

W.P.A. 6501 of 2007

**Dr. Sudhir Chandra Mallick
Vs.
State of West Bengal & Ors.**

Mr. Sakya Maity
Ms. Usha Maity

...for the petitioner

Mr. Swapan Kumar Mazumder
Mr. Saptarshi Mazumder
...for the Nabadwip Municipality

The writ petition is taken up for consideration pursuant to the order dated 2nd March, 2023 in presence of the learned advocates representing the petitioner and Nabadwip Municipality.

At the very outset it needs to be recorded that vide order dated 2nd March, 2023 this Court directed the Executive Officer of Nabadwip Municipality to prepare service book and statement of dues payable to the petitioner on his superannuation on 31st January, 2002 taking note of this fact that the retiral benefits were not paid to the petitioner. This Court directed vide order dated 16th February, 2023 to the Executive Officer of Nabadwip Municipality to prepare a statement of calculation on retiral benefits payable to the petitioner as well as service records before the next date of hearing of the writ petition and the said Executive Officer was directed to remain personally present before this Court.

Subsequently, on 2nd March, 2023 when the matter was considered by this Court the Executive Officer remained personally present before this Court but made a prayer to adjourn the matter which would enable him to prepare the service records including service book and statement of dues payable to the petitioner before the next date and the same is recorded in the order dated 2nd March, 2023 passed by this Court.

Today, the learned advocates representing the parties have jointly brought to the notice of this Court that an intra Court appeal being MAT 445 of 2023 was taken out by Nabadwip Municipality against the said order dated 2nd March, 2023 and the Hon'ble Division Bench on 21st March, 2023 disposed of the appeal as well as the connected application thereby permitted the Municipality to file an affidavit in order to demonstrate before this Court as to why service records and the statement of dues payable to the petitioner cannot be prepared and paid in connection with the service of the petitioner. Pursuant to such leave granted by the Hon'ble Division Bench an affidavit has been affirmed on behalf of Nabadwip Municipality on 29th March, 2023 which is filed today in Court and the same is taken on record.

Mr. Swapan Kumar Majumder, learned advocate representing the Municipality has been allowed to rely upon the affidavit which is affirmed on 29th March, 2023 in order to substantiate the case made out on behalf of

the Municipality. It needs to be recorded herein that previously two affidavits have been filed on behalf of said Municipality out of which one is in the form of an affidavit-in-opposition to the supplementary affidavit and another affidavit was affirmed on 13th January, 2023 pursuant to the order passed by this Court.

It has been contended on behalf of the Municipality by drawing attention of this Court to page 32 of the affidavit filed today that petitioner was appointed as Medical Officer for the outdoor department of Garrett Hospital on part time basis with effect from 1st November, 1974 by the Executive Officer and in terms of Section 66 (2) of the Bengal Municipal Act, 1932 the Executive Officer is not authorized to appoint the petitioner as Medical Officer at the material Point of time. Therefore, it is the contention of the Municipality that since petitioner was appointed on part time basis that too by the Executive Officer, he is not entitled to receive retiral benefits as claimed by the petitioner in the present writ petition and as such, this writ petition may not be entertained. It has also been submitted that there was no contribution by the petitioner from his salary towards provident fund account.

Having considered the submission made on behalf of the Municipality when this Court has made an endeavor to find the nature of employment of the petitioner as Medical Officer in the said Municipality, it

appears that petitioner worked in the capacity of Medical Officer with effect from 1st November, 1974 till 31st January, 2002, for a period of nearly 28 years.

It further appears from pages 74 and 75 of the affidavit used on behalf of the Municipality pursuant to the leave granted by the Hon'ble Division Bench that petitioner was placed under suspension by the Chairman of Nabadwip Municipality vide order dated 2nd January, 1989.

