Parishad is the existence of the Government Order dated 3rd July, 2012. Relevant portion of the Government Order reads as follows:

“8) The written examination shall be only for the purpose of screening and not for the purpose of elimination nor for determining their seniority in the promotional post. The seniority of promoted candidates shall be determined solely on the

basis of the position of the qualifying candidate in the existing gradation list of the feeder post.”

If one compares the above-quoted clause of the Government Order with the relevant statutory Rule under Chapter II of the West Bengal Panchayat (Recruitment and Conditions of Appointment of Employees of Zilla Parishad) Rules, 1997, with regard to method of recruitment, wherein it has been clearly stated that in respect of Head Assistant, the method of recruitment would be by way of promotion from amongst the Upper Division Assistants and Accountants selected on the basis of merit-cum-seniority, it would be clear that the Government Order – to the extent which has been quoted hereinabove – is wholly contradictory and contrary to the statutory rule as applicable for promotion to the post of Head Assistant. As such, the observations made by the Supreme Court in Dr. Rajinder Singh’s case (supra), as quoted hereinbefore, are squarely applicable in the facts of the instant case and there is no requirement of the petitioner to challenge the Government Order dated 3rd July, 2012, separately.

...

In the facts of the instant case, it is noticed that on the basis of the written examination held on 14th and 15th of May, 2013, the petitioner secured the highest score. Yet the private respondent no.6 was chosen over the petitioner by the concerned authority by referring to the Government Order dated 3rd July, 2012, which, as discussed hereinbefore, is wholly contradictory and contrary to the statutory rule governing the field.”

10. The learned Single Judge observed as follows:-

“Nothing has been brought to the notice of this Court that the solemn Judgement and Final Order dated the 23rd of July, 2014 has been upset to revive the so-called GO dated 3rd July, 2012. This Court is therefore conscientiously urged to hold that repeated references to the so-called GO dated 3rd July 2012 in similar individual fact situations, without the said so-called GO dated 3rd July, 2012 being in any way sanctified by law, would be a legally culpable exercise.”

11. In compliance with the said order of the learned Single Judge, respondent no. 1 was appointed to the promotional post.

12. The appellant preferred this appeal and his interim prayer for the stay of the operation of the order was refused by the Appeal Court on September 17, 2019.

13. When this appeal was taken up for final hearing before us, we were informed that by that time the appellant had retired from his service.

14. Mr. Rabilal Maitra, learned senior advocate appearing for the appellant submitted before us that it was known to all prospective candidates that selection will be made in terms of the notification dated July 3, 2012. Therefore, the writ petitioner/respondent no.1 after participation in the selection process could not contend that said notification did not apply to the selection process in question. The said order dated July 3, 2012, speaks for the selection of a candidate on the basis of seniority if he obtains the qualifying marks in the written examination. In the present case, admittedly, the appellant was placed above respondent no.1 in the gradation list, and therefore, the Zilla Parishad rightly appointed him to the said post considering his seniority.

15. On the other hand, it has been submitted by Mr. Debabrata Saha Roy that the order dated July 3, 2012, is not in conformity with the West Bengal Panchayat (Recruitment and Conditions of Appointment of Employees of Zilla Parishad) Rules, 1997. Mr. Debabrata Saha Roy submitted that the said rules

speak of selection on the basis of merit-cum-seniority, but the order dated July 3, 2012, is in contradiction with the said principle. The order dated July 3, 2012, speaks of selection on the basis of seniority. Therefore, the learned Single Judge rightly held that the said circular is in violation of the principle of merit-cum-seniority.

16. Since the whole controversy, in this case, relates to the applicability of the government circular dated July 3, 2012, it is necessary to quote the said circular in-extenso.

“Government of West Bengal
Panchayats & Rural Development Department
63, N.S.Road, Jessop Building, Kolkata 700 001

Memo.No. 3734/PN/O/III/2E-62/09 Dated: 03 .07.2012

ORDER

Whereas promotional aspects in respect of the employees of Zilla Parishad has been dealt with in the Chapter –II of the West Bengal Panchayat (Recruitment and Conditions of Appointment of Employees of Zilla Parishad) Rules, 1997;

And whereas promotion is allowed on the basis of merit-cum-seniority as envisaged in the said recruitment rule;

And whereas method and policy of assessing merit of the prospective candidates has not been defined in the said rule;

And whereas a well-defined and clear cut guideline on extending promotion on merit-cum-seniority basis is required for the employees of Zilla Parishad;

Now, therefore after careful consideration of all aspects and in exercise of power conferred under Rule 10 of the West

Bengal Panchayat (Recruitment and Conditions of Appointment of Employees of Zilla Parishad) Rules, 1997, the Governor is pleased to frame the following policy for assessing the merit of Z. P. employees in Gr. B and C posts for promotion on merit-cum-seniority basis.

