

WP.ST. 192 of 2023

(The State of West Bengal & Ors. Vs. Kedar Nath Roy)

Ms. Chaitali Bhattacharya
Mr. Kartick Chandra Kapas
..... For the petitioners

Mr. T. Halder
Mr. Arunabha Som
..... For the respondent

Affidavit-of-service filed by the petitioners be kept on record.

The present writ petition has been preferred challenging an order dated 23rd August, 2022 passed by the learned Tribunal in the original application being OA 181 of 2017.

Shorn of unnecessary details the facts are that the applicant before the learned Tribunal, who is the respondent herein, namely, Kedar Nath Roy (in short, Kedar) was appointed to the post of Clerk-Typist in the Directorate of Health Services *vide* memo dated 25th May, 1981. Thereafter, by a memo dated 8th February, 1985, he was promoted to the post of UDC with effect from 1st April, 1984. About five years thereafter by a memo dated 9th March 1990 his promotion along with others was directed to be reckoned from 1st April, 1984. Kedar thereafter was allowed to superannuate on and from 30th November, 2011. Subsequent thereto, by a memo dated 5th February, 2013 Director of Health Services, West Bengal intimated that the memo dated 8th February,

1985 giving effect to promotion from 1st April, 1984 and the memo dated 9th March, 1990 giving effect to promotion from 1st April, 1981 *'is hereby omitted post facto as he was not eligible for such promotion either from 01.04.84 or from 01.04.81 and his name was included in such orders apparently due to inadvertence'*. A corrigendum memo was also issued on 6th September, 2013 along with a memo of the self-same date directing that Kedar *'is hereby promoted to the post of UD Clerk-cum-Typist in the pay Scale of Rs.4000-125-4250-150-5300-175-7050-200-8850/- w.e.f. 23.05.2000 and treated to be posted at Mathabhanga BPHC, Cooch Behar which was vacant at the material point of time'*. In view of the said orders, Kedar's pensionary benefits including the gratuity were also withheld. Aggrieved thereby, Kedar approached the learned Tribunal and upon contested hearing the same was disposed of directing the Director of Health Services, West Bengal to grant pension and other pensionary benefits to Kedar within 15 weeks from the date of compliance of formalities treating him to have been promoted to the post of Upper Division Clerk at Mathabhanga PHC, Cooch Behar with effect from 1st April, 1984.

Ms. Bhattacharya, learned advocate appearing for the petitioners herein/respondents in the original application submits that Kedar was admittedly confirmed in the post of LDC with effect from 3rd June, 1984, as would be explicit from the memo dated 8th February, 2006,

however, even before confirmation he was erroneously granted promotion to the post of UDC with effect from 1st April, 1981.

Drawing our attention to a memorandum no. 3741-F and a memo dated 31st March, 1984 issued by the Finance Department, Ms. Bhattacharya submits that Kedar is neither entitled to promotion from 1st April, 1981 nor from 1st April, 1984 inasmuch as there was no existing vacancy on the respective dates to accommodate Kedar to the promotional post. The State in view of the said memorandum had the authority to rectify an erroneous and inadvertent order of promotion after retirement since even after retirement, the employer employee relationship exists pertaining to finalization of the pensionary benefits.

She argues that knowing fully well that he has been given promotion from a date on which he was not confirmed, Kedar maintained an absolute silence. Even on the date of retirement, Kedar was aware of the fact that promotion from the post of LDC to UDC is subject to reorganization of vacancies and in the said sequence of facts it would be explicit that the suppression of the material facts is attributable to Kedar and he did not even serve the minimum tenure required for promotion to the post of UDC. In the said conspectus, the petitioners issued the order towards rectification of date of promotion *vide* memo dated 6th September, 2013.

