

**IN THE HIGH COURT AT CALCUTTA
CIVIL APPELLATE JURISDICTION
(APPELLATE SIDE)**

Present:

**The Hon'ble Justice Arijit Banerjee
&
The Hon'ble Justice Rai Chattopadhyay**

MAT 777 of 2022

South Dum Dum Municipality & Anr.

Vs.

Raja Chowdhury & Ors.

With

IA No: CAN 1 of 2022

With

MAT 778 of 2022

With

IA No: CAN 1 of 2022

With

MAT 779 of 2022

With

IA No: CAN 1 of 2022

For the appellants

: Mr. Kishore Dutta,
Ld. Sr. Adv.,
: Mr. Ankit Agarwala,
: Mr. Subir Debnath,
: Mr. Pappu Adhikary,
: Ms. Roma Roy.

For the respondents/
writ petitioners

: Mr. Puspall Chakkraborty,
: Mr. A. Sengupta,
: Mr. Prasanna Ganguly.

For the State respondents

: Mr. Amal Kr. Sen,
Ld. AGP,
: Mr. Rajarshi Basu,
: Mr. S.T. Mina.

Judgment on: 30/01/2024

Rai Chattopadhyay, J.

1. The present appellants preferred a review petition before the Hon'ble Single Bench, along with an application for recalling, with respect to its order dated 14.01.2020, passed in writ petition No.WPA 23763 of 2019, being Nos. RWV 36 of 2020 and CAN 1 of 2020 respectively. Both of those applications were disposed of by the Hon'ble Single Judge vide order dated 21.04.2022 when the Bench has directed for rejection of both the said applications.

Hon'ble Single Judge's order dated 21.04.2022 as well as the order passed in Writ Petition No. 23763 of 2019, are under challenge in these appeals.

2. Mr. Kishore Dutta has represented the appellant/municipality here. Appellant's challenge is with regard to the verdict of the Hon'ble Single Judge, that the respondent No.1/ writ petitioner should be immediately recommended (within a stipulated time) for appointment on promotion to the vacant post of "Assistant Engineer", of the said municipality. In its order dated 14.01.2020, the Hon'ble Single Bench has also directed that upon recommendation by the appellant/municipality, the name of the respondent No.1/writ petitioner should be forthwith approved by the present respondent No. 4 i.e, the Directorate of Local Bodies, Government of West Bengal, within the time period, as directed.
3. Mr. Dutta has firstly said that such directions by the Hon'ble Single Bench, would be violative of the constitutional provisions and thus not maintainable. He specifies that the 'vacant post' of

Assistant Engineer, as indicated by the Hon'ble Single Judge, is a post reserved for candidates belonging to the category of Schedule Caste/ Schedule Tribe. The respondent No.1/writ petitioner not belonging to the said category, but being an unreserved category employee, would not be a suitable and eligible candidate for the said post. He has said that the Hon'ble Single Judge has erred in orders dated 14.01.2020 and 21.04.2022 (rejecting the review petition) by not considering that recommendation of an unreserved employee for promotion to a post earmarked as reserved, would tantamount to violation of Constitutional mandate as envisaged in Article 16(4A) and Article 16(4B) of the Constitution of India.

4. According to the appellant/municipality, the directions as above, by the Hon'ble Single Bench, suffers from non-application of judicious mind to the distinguishing features between the provisions envisaged under Article 14 and Article 16(4A) & (4B) of the Constitution of India. It is stated that the respondent No.1/writ petitioner being an unreserved employee, could not claim any right for consideration for promotion to a reserved post and that he could not have agitated any violation of his rights as envisaged under the Constitution as equal to the candidates, who might have been the suitable candidates for that post, having belonged to a reserved category. Thus the appellant/municipality has challenged the suitability of the respondent No.1/writ petitioner, for promotion to the said vacant post.
5. Mr. Dutta, for the appellant/municipality would further say that the respondent No.1/writ petitioner would not even be suitable and eligible in terms of experience in the field, as

required for promotion to the said post as per the notification. According to the appellant, the feeder post for promotion would be that of a 'sub-assistant engineer', wherein an aspirant would require to serve for a minimum period of 10 years, before he be eligible for promotion to the next higher post in the cadre. It is indicated that admittedly, the respondent No.1/writ petitioner was occupying the post of a 'sub-assistant engineer', with effect from 20.01.2016. Therefore as on the date of notification, the respondent No.1/writ petitioner would not even have sufficient years of service in the feeder post and so would not have been eligible in terms of experience.