It has also been jointly submitted by the learned advocates representing the parties that disciplinary proceeding was initiated by the concerned authority of the Municipality, but same could not be brought to logical conclusion. From such acts on the part of the said Municipality i.e suspending the petitioner vide order dated 2nd January, 1989 and subsequent initiation of disciplinary proceedings against him reveals that petitioner was not rendering service as Medical Officer on part time basis; had the petitioner been working as Medical Officer on part time basis question of issuance of suspension order and initiation of disciplinary proceeding against the petitioner would not have arisen.

In addition thereto, this Court finds that the said Municipality vide letter dated 18th June, 1977 took the initiative for obtaining necessary approval from the State Government in connection with the service of the petitioner and in this regard Executive Officer of the said

Municipality issued said letter. At page 36 of the affidavit used by the petitioner affirmed on 15th February, 2023 a document has been appended dated 7th June, 2001 issued by the Chairman of Nabadwip Municipality wherefrom it appears that the petitioner was duly paid salary and the statement of salary includes Dearness Allowance, Interim Relief, House Rent Allowance, Medical Allowance apart from basic salary and it further appears that the salary statements for the period from 3rd April, 2000 to 1st March, 2001 contains signature and seal of the then Chairman of the Municipality.

In view of aforesaid credentials relied upon by the petitioner in support of service rendered it appears that by no stretch of imagination the service rendered by the petitioner can be considered as part time. Moreover, the Chairman of the Municipality vide letter dated 3rd October, 2001 issued superannuation notice to the petitioner intimating that he would be going to retire on superannuation on 31st January, 2002 and thereby he was requested on receipt of such notice to submit formal application for pension in the prescribed form. Such document is annexed at page 31 of the affidavit used on behalf of the petitioner.

There is another legal aspect which is required to be delved into by this Court while determining the issue involved in this writ petition. Taking note of the date of appointment of the petitioner on 1st November, 1974 it

appears that The Bengal Municipal Act 1932 (for short 'said Act') was in vogue at the time of induction of the petitioner as Medical Officer in the said Municipality. This Court finds it apt to quote Section 66 Sub-Section (1) below:

“S.66 Appointment of officers and employees.

- (1) The Commissioners at a meeting may, subject to the provisions of this Act and the rules made thereunder from time to time, determine what officers and what employees of the Commissioners are necessary for the municipality, create posts of such officers and employees and fix the salaries and allowances to be paid and granted to such officers and employees.

Provided that no post of an officer of (sic) employee shall be created without the prior sanction of the State Government if the number of posts to be so created in a year for a municipality is more than one *per cent* of the total number of posts of officers and employees as existed in the year immediately preceding:

Provided further that no post carrying a monthly salary of more than one thousand rupees or a salary rising by periodical increments to more than one thousand rupees shall be created without the sanction of the State Government.”

Proviso to Sub-Section 1 of Section 66 of the said Act of 1932 empowers the Municipality to create post as per requirement of the Municipality without nod of the State Government if number of post is not more than 1% of the total number of posts of officers and employees as existed in the preceding year. It has also been provided in the second proviso to Sub-Section 1 of Section 66 that such posts should not carry a monthly salary of more than Rs. 1,000/-. In the present case it is not the case of

the Municipality that appointment of the petitioner in the post of Medical Officer was beyond 1% of the total number of posts of Medical Officer as existed in the preceding year; it has also transpired that the initial salary fixed for appointment of the petitioner was also less than Rs. 1000/-. In view of fulfillment of condition as contemplated under Section 66(1) this Court finds that there is no impediment in applying such provisions of the said Act of 1932 in the case of the petitioner. Therefore, safely it can be concluded that it was within the domain of the concerned authority of the Municipality to engage the petitioner in the post of Medical Officer on 1st November, 1974 when the said Act of 1932 was operating in the field. In this regard reliance has been placed on the judgement of the Hon'ble Division Bench dated 30th January, 2008 delivered in MAT 704 of 2007 (Chairman, Dum Dum Municipality Vs. Dr. Debranjana Biswas & Anr.), the relevant portion of the judgement is quoted below:

“Upon a perusal of the aforementioned facts, what stares us on the face, is that when the Petitioner was appointed on 29.04.1983, and when his services were confirmed on 14.8.1984, the West Bengal Municipal Act, 1993 was not even in existence. On the contrary, the law that was in existence was the Bengal Municipal Act, 1932.