Placing reliance upon the judgments delivered in the case of *State of Jharkhand Vs. Bhadey Munda & Anr.* reported in (2014) 10 SCC 398, *Premata Joshi Vs. Chief Secretary, State of Uttarakhand & Ors.* reported in (2013) 16 SCC 482, *Union of India & Ors. Vs. Bhanwar Lal Mundan* reported in (2013) 12 SCC 433, *Union Territory, Chandigarh & Ors. Vs. Gurcharan Singh & Anr.* reported in (2014) 13 SCC 598 and *Indian Council of Agricultural Research & Anr. Vs. T. K. Suryanarayan & Ors.*, reported in (1997) 6 SCC 766, Ms. Bhattacharya submits that the proposition of law that can be culled out from the said judgments is that promotion is not a fundamental right and that an employee has only a right to be considered for promotion. In respect of erroneous fixation of pay, authorities are within their domain to rectify the same and such a mistake does not confer any right upon the employee and he cannot base his claim for promotion contrary to rules. Considering the hardship that may be suffered by the retiring employee, Court may refuse recovery of any excess amount from the pensionary benefits, however, the pensionary benefits can only be released on the basis of appropriate pay fixation.

Per contra, Mr. Halder, learned advocate appearing for the respondent/Kedar submits that allegation that Kedar had not supplied the relevant documents and the service book to the authorities for finalization of pension, is absolutely unfounded inasmuch as from the memo dated 13th May, 2008, 21st April, 2008 and 27th January, 2009,

it would be explicit that Kedar's service book was with the employer.

Drawing our attention to the memorandum no. 3741-F, upon which reliance was placed by Ms. Bhattacharya, Mr. Halder submits that admittedly no show cause notice was issued and no opportunity of hearing was granted to Kedar prior to issuance of the impugned memo dated 5th February, 2013 and 6th September, 2013. Since the order dated 5th February, 2013 was not sustainable and suffered from violation of principles of natural justice, the consequential order dated 6th September, 2013 also cannot survive. In view thereof, the learned Tribunal rightly refused to accept the claim of the petitioners herein. Reliance has been placed upon a judgment delivered in the case of *Thomas Daniel versus State of Kerala & Others*, reported in 2022 LiveLaw (SC) 438.

Heard the learned advocates appearing for the respective parties and considered the materials on record.

Indisputably the respondent was appointed way back in the year 1981. He was initially promoted to the post of UDC with effect from 1st April, 1984 by an order dated 8th February 1985. About five years thereafter such promotional order was rectified and a fresh order of promotion was issued on 9th March, 1990 granting promotion to the petitioner with effect from 1st April, 1981. From the said date, till date of superannuation, no steps were taken by the respondents towards any further

rectification of the date of promotion. It is only after Kedar retired, the first memo was issued on 5th February, 2013 followed by a memo dated 6th September, 2013. In the said memoranda there is no reference to the documents upon which reliance has been placed before this Court by the State respondents. It also appears that the petitioners did not even file any reply to the original application. The fact that the memo dated 5th February, 2013 was issued without granting any opportunity of hearing to Kedar, stands established. The learned Tribunal had directed the petitioners to disburse the benefits treating him to have been promoted to the post of UDC with effect from 1st April, 1984.

It is well known that a decision is an authority for what it decides and not what can logically be deduced therefrom. Even a slight distinction in fact or an additional fact may make a lot of difference in decision making process. The judgment is a precedent for the issue of law that is raised and decided and not observations made in the facts of any particular case. There is no dispute as regards the proposition of law laid down in the judgments upon which reliance has been placed by the petitioners, however, they are distinguishable on facts.

In the instant case, no step whatsoever was taken by the authorities towards rectification of the date of promotion prior to Kedar's retirement. There is also no reference of the memo no. 3741-F and the memo dated

31st March, 1984 in the orders impugned dated 5th February, 2013 and 6th September, 2013. There had been no suppression of any fact on the part of Kedar. There is no allegation that Kedar violated any criterion of merit to avail promotion.

In the said conspectus, the learned Tribunal rightly observed that the order granting promotion to Kedar on 8th February, 1985 was recalled by an order dated 5th February, 2013, after 28 years and that too, without granting of opportunity of hearing.

The learned Tribunal, upon dealing with all the factual issues arrived at specific findings and we do not find any error, least to say any patent error of law in the order impugned.

In view thereof, we are not inclined to interfere with the order impugned and accordingly, we dismiss the writ petition.

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

All parties shall act on the server copies of this order duly downloaded from the official *website* of this Court.

(Partha Sarathi Chatterjee, J.) (Tapabrata Chakraborty, J.)