

Form No. J(2)

IN THE HIGH COURT AT CALCUTTA
Constitutional Writ Jurisdiction
Appellate Side

Present:

The Hon'ble Justice Harish Tandon

And

The Hon'ble Justice Prasenjit Biswas

WP.ST 186 of 2019

With

IA No. CAN 1 of 2020

Dr. Violet Mukhopadhyay and another

Vs.

The State of West Bengal and others.

For the Petitioner : Mr. Pritam Choudhury,
Mr. Ujjal Kumar Sarkar,
Mr. Abhishek Addhya,
Mr. Sanjit Halder.

For the State : Mr. Swapan Kumar Datta,
Mr. Tapas Kumar Mondal.

For the PSC : Mr. Pradip Kumar Roy,
Ms. Shraboni Sarkar.

Judgment on : 9th December 2022.

The Court.

The instant writ petition is taken out by the applicants challenging an order dated 20th February 2019 passed by the West Bengal Administrative Tribunal in OA 1532 of 2013 whereby and whereunder a direction was passed upon the Principal Secretary,

Department of Agriculture, Government of West Bengal, to consider the applicants for promotion when the vacancies in the promotional posts will be filled up provided they are otherwise found suitable for promotion.

Nine persons including the petitioners filed a tribunal application seeking an order upon the respondent authorities to revoke, set aside and quash the notification dated 15th June 2012 issued by the Government of West Bengal blocking the promotional avenues of the eligible persons and to give the promotional benefits with retrospective effect in terms of the notification dated 31st December 1992.

The facts, which emanate from the pleadings, are that the petitioners at the relevant point of time when the tribunal was moved were holding the post of Assistant Evaluation Officer under the West Bengal Junior Agricultural Services (Evaluation) cadre. It is further contended that at the relevant point of time when the petitioners became eligible for promotion in terms of the notification dated 31st December 1992, several requests were made to initiate a proceeding for filling up the promotional posts. The said notification provides two channels of promotion to the promotional posts; firstly, half of the posts shall be filled up through a direct recruitment process and the remaining half by promotion from the confirmed officers in the West Bengal Junior Agricultural Services (Evaluation) having at least three years experience in the said post.

Subsequently, by a notification dated 15th June 2012, an amendment was brought by putting the conditions relating to the requisite qualification at par with the direct recruitment, which, according to the petitioners, blocked the avenues of the promotion. By filing a supplementary affidavit, the petitioners relied upon a memo being no. 477 dated 25th May 2011 in support of their contention that

the process for filling up the posts was started, but, subsequently, could not be proceeded further because of the amendment having brought in the year 2012.

Several applicants approached the Tribunal with the tribunal application challenging the said notification dated 15th June 2012 and an interim order was passed staying operation of the said notification until further order. During pendency of the said application the aforesaid eligibility criteria, which, according to the petitioners blocked the avenues of the promotion, was further amended by a notification dated 18th August 2017. By such notification, the stringent eligibility criteria were relaxed and the position was restored ante in terms of the notification dated 31st December 1992.

So far as the present petitioners are concerned, they attained superannuation before the impugned order was passed and the instant writ petition is filed seeking a relief by issuing a Mandamus upon the respondent authorities to grant a notional promotion from the retrospective date of their eligibility and the monitory relief that may be admissible to such promotional posts.

It is argued by the learned Advocate appearing for the petitioners that the Tribunal while disposing of the tribunal application did not consider that the petitioners attained superannuation and, therefore, direction upon the concerned authority to consider the applicants therein for promotion when the vacancy in the promotional posts will be filled up has virtually denied the reliefs actually sought for. It is contended that the Rule, which was prevalent at the time when the promotional posts fell vacant, shall apply to fill up the promotional posts and under the subsequent amendment brought putting a stringent condition was revoked/withdrawn and, therefore, the order impugned needs interference so far as the petitioners are concerned. It is further

submitted that the notification dated 15th June 2012 was further superseded by a notice dated 18th August 2017 restoring back the situation prevalent as on the date of vacancy at the promotional posts and, therefore, the petitioners were unreasonably denied their legitimate right by an act of the authorities. In support of the contention that the Rule pertaining to promotional posts prevalent at the time when the vacancy arises should be applied, reliance is placed upon a Single Bench judgment rendered in case of **Asoke Sawoo vs. State of West Bengal**, reported in **2011(2) CHN (CAL) 82**. It is also submitted that though the aforesaid judgment of the Single Bench was upset by the Division Bench in case of **Asoke Sawoo vs. The State of West Bengal & Ors.**, reported in **(2013) 2 WBLR (Cal) 229**, but the Apex Court set aside the judgment and order of the Division Bench and accepted the principles of law laid down in the Single Bench decision. It is, thus, submitted that since the vacancy arose in the year 2011 but because of the subsequent amendment having brought in the year 2012, which was withdrawn in the year 2017, the petitioners are entitled to be appointed to the promotional posts with retrospective effect and the notional benefit should be extended in commensurate with the said promotional posts.

On the other hand, learned Advocate for the respondents submits that the process was never initiated in the year 2011, which would be evident from the memo no. 477 dated 25th May 2011 and it is a mere proposal requiring vetting of the Agricultural Department. It is further submitted that the posting to a promotional post is not a vested right nor the relief to be posted to such promotional post can be granted by the Court. It is, thus, submitted that in terms of the order of the Tribunal, the promotional posts have been filled up by promoting the persons, who were found eligible and are in service and

since the petitioners retired during pendency of the tribunal application, no relief can be granted to them.

