

IN THE HIGH COURT AT CALCUTTA
CONSTITUTIONAL WRIT JURISDICTION
(Original Side)

Present: THE HON'BLE JUSTICE RAJARSHI BHARADWAJ

W.P.O 1248 of 2022

Reserved on : 17.10.2023
Pronounced on: 12.03.2024

Prasenjit Ray & Ors.

...Petitioners

-Vs-

Kolkata Municipal Corporation & Ors.

...Respondents

Present:-

**Mr. R. Chatterjee,
Mr. Arijit Dey,**

... for the Petitioner

**Mr. Raghunath Chakraborty,
Ms. Amrita De**

**...for the respondent
Nos. 4 to 6 and
10 to 12**

**Mr. Bikash Ranjan Neogi,
Ms. Soma Chakraborty,
Ms. Ananya Neogi,
Mr. Guddu Singh**

**...for the respondent
Nos. 17, 18, 20,
21, 24, 32 & 34**

**Mr. Alok Kr. Ghosh,
Mr. Swapan Kr. Debnath**

...for the K.M.C.

Rajarshi Bharadwaj, J:

1. The instant writ petition has been preferred challenging the final gradation list of Assistant Engineers (civil) published by the Kolkata Municipal Corporation (hereinafter referred to as 'KMC') dated 5th July, 2021

wherein the petitioners were superseded by the promotees and directly recruited Assistant Engineers (civil) with effect from 6th July, 2018.

2. The facts in a nutshell are that the petitioners are Assistant Engineers (civil) (hereinafter referred to as “AE(C)”) of KMC herein respondent no.1 having promoted from the post of Sub-Assistant Engineers (civil) (hereinafter referred to as “SAE(C)”) under the 15% quota for graduates against the supernumerary post by an order dated 5th July, 2012, pursuant to the D.M.C (P) circular no. 19/IIIB/2012-13 dated 3rd July, 2012. The aforementioned circular established an avenue for advancement from the position of SAE(C) to AE(C) accessible to individuals possessing diplomas and degrees in engineering. This advancement requires 25 years of service for diploma holders and 13 years for degree holders, with the stipulation that in the latter scenario, a minimum of 05 years out of the 13 years of service must be completed as a degree holder.

3. The petitioners upon being promoted as AE(C) against the supernumerary post have been duly discharging their duties as AE(C). Moreover, by an order dated 25th January, 2019, the Hon’ble Division bench, upon revising the order of the Ld. Single Judge, upheld the legality and validity of the circular issued on July 3, 2012 and the promotion order dated July 5, 2012. It is worth noting that subsequent to the order issued on January 25, 2019, a directive was issued by the Chief Manager (Personnel) herein respondent no. 3 on December 30, 2019, with the explicit approval of the Corporation. This directive explicitly stated that the matter of re-establishing the seniority ranking among the thirty-two individuals within the Gradation List of AE(C) commencing from July 6, 2012, in accordance with their respective degree acquisition dates, has been deliberated upon and duly sanctioned. Thereafter, on 26th August, 2021, 19th March, 2021, 8th January, 2020 and 26th August, 2021 the petitioners was absorbed against the permanent vacancies in the post of AE(C) by orders issued from time to time respectively.

4. However, on 4th March, 2021 and 12th March, 2021 two provisional gradation lists for AE(C) were published by respondent no.1 wherein the petitioners were suppressed by nine direct recruits of the year 2012-13 herein respondent nos. 4-12 in the gradation list in breach of the provision of the circular no. 13 of 1984-85 dated 25th April, 1984 and was wrongfully suppressed by respondents nos. 13- 34 all of whom attained the degree after the petitioners.

5. Owing to such discrepancy, the petitioner raised objection to the provisional gradation list as published. However, the Board of Administrators issued a recommendation dated 29th June, 2021 without changing any of the objections raised by the petitioner. Shortly thereafter, the Board of Administrators, KMC published the final gradation list of AE (C) on 5th July, 2021 wherein none of the anomalies pointed out by the petitioners were removed, resulting in illegal supersession of the petitioners by their juniors. Therefore, aggrieved by such act of the respondent no.1 the present petition has been preferred.

