

(2011) 05 CAL CK 0018

Calcutta High Court

Case No: W.P.S.T. No. 379 of 2009

Sukanta Mukhopadhyaya and
Others

APPELLANT

Vs

The State of West Bengal and
Others

RESPONDENT

Date of Decision: May 17, 2011

Acts Referred:

- Constitution of India, 1950 - Article 16

Citation: (2011) 5 CHN 690

Hon'ble Judges: Mrinal Kanti Chaudhuri, J; Ashim Kumar Banerjee, J

Bench: Division Bench

Advocate: Arnendu Sundar Roy and Rama Ghosh Dostidar, for the Appellant; Amalendu Mitra and Gopal Basu, Chameli Mazumdar, for the Respondent

Judgement

Ashim Kumar Banerjee, J.

FACTS:

1. On or about January 16, 1990 the State appointed the Petitioner in the post of Sub-Assistant Engineer (Civil), in its Public Works (C.B. Department). On January 29, 1990 the Petitioner joined the post and was confirmed vide order dated February 17, 1999 with retrospective effect from January 28, 1993.
2. On December 20, 1999, State framed the Recruitment Rule for the post of Assistant Engineer (Civil) whereby the said post was to be filled up from amongst the Sub-Assistant Engineers having ten years continuous service in the feeder post as confirmed one. The candidate must pass Professional Examination conducted by Public Service Commission. In short, the selection was to be made on "merit-cum-seniority" basis. As per the Recruitment Rule, a select list was to be prepared and a panel maintained for the said purpose.

3. The Petitioner passed out the said Professional Examination on April 9, 2001 and, thus, became entitled to be considered for the post of Assistant Engineer as he fulfilled all the requisites specified under the Recruitment Rules. Petitioner applied for promotion. The Authority forwarded his name. On or about October 17, 2001 the Chief Engineer sent proposal to the Public Service Commission for filling up eight posts out of ten vacant posts. Accordingly, eight posts were filled up out of eleven proposed names. Serial No. 11, Sri Debabrata Kundu being last in the panel was promoted ignoring the Petitioner who was above Debabrata being placed in Serial No. 9. In 2002, his name was again sent. This time, the Petitioner could not get the opportunity as one post was blocked, according to him, wrongfully. Name of one Samar Narayan Dutta was proposed who was, later on, found not eligible. The Petitioner, however, was not appointed. Again, in July 2002, because of wrong inclusion of one Dibyendu Acharyya from another stream, the Petitioner could not get opportunity. In the mean time, one Rabindra Nath Dey, being senior to the Petitioner, passed out the Professional Examination in February 2002 after about one year of Petitioner's passing of the said examination, got appointment on the strength of his seniority in November 2002 when proposal was made to fill up three out of four vacant posts. Similarly, in February 2003 another senior Kanak Kumar Saha passed out the said Professional Examination and was considered. In this way, he was never considered for promotion favorably, although he passed in 2001 securing better merit than the subsequent promotes on the strength of their seniority.

LITIGATION:

4. Petitioner moved the West Bengal Administrative Tribunal on April 1, 2005. The Tribunal asked the State to explain the promotional position of the Petitioner. Executive Engineer, Birbhum vide letter dated January 5, 2009 observed that there were ten vacancies as on October 2001 and four vacancies in September 2002. Proposal was sent for filling up eight and three vacancies respectively. The Petitioner thus could not be considered. Tribunal asked production of records. The Respondents could not produce the records as those were not traceable and therein. The Tribunal heard the matter on January 5, 2009. Only two documents were produced coupled with written inability to produce the main file. The Tribunal finally dismissed the application vide judgment and order dated March 19, 2009. Being aggrieved, the Petitioner approached us by filing the present application on May 6, 2009 which we heard on the above mentioned dates.