- 1) The eligible candidates shall be required to appear in a written test for 50 (fifty) marks for the purpose of screening. The syllabus of such test will be as follows:-
 - a. The W.B. Panchayat Act, 1973.
 - b. The W.B. Zilla Parishad (Leave & Recruitment of Staff) Rules, 1973.
 - c. D.C.R.B Scheme, 1985.
 - d. ROPA Rules for PRI Employees.
 - e. Reservation Policy.
 - f. Provident Fund rules for the employees of P.R. bodies, 1991.
- 2) The qualifying marks required for promotion shall be 15 out of 50 in the written screening test.
- 3) The APR of the candidates for last three years (1st April to 31st March) shall be considered at the time of preparation of panel of prospective candidates.
- 4) 50 point roster shall be maintained strictly.
- 5) There should not be any break in service, vigilance case or any adverse report including Disciplinary/Criminal proceedings against the employee.
- 6) The prospective candidate must have submitted the 'Declaration of Assets as on 1st day of January' for last three years before the competent authority within scheduled date.
- 7) Number of candidates for the post will be five times of the available vacancies. In case of insufficiency in number of eligible candidates, the minimum requirement may be waived off by the appointing authority.
- 8) The written examination shall be only for the purpose of screening and not for the purpose of elimination nor for

determining their seniority in the promotional post. The seniority of promoted candidates shall be determined solely on the basis of the position of the qualifying candidate in the existing gradation list of the feeder post.

- 9) If a candidate, being senior in gradation list, fails to secure qualifying marks in the written test, shall not be considered for promotion.

This order issues in supercession of previous orders/clarifications in similar matter including memo. no. 155(361)P.N./O/cell III/2E-65/2004 dated 12th January 2005 of this Deptt.

By order of the Governor

Sd/-

(Saurabh Kumar Das)
Principal Secretary
to the Govt. of West Bengal.

Memo. No. 3734/1(39)/PN/O/III/2E-62/09

Dated: 03.07.2012

Copy forwarded for information & necessary action to:-

1. The Commissioner, Panchayats & Rural Development Department.
2. The Joint Secretary (Policy Cell), Panchayats & Rural Development Department.
3. The Joint Secretary (Law), Panchayats & Rural Development Department.
4. The Executive Officer, Zilla Parishad(All)/Siliguri Mahakuma Parishad.
5. The Additional Executive OfficerZilla Parishad (All)/Siliguri Mahakuma Parishad.

Sd/-

OSD & Ex-Officio Deputy Secretary
to the Govt. of West Bengal
Panchayats & Rural Development Department”

17. We regret our inability to persuade ourselves to hold that the said circular dated July 3, 2012, is contrary to the principle of merit-cum-seniority. In our reading, the aforesaid circular does not provide for selection on the basis of seniority, rather it gives due weightage to merit.

18. It was glossed over in ***Chinmoy Dey (supra)*** as well as by the learned Single Judge that the circular provides for a two-fold merit test. Firstly, the candidates are to be scrutinized on the basis of a qualifying written test for 50(fifty) marks. If a candidate secures less than 15(fifteen) marks, he will not be considered for the promotion notwithstanding his seniority position in the gradation list. The merits of the candidates, who have been screened having secured the qualifying marks, have to be thereafter adjudged on the basis of their last three years' annual performance report. The circular further clarifies that the seniority of the promoted candidate shall be determined solely on the basis of the position in the existing gradation list of the feeder post.

19. It is quite reasonable that in the case of in-service promotion, the merit of a candidate should be adjudged on the basis of his recent past performance. It is, inter alia, the evaluation of an employee's skill, ability, devotion, sincerity, and sense of discipline by the superior officer. Therefore, the annual performance of a candidate is one of the most important yardsticks for consideration of his merit. In the case of in-service promotion, mere academic knowledge of a candidate may not be the sole criterion to test his merit.

20. The relevant recruitment rules namely, West Bengal Panchayat (Recruitment and Conditions of Appointment of Employees of Zilla Parishad)

Rules, 1997 provide for selection on the basis of merit-cum-seniority. The principle of merit-cum-seniority has been explained by the Supreme Court in a number of decisions. It has been held that in selection on the merit-cum-seniority basis, the seniority will be considered only where the merit and ability of the candidates are approximately equal. **[See: (1995) Supp 1 SCC 434 (Sarat Kumar Dash v. Biswajit Patnaik)]**.

21. Therefore, we are of the opinion that the circular dated July 3, 2012, in fact, adheres to the principle of merit-cum-seniority and is not in violation of the extant recruitment rules. The learned Judge, therefore, fell into error in allowing the writ petition on the basis of the observations made in **Chinmoy Dey (supra)**.

22. In the present case, however, we find that the annual performance reports of the prospective candidates were not at all considered. It is the stand of the Zilla Parishad that there was no practice of maintaining the annual performance reports of the employees. We are, therefore, not in a position to assess the inter-se merit of the appellant and respondent no.1 on the basis of their annual performance reports. The fact, however, remains that the respondent no.1 scored higher marks than the appellant in the written test, and in absence of annual performance reports, in the facts of this case, the merits have to be adjudged on the basis of the performance in the written test. Admittedly, the respondent no. 1 performed better than the appellant in the written test. The appellant has already retired from service. At this juncture, therefore, we are not inclined to interfere with the direction of the learned

Single Judge, though we do not approve of the reasoning in the impugned order.

23. Accordingly, M.A.T. No. 1038 of 2019 is dismissed.

24. 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.)