6. The Learned Counsel representing the petitioner has advanced the following arguments:

- I.** The respondent authorities have acted wrongfully and illegally in placing nine directly recruited individuals from the year 2012-13 in the seniority list for AE(C) as of 5th July, 2021 superseding the petitioners. This inclusion contravenes the guidelines established in D.M.C (P)'s circular no. 13 of 1984-85 dated 23rd April, 1984 which stipulates that employees promoted in a specific year should be regarded as a collective senior group or in-bloc seniority, in comparison to the direct recruits of the same year.
- II.** The petitioners have been subjected to an unlawful and improper supersession in the aforementioned seniority lists for AE(C) by one Satada Chaki and other promotees being respondent nos. 13 to 34. Notably, all of these respondents acquired their degrees after the petitioners did. However, in accordance with relevant circulars, seniority

in the promotional position of Assistant Engineer (Civil) for engineers holding degrees is determined from the date of degree acquisition or the date it is officially recorded in the Service Book. It is noteworthy that respondent nos. 13 and 14 were initially promoted under the quota for diploma holders on January 1, 2012, but they were subsequently recognized as degree holders on July 28, 2018.

- III.** When persistent objections were repeatedly raised against the challenged gradation list, the Board of Administrators of KMC issued a recommendation on 29.06.2021, disregarding these objections. This recommendation contradicted the established legal precedent regarding the calculation of seniority, specifically in relation to the promotion of individuals to supernumerary posts and the determination of gradation. In this process, the petitioners were at risk of being bypassed by both nine directly recruited Assistant Engineers from the 2012-13 selection process (Respondents No. 4 to 12) and promotee Assistant Engineers (Respondents Nos. 13 to 34). Importantly, some of these promotee Assistant Engineers did not meet the eligibility criteria for promotion as of 05.07.2012, as they had not completed five years of service in the Sub Assistant Engineer role following their graduation.
- IV.** The purported justification provided by the Board of Administrators in their proposal and agenda item for not considering the seniority of the petitioners, in line with Circular no. 13 of 1984 and the relevant circulars on seniority calculation for the promotional post of Assistant Engineer (Civil), was that these promotions were made to supernumerary posts without adhering to reservation laws. Additionally, they argued that adopting the norm of calculating seniority based on the date of degree acquisition would significantly violate the prevailing seniority norms. Furthermore, the Board of Administrators claimed that the matter was sub judice before the Hon'ble Supreme Court. It's worth noting that the resolution of the Board of Administrators did not address whether Scheduled Caste candidates were being promoted

against the vacancies reserved for them in the 50-point roster. The Board of Administrators, therefore, has acted beyond its jurisdiction, has also purported to illegally rescind/cancel the approval of the Corporation dated 21.12.2019 on recommendation of the Mayor-in-Council dated 13.12.2019; pursuant where to the office order dated 30.12.2019 was issued.

- V.** The Hon'ble Supreme Court in **Chandan Banerjee & ors v. Krishna Prosad Ghosh & ors** reported in **2021 SCC OnLine SC 773** recorded that "It cannot be denied that Sub Assistant Engineers once promoted to the post of an Assistant Engineers in there supernumerary posts would be performing the task and functions of an Assistant Engineer. Thus, it is not merely a charge in the denigration of a Sub Assistant Engineer to an Assistant Engineer, but involves an increase in workload, supervisory functions and performance of the regular functions of an Assistant Engineer. Since that is the case, we do not find any reason why the rationale underlying the need for higher degree holders in the Assistant Engineer cadre through regular promotion would not be applicable in the case of supernumerary posts"
- VI.** It is an established legal principle, when an appointment or promotion is executed after a thorough evaluation of all qualified candidates and the appointee herein the petitioners consistently serves in the position and fulfills the associated responsibilities without interruption until their service is regularized in accordance with the rules governing substantive appointments, there exists no justification for excluding the provisional service when determining seniority.
- VII.** The Respondents have engaged in unlawful conduct by denying the petitioners the remuneration scale of Executive Engineers (Civil) that they rightfully qualified for starting on 6th July, 2018, as stipulated in the Career Advancement Scheme of KMC. Instead, they have, inappropriately, allocated the said remuneration scale to the petitioners

at differing dates during 2020-2021, thereby deviating from the established entitlement date.