JUDGMENT AND ORDER IMPUGNED:

5. The Tribunal observed that selection for recommendation was made on the basis of consideration of ACR. There was no examination or interview. If five years' average ACR rating was considered to be an indication of merit it was clear that names were not arranged in order of merit. The names were arranged in order of seniority. The Tribunal also found that the applicants secured more than the

required minimum marks in ACR on both the occasions, however, candidates senior to him getting lesser marks were preferred. The Tribunal held, the Commission followed "seniority-cum-merit". The Tribunal however, observed that in absence of any indication in the Recruitment Rule, Public Service Commission was free to determine their own methodology. The Tribunal rejected the Petitioner's contention that passing of the departmental Professional Examination was one of the relevant factors. The Tribunal held that such examination was held twice a year. Many of the candidates need multiple chances to clear such examination, however, no merit position was indicated in the result of such examination and passing of such examination did not confer any additional merit to the applicant. The Tribunal considered each and every selection process from 2001 onwards and, ultimately, held that Petitioner's grievance was without any basis. Tribunal rejected his application.

CONTENTION OF THE APPLICANT BEFORE US:

6. Mr. Arnendu Sundar Roy, learned Counsel appearing for the Petitioner contended as follows:

- a) While passing of the Professional Examination was a condition precedent the result of such examination should be considered as an additional merit.
- b) From the selection process it was clear that although there was no specific mention it was understood to be a selection on "merit-cum-seniority" and not "seniority-cum-merit" as erroneously held by the Tribunal.
- c) Even if it was held that seniority should be a relevant factor from the conduct of the Respondent, it was clear that they purposely blocked the chance of the Petitioner on more than one occasion, either by not proposing to fill up all the vacancies or by blocking one post by sending wrong candidates who were ultimately found to be not eligible.
- d) Once the procedure for recruitment was understood to have been followed through "merit-cum-seniority" the Authority must do it in the same manner as prescribed, or not at all. There must be a fair play in the selection process which was conspicuously absent in the instant case.
- e) Article 16 of the Constitution mandated equal opportunity to all eligible candidates. Petitioner did not get such opportunity although being eligible and thus suffered from violation of principle of natural justice.
- f) The entire process being arbitrary and/or vague, should be struck down and the wrong must be undone.

CASES CITED:

7. To support his contention, Mr. Roy cited the following decisions:

1. Things to be done in the manner prescribed, must be done in the same manner or not at all.

i) All India Reporter 1936 PC 253 (Nazir Ahmad v. King Emperor)

ii) All India Reporter 1952 Cal 255 (Subal Chandra Kundu v. The State of West Bengal and Ors.)

iii) All India Reporter 1967 SC 1427 (S.G. Jaisinghani v. Union of India and Ors.)

iv) 1983 SCC 382 (Y.V. Rangaiah and Others v. J. Sreenivasa Rao and Ors.)

v) [Amrit Lal Chum Vs. Devoprasad Dutta Roy,](#)

vi) All India Reporter 1999 SC 1281 (Babu Verghese and Ors. v. Bar Council of Kerala and Ors.)

vii) [Commissioner of Income Tax, Mumbai Vs. Anjum M.H. Ghaswala and Others,](#)

viii) [Bhavnagar University Vs. Palitana Sugar Mill Pvt. Ltd. and Others,](#)

2. Merit-cum-Seniority

i) All India Reporter 1998 SC 2289 (Sher Singh and Ors. v. Surinder Kumar and Ors.)

ii) All India Reporter 1998 SC 2565 (B.V. Sivaiah and Ors. v. K. Addanki Babu and Ors.)

iii) All India Reporter 2001 SC 2306 (The Central Council for Research in Ayurveda and Siddha v. Dr. K. Santhakumari)

iv) [Haryana State Electronics Development Corporation Ltd. and Others Vs. Seema Sharma and Others,](#)

v) [Rajendra Kumar Srivastava and Others Vs. Samyut Kshetriya Gramin Bank and Others,](#)

vi) 2010 1 SCC 345 (Rupa Rani Rakshit and Ors. V. Jharkhand Gramin Bank and Ors.)

vii) judgment and Order dated February 23, 2011 in SLP (Civil) No. 2659 of 2011 (Haryana State Warehousing Corporation v. Jagat Ram and Anr.)

3. Equal Treatment

i) All India Reporter 1999 SC 3471 (Ajit Singh and Ors. v. The State of Punjab and Ors.)

ii) 2001 1 CCC 172 (State of West Bengal and Anr. v. Chirantan Sarkar)

iii) All India Reporter 2007 SC 2102 (S.B. Bhattacharjee v. S.D. Majumdar and Ors.)