6. Veracity of qualification of the respondent No.1/writ petitioner has also been questioned by the appellant/municipality. It is stated that to be eligible for promotion to the post of "Assistant Engineer", the person would require to be adequately qualified with a degree of engineering, from a recognised institution. According to the appellant/municipality, the degree shown by the respondent No.1/writ petitioner, in support of his educational qualification, has been obtained from a university, not affiliated to the University Grants Commission. The appellant has claimed that the fact come to its knowledge very recently and on this ground it had preferred the recalling application (as mentioned above), before the Hon'ble Single Bench. According to the appellant/municipality, a qualification on the basis of a degree from an unaffiliated university, would not be acceptable as adequate or sufficient. According to it, the degree itself would have no sanctity in view of the fact that the institution providing the same, has no sanction as per law.

7. Lastly, Mr. Dutta has submitted that his client, the appellant/municipality has already undertaken the process of recruitment in the said vacant post of “Assistant Engineer”, by way of ‘direct recruitment’, and not by way of promotion of a departmental candidate, as there was no candidate available in the consideration zone, in the category of Schedule Caste/ Schedule Tribe, for which the post is actually reserved. That, in this matter the appellant/municipality has exercised discretion available to it by dint of the existing rules, and can exercise the same without any encumbrances, as no substantive right to the post has yet accrued in favour of the respondent No.1/writ petitioner. In view of this, he says, that it is not feasible too, to issue direction for recommendation of the name of the respondent No.1/writ petitioner.
8. Mr. Chakraborty appeared for the respondent No.1/writ petitioner. He argued that the appellant/municipality has failed to produce and show any document in support of its claim that the said vacant post actually is committed to a candidate of Schedule Caste/ Schedule Tribe community. On the contrary, he has relied on an order dated 31.07.2019, passed by the appellant, in compliance with this Court’s order in the writ petition W.P. No. 9823(w) of 2019, to show that until then it was never in contemplation of the appellant, that the said vacant post actually belonged to the Schedule Caste/ Schedule Tribe category, as the appellant has not mentioned the same, in the said order, as a reason why the respondent No.1/writ petitioner was not found suitable for the post. According to Mr. Chakraborty, this is only an afterthought by the appellant, to take this plea, before this appeal Court.

9. Mr. Chakraborty has strongly relied on the order of this Court, dated 18.09.2019, in writ petition No. WP 17748(w) of 2019. He says that in the said order there have been several observations by the Court, which remained unchallenged and thus have become final and accepted by the appellant/municipality. According to the respondent No.1/writ petitioner, what the Court relied on in the said order dated 18.09.2019, to come to its decision regarding educational qualification of the writ petitioner and also about the veracity of the memorandum dated 22.02.2019, by dint of which the appellant made communication of its decision that the post of “Assistant Engineer” would be filled up by the process of direct recruitment, stands unchallenged at any subsequent point of time. Therefore at present the appellant/municipality may not be allowed to and is actually precluded by the law to again agitate and dispute either the educational qualification of the writ petitioner or his suitability for the post in any manner whatsoever.
10. According to Mr. Chakrabarty, an order of the Director of Local Bodies, dated 25.11.2019, is also supporting his client’s case. By referring to the said document, he has stated that the said authority (respondent No.4 in this appeal), in the said order, has held that the writ petitioner has fulfilled all the criteria for promotion to the post of “Assistant Engineer”.
11. The other submission of the respondent No1/writ petitioner, was that the criterion for a candidate to complete a minimum ten years of service in the feeder post, would not be tenable for the reasons as follows. He said firstly, that the notification would show that a candidate would require to have completed

ten years of service and not particularly in the feeder post only. According to Mr. Chakrabarty, his client has duly fulfilled the criterion of ten years of completed service with the appellant/municipality. Secondly that, the appellant/municipality, in other cases, has ignored strict adherence to this criteria and promoted employees, even prior to their fulfilling ten years of service in the feeder post. Therefore, by compelling the respondent No1/writ petitioner to compulsorily fulfil the criterion as above, the appellant has exercised sheer discrimination and arbitrariness.

