

IN THE HIGH COURT AT CALCUTTA
Constitutional Writ Jurisdiction
Appellate Side

Present :- Hon'ble Justice Amrita Sinha

WPA 23184 of 2022

Khuku Kundu & Anr.

Vs.

The State of West Bengal & Ors.

For the writ petitioners	:-	Mr. Dwaipayan Sengupta, Adv. Mr. Samrat Dey Paul, Adv.
For the State	:-	Mr. Malay Singh, Adv. Ms. Neelam Singh, Adv.
Heard on	:-	02.04.2024
Judgment on	:-	12.04.2024

Amrita Sinha, J.:-

The petitioners are the heirs and legal representatives of the original writ petitioner Santosh Kundu, a retired employee of the Santipur Municipality, who expired during the pendency of the writ petition. The employee was appointed as Technical Assistant on 2nd March, 1991. In the meeting of the Board of Commissioners held on 31st December, 1992, resolution was adopted to grant scale of pay for the post of Road Sarkar to the employee with effect from 1st January, 1993. On and from 1st March, 1995 the employee was promoted to the post of Sub Assistant Engineer.

The Chairman of the Municipality, by communicating letter dated 18th October, 2017, approached the Director of Local Bodies for issuance of approval of the employee to the sanctioned post of Sub Assistant Engineer

from the date of his promotion that is 1st March, 1995. The Director of Local Bodies, vide communication dated 27th September, 2021, intimated the Chairman of the Municipality to forward copy of the government approval of the appointment of the employee to the post of Sub Assistant Engineer and an approved profile (IOSMS) of the employee. The employee retired from service on attaining his normal age of superannuation on 31st January, 2022.

The request for post facto approval for promotion of the employee stood rejected vide communicating memo of the Deputy Secretary, Urban Development and Municipal Affairs Department dated 16th December, 2022. The same is impugned in the instant writ petition.

The ground for rejection of the prayer for post facto approval for promotion is that the prayer cannot be entertained as the West Bengal Municipal Employees' (Recruitment) Rules, 2005 does not permit such promotion.

It has been submitted that as the Municipality enjoyed the service of the employee in the post of Sub-Assistant Engineer with effect from 1st March, 1995 and the employee continued to serve in the said post till his superannuation on 31st January, 2022, accordingly, the employee ought to be paid his terminal benefits in accordance with the scale of pay of Sub-Assistant Engineer.

Reliance has been placed on the order passed by the Department of Municipal Affairs on 7th May, 2009 authorising the Director of Local Bodies

to issue orders, accord post facto approval of appointment/promotion made by the municipalities against sanctioned vacancies during the period 14th July, 1994 to 15th October, 2000 holding erstwhile scale of pay of Rs. 380/- to Rs. 910/- since revised to Rs. 4,000/- to 8,850/- and below.

It has been submitted that as the petitioner was promoted during the period as mentioned in the order of the department on 7th May, 2009, accordingly, the Director of Local Bodies ought to accord post facto approval for promotion to the employee in the post of Sub-Assistant Engineer.

Reliance has been placed on the judgment delivered by a coordinate Bench of this Court on 15th November, 2019 in WP No. 10717(W) of 2015 (***Debdas Saha -vs- State of West Bengal & Ors.***).

Reliance has also been placed on the order dated 9th September, 2022 passed by this Bench in WPA No. 5283 of 2019 in the matter of ***Sri. Bhabani Shankar Roy -vs- State of West Bengal & Ors.***

Prayer has been made for grant of post facto approval of promotion to the post of Sub-Assistant Engineer and pass order for release of terminal benefit in favour of the heirs of the deceased employee.

Learned advocates representing the respondents oppose the prayer of the petitioners.

It has been submitted on behalf of the State respondents that as per the West Bengal Municipal Employees' (Recruitment) Rules, 2005 a candidate for the post of Sub-Assistant Engineer must possess diploma in

civil or electrical engineering from any institution recognized by the Government and may be appointed either by direct recruitment or by promotion only in the case of permanent employee with the educational qualification of direct recruitment and with at least five years of experience. As the employee did not meet the eligibility criteria for grant of promotion, post facto approval to the post of Sub-Assistant Engineer cannot be given.

In response to the submission made on behalf of the employee that he would be covered by the order of the department dated 7th May, 2009 it has been submitted that the said order will not be applicable in the present case as the employee was not appointed against a sanctioned post. The employee was granted pay scale which is far above the pay scales approved by the aforesaid order. The scale of pay of Sub-Assistant Engineer is higher than the pay scales prescribed in the Government Order.

The State respondents rely upon the provision of Section 56 of the West Bengal Municipal Act, 1993 which mentions that all officers and employees of the Municipality are paid salaries and allowances out of the municipal fund. The Municipality also provides for pension, gratuity, provident fund, incentive, bonus to its employees as per the prescribed Rules.

Rule 31(1) of Death cum Retirement Benefits Rules, 2003 provides that pension shall be paid by the Municipality from its own fund, however, as per administrative arrangement 40% of the pension of retired employees of the Municipality is borne by the State Government, as such, Municipality

did not request for issuance of approval of promotion granted to the petitioner in 1995 till 2017 when the petitioner was at the fag end of his service tenure.