7. Submissions advanced by respondent no.1 are:

- I.** Throughout the entirety of the year 2012, there were no instances of birth or availability of vacancies for the promotion of S.A.E. (Civil) personnel according to the stipulated quota under D M C (P) Circular No. 4 of 2001-02. Nonetheless, opportunities for direct recruitment to the position of A.E. (Civil) did exist.
- II.** In an endeavor to alleviate stagnation in the advancement of S.A.E. to the subsequent higher rank of A.E., the K.M.C. issued a directive on June 17, 2008, commonly referred to as the First Career Advancement Scheme. Respondents 4 to 12 were directly appointed as A.E. (Civil), while the petitioners, alongside respondents 13 to 34, who met the eligibility criteria regarding the required service duration in the capacity of S.A.E. (Civil), were appointed to the supernumerary position of A.E. (Civil) specifically created to address the stagnation issue.
- III.** The petitioners did not raise objections regarding their status as reflected in the Gradation List of S.A.E. (C). While it is a fact that the petitioners, despite their lower positions on the Gradation List of S.A.E. (C), obtained promotions to the supernumerary A.E. (Civil) post ahead of respondents 13 to 34 due to their earlier acquisition of engineering degrees, in accordance with the terms outlined in the circular of July 3, 2012. Since such promotions were not categorized as regular, the relative positions of the petitioners and other appointees remained unchanged in the Gradation List of S.A.E. (C).
- IV.** Concerning the matter of seniority in the Gradation List for A.E.(C), it is contended that there is no merit in the argument that both the petitioners and respondents 4-12 received promotions in the same year, 2012. The factual situation is different because respondents 4-12 were directly recruited to the post of A.E.(C) and their seniority position is to be determined based on their date of entry into the cadre. Conversely,

the petitioners were not initially part of the cadre due to their appointment to the supernumerary A.E(C) position in the same year. It has already been established that the petitioners were included in the Cadre AE (C) in the years 2020 and 2021.

V. It has also been noted that the supernumerary positions are personal to the eligible A.E's and cease to be applicable once they are promoted on a regular basis to A.E's positions or cease to be in service. In light of the findings and observations of the Hon'ble Supreme Court, the petitioners are not entitled to the requested remedies.

VI. The petitioners have additionally sought the annulment of the final Gradation List for A.E. (C) issued on July 5, 2021, which was issued erroneously due to an incorrect interpretation of the judgment of the Hon'ble Appellate Court and prior to the delivery of the judgment from the Hon'ble Supreme Court in the aforementioned case on September 21, 2021.

8. Learned Counsel on behalf of the respondents no. 4 to 6 and 10 to 12 have contended that:

- I.** The supernumerary post is not a formal promotion on the basis of vacancy as per gradation list, but instead a special arrangement for removal of stagnation. The benefit of supernumerary post of AE was given to all eligible SAE's. It is also clear from the said Circular that only financial benefit was granted to the said AE's holding supernumerary posts and no actual promotion was made against availability of permanent vacancies so that actual strength of AE cadre will not change.
- II.** The authorized position strength is granted and approval by the State Government and the KMC lacks the authority to unilaterally establish authorized positions. In the current situation, if there were any vacant positions, there would be no reason to establish additional positions. However, because there were no vacancies, the petitioner cannot assert

any advantage based on the 2019 circular that confirmed their status as an Assistant Engineer since 2012.

III. The allegation of supersession of the petitioners by direct recruits of the year 2012-13 herein the respondent nos. 4 to 12 in the gradation list dated 5th July, 2021 being a breach of the provisions of D.M.C. (P)'s Circular 13 of 1984 -85 dated 23rd April, 1984. It may be noted that the said Circular 13 of 1984-85 dated 23rd April, 1984 which provides that promotes of a particular year shall be treated as en-bloc seniors to direct recruits is in respect of normal promotion to sanctioned posts only and not applicable in case of supernumerary posts. The petitioners were absorbed in permanent/sanctioned post long after the respondents herein who were directly recruited in the post of Assistant Engineer in the year 2012-2013 and are therefore the petitioners are junior to your respondents herein.

9. The Learned Counsel representing respondents no. 17,18,20,21,24,32 and 34 (Private Respondents) have advanced the following arguments:

I. The petitioners have refrained from contesting the gradation list, which, following the judgment of the Hon'ble Supreme Court, has achieved a conclusive status. Consequently, they are now precluded from seeking an alteration in the seniority ranking of the petitioners within the gradation list. It has been argued that the petitioners, through both oral and written submissions, have attempted to dispute the gradation list, which is legally impermissible. As long as the gradation list that indicates the seniority positions of the petitioners and others, as mentioned in that list, remains valid and unchallenged by a higher authority, in line with the principles set out by the Supreme Court, the petitioners are not entitled to assert a superior seniority status over the other individuals. In the writ petition, the petitioners sought a writ of mandamus to annul the resolution passed by the Board of Administration of KMC in its meeting on 29th June, 2021, as well as the final gradation list for Assistant Engineer (Civil). It is respectfully

contended, however, that the resolution adopted by the Board of Administrators of KMC and the final gradation list for Assistant Engineer (Civil) are intricately linked to the gradation list issued on 23rd September, 2015 which had received approval from the Supreme Court.