Learned Counsel for the Writ Petitioner/Respondent no.1 has drawn our attention to the provisions of Section 66 of the

said Municipal Act, 1932. It would therefore be apposite to take note of the said provision, here at this stage itself, because the same clearly gave a right upon the Commissioners of the Municipality, not only to determine what Officers and employees were necessary for the Municipality but also gave them the right to create posts of such Officers/employees and to fix their salaries and allowances. The posts of Officers to be created by the Commissioners under sub-section (1) of Section 66 included the post of a Medical Officer. Section 66(1) read with Section 66(3) of the Bengal Municipal Act, 1932 read as under:

“Section 66. Appointment of officers and employees.

(1) The Commissioners at a meeting may, subject to the provisions of this Act and the rules made thereunder from time to time, determine what officers and what employees of the Commissioners are necessary for the municipality, create posts of such officers and employees and fix the salaries and allowances to be paid and granted such officers and employees;

Provided that no post of an officer or employees shall be created without the prior sanction of the State Government if the number of posts to be so created in a year for a municipality is more than one per cent of the total number of posts of officers and employees as existed in the year immediately preceeding;

Provided further that no post carrying a monthly salary of more than one thousand rupees or a salary rising by periodical increments to more than one thousand rupees shall be created without the sanction of the State Government.

(3) The post of officers to be created by the Commissioners under subsection (1) may include all or any of the following:-

- (a) a Secretary***
- (b) a Medical Officer,***
- (c) one or more Sanitary Inspectors,***
- (d) a Superintendent of Waterworks,***
- (e) an Assessor,***
- (f) an Office Superintendent,***
- (g) an Accountant;***

Provided that every officer referred to in this sub-section shall possess such qualifications as may be prescribed.”

Upon a perusal of the aforementioned provisions as contained in Section 66 of the Bengal Municipal Act, 1932, we are of the view that at the relevant point of time when the Respondent no.1 was appointed, the Commissioners of the Municipality could have appointed the Writ Petitioner/Respondent no.1. It is nobody's case that the post on which he was appointed was more than one per cent of the total number of posts as contemplated in the 1st proviso to Section 66 above.

In these circumstances, the attempt on the part of the Municipality to take recourse to the 1993 Act is an attempt, which appears to have been made in desperation.

We are also of the view that having allowed the Respondent no.1 to continue in service uninterruptedly for 16/17 years, it was absolutely arbitrary on the part of the Appellants to make submissions basing their logic on a provision of law which was not even in existence at the time when the Respondent no.1 had been appointed.”

Since in the present case, this Court is considering the appointment of Medical Officer that too at a time when The West Bengal Municipal Act, 1993 was not in vogue, placing reliance upon **Dr. Debranjana Biswas** (supra) it is found that it would be travesty of justice if the service rendered by the petitioner for a period of 28 years commencing from 1st November, 1974 till 31st January, 2002 is treated as part time.

Accordingly, the concerned authority of Nabadwip Municipality as well as State-respondents are directed to settle the pension case of the petitioner within a period of 8 (eight) weeks from the date of communication of this order and release the retiral dues in favour of the petitioner at an early date but not later than 12 (twelve) weeks from the date of communication of this order.

Surprisingly, this Court has found that the State-respondents are not present before this Court though at one point of time State- respondents were represented by

learned advocates. Till date State-respondents have not used any affidavit.

This Court directs the State-respondents at the time of processing the pension case of the petitioner, if necessary, grant post facto approval in favour of the petitioner for the purpose of finalization of petitioner's retiral dues.

Personal appearance of the Executive Officer Mr. Pyari Mohan Sarkar stands dispensed with.

With the aforesaid directions, the writ petition stands disposed of.

However prayer for interest on retiral dues to be paid by the authorities in terms of the aforesaid directions, is not considered at this stage but the petitioner shall be at liberty to take steps in accordance with law after release of retiral dues.

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.)