12. The State respondent has also filed its affidavit in this appeal. It says that after disposal of the writ petition being WPA 23736 of 2019, the appellant has come to know about the fact that 'Karnataka State Open University' from where the respondent No1/writ petitioner claims to hold a degree in engineering, has lost affiliation with the University Grants Commission. According to the State, as the appellant is the sole authority for appointment or promotion, the liability vests with it only, for verification of the testimonials. That, there is no scope for the 'Directorate of Local Bodies' of the State, to judge the veracity of testimonial of a candidate and it acts uniquely, upon the recommendation of the appellant. Basically it says that unless and until writ petitioner's name is sponsored by the appellant, upon being satisfied regarding his eligibility and suitability for the post, the State authority, being the 'Directorate of Local Bodies', is not empowered in this matter, to be involved in any way.
13. This appeal Court would only the question as to whether by not allowing promotion to the respondent/writ petitioner, the

appellant/corporation has violated any of his rights, which the appellant, being an instrumentality of the State, was otherwise obliged and duty bound to protect.

14. While dealing with that question, this Court is first confronted with the proposition that, promotion, would not be available to the writ petitioner/respondent, as a matter of right. He cannot per se claim promotion as a matter of right or claim a promotional post.

It is well settled that to fill up a promotional post would be the administrative prerogative of the employer only and it cannot be insisted upon by the employees, even though eligible.

15. Let us see how the writ petitioner has claimed his rights and alleged violation of those rights by the appellant/corporation. His arguments are two fold in this regard. That, he is educationally qualified and adequately experienced and is thus eligible for the post.

His degree of engineering is however denied and challenged, the ground being that the issuing institution is an unrecognised one. The writ petitioner, though has not denied this fact, but rests confidence on that initially the Corporation as well as the State had permitted him to pursue the course from such institution and recognised his qualification.

Needless to say that a degree from an unrecognised institution would bear no value as regards the educational qualification of a person. Having said so, it becomes an empty formality to mention that the writ petitioner's degree cannot be counted to assess his qualification.

- 16.** In terms of experience, writ petitioner's own admission would be a constraint for him to claim any right to the promotional post. Admittedly, he has not served in the feeder post of the same, for the minimum qualifying period as per rules, that is, for 10 years. He would be susceptible with the idea that minimum 10 years service with the appellant would be sufficient, that being the required period as per rules. His arguments on this has developed taking clue from the words and texts of the concerned rules, where the appellant, as a matter of fact, has not included the words that 10 years service with the Corporation, in the feeder post, would be the criteria.

However, even in such a situation, the applicability, executability and feasibility of a provision cannot but be fostered. "Assistant Engineer" is a technical post and can be catered by persons having typical technical knowledge only. It can never be generalised, in terms of technical knowhow. A person though having 10 years of experience as an employee of the appellant/corporation but without the typical technical knowhow, required for that post, can never be meant to be eligible for the said post, irrespective of how many years he might have served in the Corporation. Writ petitioner's claim of promotion, on the ground of having completed 10 years of service with the appellant/Corporation, though not as a sub-assistant engineer through the entire period, is thus unfounded, inconvincible and unacceptable.

- 17.** It has also to be considered, if the writ petitioner, being an incumbent of general category, could claim any right to a post which is reserved for a candidate of SC/ST category.

The appellant/employer has to follow the bench mark provided as per the 50 point roster, in case of granting

promotion to an employee. It is seen that according to the same the concerned promotional post would be reserved for a candidate of SC/ST Category. The appellant has also proceeded according to the same and due to non availability of a candidate within the institution, it has exercised discretion to convert post, to be filled up by a direct recruitee. As an employer the appellant would be duty bound to uphold the public policy and there would hardly be any scope to challenge appellant's doing so. The concerned post if is earmarked for a candidate of SC/ST category is a matter of record and thus the challenge of the writ petitioner of the appellant having acted on afterthought considerations, in this respect, is unsustainable.

18. On the discussions as above, this Court finds hardly any cogent grounds for the respondent/writ petitioner to claim any right or infringement thereof by the appellant, in denying him promotion to the concerned post. These appeals should therefore, be maintained for the reasons discussed as above.
19. Appeals being MAT 777 of 2012 with CAN 1 of 2022, MAT 778 of 2022 with CAN 1 of 2022, MAT 779 of 2022 with CAN 1 of 2022 are allowed.