Learned advocate representing the Municipality has submitted that the Municipality cannot grant pension to the employee until and unless post facto approval is given and the Municipality is ready to comply the direction passed by the Court. The Municipality has not taken any independent decision in the matter. The Municipality does not formally oppose the prayer of the employee for grant of post facto approval of promotion and submits that if the State Government accords post facto approval, then the Municipality will act in accordance with the said order.

I have heard and considered the rival submissions made on behalf of the parties.

Admittedly, it appears that prior to engaging the employee in the post of Sub-Assistant Engineer the Municipality never sought for sanction of any authority. The Recruitment Rules, 2005 relying upon which the prayer for post facto approval of the employee has been rejected was not in existence when the employee was engaged to work as the Sub-Assistant Engineer in the year 1995. The subject Rule for the year 2005 does not have any retrospective application, and accordingly, the Government ought not to rely upon the said Rule for rejecting the claim for post facto approval of the employee in the post of Sub-Assistant Engineer. The respondent authority

ought to consider the claim of the employee relying on the Rules that were in operation on the day the employee was appointed to the post.

The post of Sub-Assistant Engineer is a technical post and a person who does not possess the requisite qualification or the eligibility to hold such post ought not to be given the benefit of the said post. From the documents annexed to the writ petition it is not evident that the petitioner possessed the requisite qualification for serving as the Sub-Assistant Engineer. On the contrary it appears that, the employee was initially appointed as a Technical Assistant on daily rated basis. Thereafter considering his ability, sincerity and good attendance his scale of pay was enhanced and made at par with the scale of post of Road Sarkar in the year 1993. In the year 1995 the employee was promoted to the post of Sub-Assistant Engineer.

How an employee who was initially engaged as a Technical Assistant, later paid the scale of pay of Road Sarkar, be promoted to the post of Sub-Assistant Engineer is not clear either from the petition filed by the writ petitioner or the opposition filed by the Municipality.

Admittedly, the employee had worked in the Municipality for a considerable period of time. It is not quite clear as to what prevented the Municipality for taking up the matter of approval of the service of the employee from his initial date of appointment till immediately prior to his retirement in January, 2021. The first request for grant of post facto approval was made by the Municipality before the Director of Local Bodies

only in the year 2017. No explanation has been put forthwith by the Municipality for not taking any steps for obtaining post facto approval of appointment of the employee from the date of his promotion in the year 1995 till 2017.

The Government Order of the year 2009 relied upon by the employee is applicable only in respect of employees enjoying a particular scale of pay. The scale of pay enjoyed by the employee was far more than the scale of pay as mentioned in the subject Government Order. The Municipality has admitted that due to oversight and mistake, Government approval was not obtained at the time of promoting the employee in the post of Sub-Assistant Engineer.

It was absolutely improper for the Municipality to not obtain approval of appointment of the employee when he was in service in the post of Sub Assistant Engineer from the period 1st March, 1995 till his date of superannuation on 31st January, 2022. After enjoying the service of the employee in the post of Sub Assistant Engineer for so many years it will be absolutely unjust and unfair to not allow terminal benefit to the employee in the proper scale of pay.

At the same time, it is to be seen as to whether the appointment of the employee in the post of Sub Assistant Engineer was in accordance with the relevant rules. If it is found that the appointment of the employee is in accordance with the service rules and the employee served the Municipality for such a long period of time in the post of Sub Assistant Engineer, then the

respondent authorities are bound to grant post facto approval to the service of the employee. But if it is detected that the initial appointment of the employee in the post of Sub Assistant Engineer was not in accordance with the service rules, then the terminal benefit has to be sanctioned apropos the post in which he was previously serving.

The employee has already expired without enjoying his terminal benefits. The widow and the child of the employee ought not to suffer any further. Being the heirs and legal representatives of the deceased employee, they are liable to enjoy the fruits of labour which is legally due and payable.

The relief granted by the Court in the matter of Debdas Saha (supra) and Bhabani Shankar Roy (supra) cannot be granted in the present case as a cloud has been raised with regard to the appointment of the employee in the post of Sub Assistant Engineer which requires technical qualification. Had it been the case that the deceased employee was serving in a post which did not require any technical qualification, then order could have been passed for according post facto approval.

The Municipality accepts that the employee had the necessary qualification for appointment in the post of Sub Assistant Engineer, as such, the Municipality is directed to follow up the issue with the Director of Local Bodies to obtain necessary approval and ensure that the heirs of the deceased employee gets their due benefit without any further delay. The Director of Local Bodies is directed to take prompt necessary steps to accord necessary approval so that the terminal benefit of the deceased employee in

the appropriate scale can be disbursed in favour of his heirs as soon as possible. Both the authorities shall take steps in accordance with the direction passed herein above at the earliest but positively within a period of four months from the date of communication of this order.

The impugned communicating memo of the Deputy Secretary, Urban Development and Municipal Affairs Department dated 16th December, 2022 is, accordingly, set aside.

Writ petition stands disposed of.

No costs.

Urgent certified photocopy of this judgment, if applied for, be supplied to the parties or their advocates on record expeditiously on compliance of usual legal formalities.

(Amrita Sinha, J.)