8. Mr. Roy also cited the following cases to support his proposition that there must be fair play in selection process and a selection violating the rule must be struck down, so was the case when manifestation of arbitrariness was apparent:

i) [Ayyasami Vs. State of Tamil Nadu,](#)

ii) All India Reporter 1997 SC 3775 (Mohan Lal and Others -VS- State of Himachal Pradesh and Others)

iii) All India Reporter 2001 SC 152 (Praveen Singh -VS- State of Punjab and Others)

CONTENTION OF THE RESPONDENT:

9. Ms. Chameli Mazumdar, learned Counsel appearing for the Respondent contended as follows:

a) As per the Recruitment Rule for the post of Assistant Engineer the Public Service Commission was to be consulted. In absence of any definite instance of irregularity, the State must not be blamed.

b) Forty per cent of the post of Assistant Engineers were to be filled up by promotion from amongst the persons working as Sub-Assistant Engineers in the feeder post. In absence of any specific guideline, the Public Service Commission was free to accept the mode of "seniority-cum-merit" which was a well-reasoned procedure.

c) "Merit-cum-seniority" was never the criteria for the post. Hence, the contention of the Petitioner that he was ignored having better merit, was not tenable.

d) The Public Service Commission considered the ACR of all candidates coming within the zone of consideration and then gave promotion without holding any examination or interview which was an established procedure followed so long.

e) There being no malafide or unfair deal, the promotional process was not available to judicial review.

f) Even if the Petitioner was entitled to challenge the selection process in absence of the successful candidates being made parties such challenge must fail and the Tribunal was right in dismissing the same.

10. Ms. Mazumdar distinguished authority cited by Mr. Roy and contended that in absence of any malafide or unfair deal the promotional process could not be challenged. She also contended that the Petitioner, although did not get the promotion successfully, was given two ACP benefits, first one in the tenth year and the second one in the sixteenth year.

CASES CITED BY THE RESPONDENT:

11. Ms. Mazumdar cited the following decisions:

i) All India Reporter 1998 SC 2565 (B.V. Sivaiah and Others -VS- K. Addanki Babu and Others)

ii) [Rajendra Kumar Srivastava and Others Vs. Samyut Kshetriya Gramin Bank and Others,](#)

CONTENTION OF THE PUBLIC SERVICE COMMISSION:

12. Mr. Amalendu Mitra, learned Counsel appearing for the Public Service Commission contended that Commission followed the well-settled procedure of "seniority-cum-merit" as there was no mandate of the Recruitment Rule to follow the "merit-cum-seniority" basis.

OUR VIEW:

13. Seven decisions were cited by Mr. Roy to support his proposition that the things prescribed to be done in a manner must be done in that manner or not at all. Such proposition is well settled through out the world and is regularly followed. We are, however, unable to find out any scope to apply the same. Mr. Roy was not able to show any specific mandate of the Recruitment Rule that the procedure must be followed on "merit-cum-seniority" basis. He relied on a guideline called as Statement of Promotional Policy dated August 5, 1981 issued by the Finance Department, Government of West Bengal. Clause 4 of the said policy was relied upon which is quoted below:

In the cause of State Services, including the State Civil Service, State Health Service and the State Engineer Service, the number of posts currently available in scales 18 and 19 are being increased with effect from April 1, 1981; these posts will be filled through promotion on the basis of merit-cum-seniority, from within the respective service and departmental cadres. The re-arrangement of posts within each cadre is listed in the index.

14. From the Clause quoted above, it would appear that such Clause would apply to scale No. 18 and 19 whereas the post of Assistant Engineer attracts much lower scale. Hence, the said Clause would not apply. There was no other Recruitment Rule and/or guideline relied upon by Mr. Roy which specifically provided that selection for the post of Assistant Engineer from in-house candidates would be made following "merit-cum-seniority" and not "seniority-cum-merit". Mr. Roy in this regard relied upon paragraph 7 and 8 of the affidavit-in-opposition filed by the State before the Tribunal wherein the deponent had stated that his case could not be considered according to "merit-cum-seniority" rules. If we read both the paragraphs conjointly we would find that such statement was made in the context of the fact that although he had successfully come out from the departmental examination he could not be considered because of his lower position in the seniority list. It was nowhere stated that the "merit-cum-seniority" rule would be followed. In any event, there was no definite procedure laid down specifically restricted the selection through "merit-cum-seniority", at least Mr. Roy was not able to show us. Hence, the decisions in the case of "merit-cum-seniority" would not be of any importance to us. In this regard however, we rely upon the latest decision of the Apex Court in the case of Rupa Rani Rakshit (Supra) which was relied on by Mr. Roy as well as Ms. Mazumdar. In the said decision the Apex Court observed that when a person was promoted to a