The order dated 21.04.2022, in Writ Petition No. 23763 of 2019 is set aside.

The order dated 14.01.2020, passed in Nos. RWV 36 of 2020 and CAN 1 of 2020 in writ petition No.WPA 23763 of 2019 are set aside.

All the appeals, along with applications, if any, are disposed of.

Arijit Banerjee, J. :-

1. I have had the occasion to read the well considered judgment of my Learned Sister and I agree with the conclusion reached by my Learned Sister. However, I take this opportunity of adding a few words.
2. The respondent no. 1 / writ petitioner was appointed as Majdur by the Municipality on compassionate ground on September 2, 1996. A resolution to that effect was adopted by the Municipality on August 30, 1996. Thereafter, the writ petitioner pursued his academic carrier in Civil Engineering with the permission of the Municipality. On the basis of enhanced qualification, the writ petitioner was promoted to the post of sub-assistant Engineer with effect from January 20, 2016.
3. Subsequently, on January 31, 2019, the post of Assistant Engineer in the Municipality fell vacant. The writ petitioner came to know that the post of Assistant Engineer would fall vacant on January 31, 2019 and filed representations on November 21, 2018, November 29, 2018 and January 5, 2019 claiming promotion to the post of Assistant Engineer.
4. Alleging inaction on the part of the Municipality, the respondent no. 1 herein filed a writ petition being W.P.A 9823 of 2019. By an order dated June 26, 2019, a learned Judge of this Court directed the Chairman of the Municipality to consider the representations of the writ petitioner. The Chairman of the Municipality considered the representations and rejected the same. Such rejection order was challenged by the respondent no. 1 herein by filing another writ petition being W.P.A. 17748

of 2019. By an order dated September 18, 2019, a learned Judge directed the writ petitioner therein to make a fresh representation which was to be considered by the Director of Local Bodies.

5. A fresh representation was made by the respondent no 1 herein. By an order dated November 25, 2019 the Director of Local Bodies observed that he has no objection to accord approval to the promotion of the writ petitioner to the post of Assistant Engineer from the post of sub-assistant Engineer, in the event his case was forwarded and recommended by the Municipality following due process of law. This order was challenged by the respondent no. 1 herein by filing a third writ petition being W.P.A. 23763 of 2019, in the present round of litigation. That writ petition was disposed of by a judgment and order dated January 14, 2020, passed by a learned Single Judge of this Court. The learned Judge directed the Municipality to recommend and forward the name of the respondent no 1/writ petitioner for appointment on promotion in the post of Assistant Engineer and with a further direction upon the Director of Local Bodies to grant necessary approval to the recommendation to be forwarded by the Municipality.
6. Subsequently, the Municipality filed a petition for review of the judgment and order dated January 14, 2022, being RVW 36 of 2022.
7. The Chairman of the Municipality also filed a recalling application being CAN 1 of 2021 in WPA 23736 of 2019 for recall of the order dated January 14, 2022. One of the grounds taken in such application was that the Karnataka State Open

University from which the respondent no.1 /writ petitioner claims to have obtained his diploma in civil engineering, was not affiliated to the UGC and is not recognised by the Government.

8. By an order dated April 21, 2022, the learned Single Judge dismissed the two applications for review and recall of the parent order dated January 14, 2020. MAT 777 of 2022 and MAT 778 of 2022 have been filed by the Municipality challenging the order dated April 21, 2022, dismissing the review and recalling applications. MAT 779 of 2022 has been filed by the Municipality assailing the original order dated January 14, 2022, whereby the writ petition was disposed of by the learned Judge.
9. I completely agree with my learned sister that the order dated January 14, 2020, whereby the writ petition of the respondent no 1 was allowed by the learned Single Judge, cannot be sustained.
10. Firstly, the post concerned is reserved for Schedule Caste candidates. The writ petitioner admittedly belongs to the general category. Hence, no mandate should have been issued for promotion of the writ petitioner to the concerned post of Assistant Engineer.
11. Secondly, the degree and the diploma in civil engineering claimed to have been obtained by the writ petitioner, turned out to be from Universities which are not recognised by the Government. Accordingly, such degree/diploma are of no value. Rule 4 Entry 19 of the West Bengal Municipal Employees' (Recruitment) Rules, 2005 permits filling up of the post of