II. It is further submitted that the petitioners kept their lien in the substantive post of SAE(C) till their regular absorption in the post of Assistant Engineer (Civil) during the year 2021-2022. They cannot claim seniority before their birth in the cadre of Assistant Engineer (Civil) working in the supernumerary post and having appointed on ad- hoc basis without following recruitment rules cannot claim seniority over the Assistant Engineers (Civil) who were regularly appointed during the years 2018-2020.

10. Upon a thorough examination of the documents presented to the Court and taking into account the arguments put forth by the parties, this Court holds the opinion that the petitioners, in their capacity as holders of the "supernumerary post," are not to be considered as part of ex cadre post. It is crucial to note that the term "supernumerary post" holds a specific legal significance within the context of service jurisprudence. A supernumerary post, as per government instructions, is categorized as a permanent position. Certain distinct features of a supernumerary post becomes apparent, such as:

“(i) It is always a permanent post.

(ii) It is created to accommodate the lien of an officer, who in the opinion of the authority competent to create such a post is entitled to hold a lien against a regular permanent post.

(iii) It is created due to non-availability of a regular permanent post. Such post is personal to the officer for whom it is created and stands abolished as soon as the officer for whom it was created vacates it.

(iv) It is a shadow post, inasmuch as no duties are attached to it and the officer concerned performs duties in some other vacant temporary or permanent post.”

Therefore, the petitioners cannot be treated to be outside the sanctioned strength of the post of AE(C) or other promotional posts, as otherwise the very creation of Supernumerary post would stand otiose and meaningless.

11. Moreover, the Supreme Court in **Chandan Banerjee & Ors (supra)** while deciding the veracity of the gradation list dated 5th July, 2012 reiterated that the promotional protocol established by KMC for supernumerary positions is devoid of irrationality, arbitrariness or detriment to diploma holder SAEs. In the realm of public policy and public employment, the legislature or its designated authority must possess adequate discretion to determine the calibre of individuals it aims to engage for diverse positions. In the absence of arbitrariness, the Courts to abstain from intervening in matters within the purview of policy.

12. The Supreme Court in **Direct Recruit Class II Engineering Officers' Association v. State of Maharashtra and others** reported in **1990 (2) SCC 715** held that if the appointment/promotion is made after a fair assessment of all eligible candidates and the appointee continues in the position without interruption until their service is regularized in accordance with established rules for regular substantive appointments, there is no justification to exclude their acting service when determining seniority. The Supreme Court in **D.R. Nim v. Union of India** reported in **(1967) 2 SCR 325** reiterated that when an officer has worked for a long period as in this case for nearly fifteen to twenty years in a post and had never been reverted, it cannot be held that the officer's continuous officiation was a mere temporary or local or stop-gap arrangement even though the order of appointment may state so. In such circumstances the entire period of officiation has to be counted for seniority. Any other view would be arbitrary and violative of Articles 14 and 16(1) of the Constitution because the temporary service in the post in question is not for a short period intended to meet some emergent or unforeseen circumstances. In the present circumstances the petitioners who have been holding the posts from a long time should be considered as senior to the promotee AE(C)

herein the private respondents who completed their graduation subsequent to that of the petitioners as well as to the direct recruits herein respondent nos. 4-6 and 10-12 who commenced their service in the years 2012-13.

13. Furthermore, it is imperative to note that a subset of the promoted Assistant Engineers failed to satisfy the eligibility criteria for advancement as of the pivotal date, 05.07.2012. This deficiency stemmed from their inability to fulfill the prerequisite of accumulating a minimum of five years of service in the capacity of Sub Assistant Engineers after their graduation. Despite this glaring non-compliance, these individuals were accorded a senior ranking in the gradation list, surpassing the rightful standing of the petitioners. Such incongruities cast doubt upon the fairness and impartiality of the promotion process, as the essence of meritocracy appears compromised in favour of arbitrary preference by the respondents herein.

14. For the foregoing reasons, the writ petition is allowed directing the respondent no.1 to recall the resolution adopted by the Board of Administrators of KMC at its meeting dated 29th June, 2021 and quash the final gradation list of the AE(C) of KMC dated 5th July, 2021. The respondent no. 1 is further directed to create a fresh gradation list considering the supernumerary posts created in the year 2012.

15. All pending applications are accordingly disposed of. However, there shall be no order as to costs.

16. Urgent Photostat certified copies of this judgment, if applied for, be supplied to the parties upon fulfillment of requisite formalities.

(RAJARSHI BHARADWAJ, J)

Kolkata

12.03.2024

PA (BS)