post without following the rules prescribed for such promotion such promotion could not be held to be a regular promotion. In the instant case, there was no specific recruitment rule suggesting a particular mode of selection. Hence, it could not be said that the subject promotion was without following the recruitment rule. In paragraph 8 and 9 of the said decision the Apex Court distinguished the difference between "merit-cum-seniority" and "seniority-cum-merit". In the said case the bank did not subject the eligible candidates to any process of assessment to ascertain any specified minimum merit. The bank proceeded to assess their inter se merit with reference to four criteria - period of service, educational qualification, performance and interview by allotting marks in each category. The Apex Court observed that such procedure could not be said to be "seniority-cum-merit" for promotion, it was different from the principle of "seniority" and the principle of "merit-cum-seniority". The Apex Court observed that where the promotion was based upon "seniority-cum-merit", promotion was not automatic with reference to seniority alone. Merit would also play a significant role. In the instant case the Public Service Commission considered the ACR as well as the seniority and gave promotion. Hence, we do not find any illegality being committed therewith.

15. On the issue of equal treatment Mr. Roy cited three decisions, two of the Apex Court and one of our Court. We do not find any discrimination being made in the instant case while conducting the promotional recruitment/promotional process.

16. We are of the view that Tribunal did not commit any illegality while approving the promotional process and rejecting the challenge thrown by the Petitioner to such process.

RESULT:

17. W.P.C.T.379 of 2009 is dismissed without, however, any order as to costs.

OBSERVATION BEYOND:

18. We would have ordinarily stopped here. However, we would be failing in our duty if we do not highlight one aspect that was possibly overlooked by the Tribunal.

19. The Petitioner was appointed in Sub-Assistant Engineer in 1990. He was confirmed in 1993. He was eligible for the next promotion in 2000 after completing ten years of service in the feeder post.

20. From the promotional process held in the year 2001 onwards it is clear that as and when any senior crossed the barrier of Professional Examination the chance of the Petitioner became bleak. By this process, each time, he was sidetracked although having better merit by virtue of the ACR. The Apex Court observed that promotion was not a matter of right. At the same time an employee is well within his right to advance in his service career. To take care of the stagnation in the original post, the Apex Court suggested ACP benefits which is now being followed by all State Governments, Central Government and other Public Sector Organizations. We,

however, feel that such benefit might not be sufficient in all cases. When a person is appointed in a post knowing fully well that there would be little chance in advancing his service career stagnation could be taken care of by making provision for ACP benefit. In the instant case, each post is having three or four scales as we are told. The post of Sub-assistant Engineer has more than one scale. Hence, the ACP benefit may not act as a proper substitute for promotion. The Petitioner, although, enjoyed two ACP benefits is still stagnating in the post of Sub-Assistant Engineer. On a query made by this Court, Mr. Roy, on instruction, informed us that till his retirement he would not be getting any promotion if the present system continued. Ms. Mazumdar did not contradict such submission of Mr. Roy. Hence, the stagnation remains through out the service career of an engineer who joined as Sub-Assistant Engineer in 1990 and would continue to be so for about thirty/thirty-five years and would be retiring from the same post. It would not only cause frustration to the concerned employee but also would demoralize him resulting loss of efficiency ultimately causing loss to the employer who would not be in a position to utilize him and his service properly. Time has come when State must find ways and means to ameliorate such misery. If necessary, they may refer the issue to the body of expert being the Pay Commission, which we hope, would suggest an efficient mode to take care of such situation.

DIRECTION:

21. We direct the Registrar General of this Court to send a copy of this judgment to the Chief Secretary, State of West Bengal for his perusal and necessary action. We hope, steps would be taken from his end.

22. Urgent Photostat copy will be given to the parties, if applied for.

Mrinal Kanti Chaudhuri, J.-

I agree.