Assistant Engineer of the Municipality by direct recruitment or by promotion. The qualification for a candidate in case of direct recruitment is that he must have the degree of Bachelor of Engineering (Civil) from any University recognised by the Government. The minimum qualification for a candidate to be promoted to the post of Assistant Engineer from the post of sub-assistant engineer is at least 10 years experience in Municipal works. In the present case, the writ petitioner was appointed in the post of sub-assistant Engineer on January 20, 2016. Hence, he does not have the 10 years experience that is required by a candidate aspiring to be promoted from the post of sub-assistant Engineer to the post of Assistant Engineer. The argument of the writ petitioner that his experience must be counted from his initial appointment in the year 1996 since the aforementioned Rule does not say that the experience must be as sub-assistant engineer, does not appeal to me at all. The post of sub-assistant engineer is a feeder post. The job that is involved is of a technical nature. On a meaningful reading of Rule 4 Entry 19 of the West Bengal Municipal Employees (Recruitment) Rules, 2005, I have no doubt in my mind that the 10 years experience in municipal works stipulated in the Rule must be experience as sub-assistant Engineer. Hence, the writ petitioner does not qualify for promotion to the post of Assistant Engineer.

12. One more point was probably not brought to the notice of the learned Single Judge. As per the West Bengal Municipal Employees (Recruitment) Rules, 2005, the municipality has a discretion of filling up the post of Assistant Engineer either by direct recruitment or by promotion. The Municipality has exercised such discretion and has adopted a resolution dated

January 31, 2019, to fill up the vacant post by direct recruitment.

The West Bengal Municipal Service Commission Act, 2018 was notified in the Official Gazette on September 13, 2018. Section 7 of the said Act reads as follows:-

“7. (1) Notwithstanding anything contained in any other law for the time being in force and subject to the provisions of sub-section (3), it shall be the duty of the Commission to select persons for direct recruitment to such categories of posts and services in the establishments of Urban Local Bodies (Municipal Corporations, Municipalities, Notified Area Authorities, Industrial Township Authorities) and also establishment of different Organizations under Urban Development and Municipal Affairs Department, as may be prescribed.

(2) It shall be the duty of the Commission to perform such other functions as the State Government may, by notification, specify and also advice the State Government on such matter as may be referred to it.

(3) Nothing in this section shall apply to direct recruitment to the posts or services which are—

(a) required to be made through the Public Service Commission, West Bengal;

(b) filled up from the candidates belonging to the exempted categories which has been declared or is declared by the State Government by notification issued in exercise of the power conferred by section 3 of the West Bengal Regulation of Recruitment in State Government Establishments and

Establishments of Public Undertaking, Statutory Bodies, Government Companies and Local Authorities Act, 1999;

(c) excluded from the purview of this Act by the State Government by notification.”

13. Therefore, after the coming into force of the Act of 2018, and in view of the non-obstante clause in section 7 thereof, the Municipal Service Commission alone is empowered to select persons for direct recruitment to the prescribed categories of post in Urban Local Bodies including Municipalities.
14. The Municipal Service Commission was constituted on January 2, 2019. The relevant notification has been filed in court on behalf of the Municipality. Hence, it is not within the power of the Municipality any more to choose a candidate for filling up the vacant post of Assistant Engineer. The Municipality sent requisition to the Municipal Service commission on February 23, 2019 for taking requisite action for filling up the vacant post of Assistant Engineer.
15. In view of the aforesaid, no order should have been passed directing the Municipality to forward and recommend the name of the writ petitioner to the Director of Local Bodies with a further direction to the latter to grant approval to the appointment of the writ petitioner in the post of Assistant Engineer.
16. The order dated January 14, 2020 therefore stands set aside and MAT 779 of 2022 stands allowed. Consequently, the other two appeals also stand allowed and are accordingly disposed of. There will be no order as to costs.

- 20.** Urgent certified copy of this judgment, if applied for, be given to the parties, upon compliance of requisite formalities.

I Agree,

(Rai Chattopadhyay, J.)

(Arijit Banerjee, J.)