On the backdrop of the aforesaid facts, the seminal point involved in the instant writ petition is whether the Mandamus can be issued upon the authorities to appoint the petitioners at the promotional posts and extend the notional benefit attributed to such posts after they attained superannuation.

In **Asoke Sawoo (supra)**, the judgment was passed in relation to a recruitment process to fill up the feeder post and not related to the promotional post. The point, which felt for consideration, was whether the Rule prevalent at the time of vacancy having arisen to such feeder post should be the guiding factor or the amended Rules shall apply when the process for filling up the said post was initiated. The Single Bench held that even if the vacancy has arisen at an earlier point of time but no process was commenced to fill up the said non-promotional post meant for direct recruitment, no Mandamus can be issued by the Court of Writ to compel the employer to fill up the said post. It is ultimately held that the Rule, which was prevalent at the time when the selection process was initiated, shall be the guiding factor in the following:

“The further contention urged by Mr. Bari that those rules existing on the date the vacancies arose, without anything more, should be the guiding factor for filling up the posts, if accepted, is sure to produce abnormal results. Whether or not a particular post shall be filled up is in the absolute domain of the employer. There may be good reasons for an employer to keep a post vacant. Suppose a vacancy has arisen in 1998 and no process is commenced to fill up a non-promotional post, meant to be filled up only by direct recruitment. No one can seek Mandamus from the Court of Writ to compel the employer to fill up such post. Now if the employer seeks to fill up the post in 2010 in accordance with amended or new rules for recruitment which have been made

operative from say 2008, could any one lawfully claim that the post must be filled up in accordance with the rules that were in existence in 1998 when the vacancy arose? The answer possibly cannot be in the affirmative. No process of selection having commenced, there is no question of any right of consideration having accrued in favour of any candidate. Accepting the contention of Mr. Bari would mean imposing unreasonable fetters on a candidate who may have acquired a right of consideration under the said Rules of 2008. That is precisely the reason why Courts have added the rider of commencement of selection process' in its decisions while deciding the issues before it, referred to above, suggesting that unless the amending rules are to apply with retrospective effect, the rights of the candidates who have offered their candidature should not be impaired."

However, in paragraph 33 of the said judgment it is held that in case of promotion to a vacant post and an amendment having been brought into the Rule, the right of the incumbent may be impaired and, therefore, such incumbent may validly raise a claim that the promotional post was not filled up to deny him a promotion and the amended Rules have been framed in such a manner to exclude him from the zone of consideration. The Single Bench further observed that the right to be considered for promotion is a right guaranteed under Article 16 of the Constitution of India and the bona fide of the employer would definitely fall for consideration if a challenge is thrown by such aggrieved incumbent against the action of the employer in not filling up the post in accordance with law, i.e. the Rules existed on the date the promotional post fell vacant.

The judgment of the Single Bench was set aside by the Division Bench holding that the moment the post fell vacant even in case of a recruitment to a non-promotional post, the Rules prevalent at the time when such vacancy arose shall apply.

The Apex Court set aside the judgment of the Division Bench and held that no vested right arise in favour of the candidates merely

by initiation of selection process, the new scheme certainly could be applied to a selection process in the following:

“Since no vested rights arise in favour of the candidates merely by initiation of selection process, the new scheme certainly could be applied to the selection process. The learned Single Judge of the High Court took this view which has been reversed in the impugned judgment.

We are of the view that Division Bench is not justified in interfering with the view taken by the learned Single Judge.”

The aforesaid observation has been projected affront by the petitioners to contend that distinction has to be drawn between the initiation of process for filling up the non-promotional post and the promotional post. Since the Apex Court has accepted the views expressed by the Single Bench, it is to be considered in such perspective and, therefore, the promotional post can only be filled up by a Rule prevalent at the time such post fell vacant.

We have carefully considered the observations of the Single Bench and the Apex Court approving and accepting the view and we find that the core issue involved therein relates to the applicability of the Rule at the time of initiation of the non-promotional post. The view of the Division Bench that the moment non-promotional post fell vacant, the process for filling up the same must be undertaken on the Rules prevalent at the time when such post fell vacant, was not accepted by the Apex Court.

The initiation of the process is to be understood in the perspective of the decision taken in the above noted report. The right to be promoted is not recognized, but the right to be considered for such promotion is protected under Article 16 of the Constitution of India. The filling up of the promotional post is within the domain of the employer and the initiation of process may be on the basis of the

Rules prevalent at the time of vacancy having arisen in the promotional post.

The memo being no. 477 dated 25th May 2011 does not appear from the meaningful reading thereof that any selection process was initiated in terms of the Rules prevalent at the time of vacancy. A proposal was made to initiate a process for filling up the posts, which does not receive the vetting from the Agriculture Department. However, an amendment was brought in the year 2012 on the eligibility criteria, which impedes the claim of the incumbents and during pendency of the tribunal application, the position was reversed as the Government further issued a notification in the year 2017 restoring the position from the retrospective date.

Admittedly, the petitioners retired at an interregnum period i.e. the period between the amendment having brought to the eligibility criteria and the revival and/or restoration in the year 2017. Since the process for promotion was not initiated and actually the promotion did not take effect, the petitioners cannot claim reliefs as sought for in the garb of the legitimate expectation.

We have been informed by the respondents that some of the incumbents being the applicants before the Tribunal have been promoted as they did not attain superannuation with the prospective date and, therefore, we do not find that the petitioners, who have retired from service, are entitled to any notional benefit as claimed.

The writ petition and the connected application are dismissed.

There shall, however, be no order as to costs.

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(Harish Tandon,J.)

(Prasenjit Biswas, J.)

