(2014) 07 CAL CK 0039

Calcutta High Court

Case No: Writ Petition No. 15909 (W) of 2013

Chinmoy Dey		APPELLANT
	Vs	
The State of West Bengal		RESPONDENT

Date of Decision: July 23, 2014

Acts Referred:

- Constitution of India, 1950 - Article 166

Citation: (2014) 3 CALLT 682 : (2015) 5 CHN 535

Hon'ble Judges: Biswanath Somadder, J

Bench: Single Bench

Advocate: Chitta Ranjan Chakraborty and Sumanta Chakraborty, Advocate for the Appellant; Sankar Prasad Dalapati, Subhabrata Datta led by Ansar Ali Mondal, Arka Bhattacharya, Asit Baran Raut and Tuhin Subhra Raut, Advocate for the Respondent

Judgement

Biswanath Somadder, J.

The only issue that falls for consideration in the facts and circumstances of the instant case is whether the petitioner is entitled to be considered for being promoted on the basis of merit-cum-seniority or not. It is the admitted position that the petitioner had sat for a departmental examination for the post of Head Assistant of North 24-Parganas Zilla Parishad. The written examination was held on 14th and 15th of May, 2013. According to the petitioner, if the merit-cum-seniority criteria would have been followed, he would have come in the first position. However, the private respondent No. 6 was chosen on the basis of seniority-cum-merit, which, according to the petitioner, was not in accordance with the West Bengal Panchayat (Recruitment and Conditions of Appointment of Employees of Zilla Parishad) Rules, 1997. The learned advocate for the petitioner has referred to Chapter II of the said Rules and stated that in case of Head Assistant, the method of recruitment was by way of promotion from amongst the Upper Division Assistants and Accountants selected on the basis of merit-cum-seniority. This statutory Rule, according to the learned advocate for the petitioner, was flouted by the concerned respondent

authority while selecting the private respondent No. 6 for the post of Head Assistant upon her participation in the written examination held on 14th and 15th of May, 2013.

2. Learned advocate for the petitioner has relied on the following judgments of the Supreme Court in order to buttress his submission:

1. B.V. Sivaiah and Others etc. Vs. K. Addankl Babu and Others etc.,

2. Dr. Rajinder Singh Vs. The State of Punjab and Others, , and

3. Anil Ratan Sarkar and Others Vs. State of West Bengal and Others, .

3. On the other hand, the learned advocate appearing for the private respondent No. 6 has referred to a copy of a Government Order annexed to the affidavit-in-opposition filed on behalf of his client. He submitted that the said Government Order dated 3rd July, 2012, clearly states that the written examination shall be only for the purpose of screening of candidates and not for the purpose of elimination nor for determining their seniority in the promotional post. As such, his client has been rightly promoted to the post of Head Assistant.

4. Learned advocate appearing on behalf of the North 24-Parganas Zilla Parishad also referred to the same Government Order and submitted that it has been issued by the Governor under Article 166 of the Constitution of India and, as such, its sanctity cannot be compromised in any manner and it governs the field with regard to promotion to the post of Head Assistant in respect of North 24-Parganas Zilla Parishad. He also submitted that the petitioner has not challenged the said Government Order and so long as it remains in force, there cannot be any reason for promotion to the post of Head Assistant to be held on the basis of merit-cum-seniority.

5. Before answering the issue sought to be raised in the instant writ petition, it may be necessary to advert to the observations made by the Supreme Court in Dr. Rajinder Singh''s case (supra), which reads as follows:

"7. The settled position of law is that no Government order, Notification or Circular can be a substitute of the statutory rules framed with the authority of law. Following any other course would be disastrous inasmuch as it would deprive the security of tenure and right of equality conferred upon the civil servants under the constitutional scheme. It would be negating the so far accepted service jurisprudence. We are of the firm view that the High Court was not justified in observing that even without the amendment of the Rules, the Class II of the service can be treated as Class I only by way of notification. Following such a course in effect amounts to amending the rules by a Government order and ignoring the mandate of Art, 309 of the Constitution."

6. The above observation is germane in the facts of the instant case since the only point raised by the private respondent No. 6 as well as the North 24 - Parganas Zilla Parishad is the existence of the Government Order dated 3rd July, 2012. Relevant portion of the Government Order reads as follows:

"8) The written examination shall be only for the purpose of screening and not for the purpose of elimination nor for determining their seniority in the promotional post. The seniority of promoted candidates shall be determined solely on the basis of the position of the qualifying candidate in the existing gradation list of the feeder post."

7. If one compares the above-quoted clause of the Government Order with the relevant statutory Rule under Chapter II of the West Bengal Panchayat (Recruitment and Conditions of Appointment of Employees of Zilla Parishad) Rules, 1997, with regard to method of recruitment, wherein it has been clearly stated that in respect of Head Assistant, the method of recruitment would be by way of promotion from amongst the Upper Division Assistants and Accountants selected on the basis of merit-cum-seniority, it would be clear that the Government Order - to the extent which has been quoted hereinabove - is wholly contradictory and contrary to the statutory rule as applicable for promotion to the post of Head Assistant. As such, the observations made by the Supreme Court in Dr. Rajinder Singh''s case (supra), as quoted hereinbefore, are squarely applicable in the facts of the instant case and there is no requirement of the petitioner to challenge the Government Order dated 3rd July, 2012, separately.

8. In Anil Ratan Sarkar''s case (supra), the Supreme Court, inter alia, held to the effect that any administrative instruction/circular/order cannot infiltrate into an arena covered by judicial orders.

9. The concept of consideration for promotion on the basis of seniority-cum-merit being distinct from merit-cum-seniority has been discussed in various judgments including the judgment of the Supreme Court rendered in B.V. Siviah''s case (supra), wherein it has been held, inter alia, to the effect that the principle of "merit-cum-seniority" lays greater emphasis on merit and ability and seniority plays a less'' significant role. Seniority is to be given weight only when merit and ability are approximately equal. On the other hand, as between the two principles of seniority and merit, the criteria of "seniority-cum-merit" lays greater emphasis on seniority.

10. In the facts of the instant case, it is noticed that on the basis of the written examination held on 14th and 15th of May, 2013, the petitioner secured the highest score. Yet the private respondent No. 6 was chosen over the petitioner by the concerned authority by referring to the Government Order dated 3rd July, 2012, which, as discussed hereinbefore, is wholly contradictory and contrary to the statutory rule governing the field.

11. The Government Order dated 3rd July, 2012, which stood as embargo and/or fetter for the petitioner from being promoted to the post of Head Assistant, therefore, is required to be ignored while the petitioner''s case for promotion on the basis of his performance in the written examination held on 14th and 15th of May, 2013, is considered afresh by the concerned authority of the North 24-Parganas Zilla Parishad.

12. The writ petition is, thus, disposed of with a direction upon the Executive Officer of the North 24-Parganas Zilla Parishad to consider the petitioner''s case for promotion afresh on the basis of merit-cum-seniority, strictly in terms of Chapter II of the West Bengal Panchayat (Recruitment and Conditions of Appointment of Employees of Zilla Parishad) Rules, 1997, based on his performance in the written examination held on 14th and 15th of May, 2013 and on the basis of the observations made hereinabove.

13. However, taking into consideration that the private respondent No. 6 has already given promotion - rightly or wrongly - and she is attaining superannuation at the end of this month, the entire exercise, in terms of this order, shall be conducted by the Executive Officer of the North 24-Parganas Zilla Parishad immediately after the retirement of the private respondent No. 6, so that her service is not affected in view of the observations made in this order. The Executive Officer, North 24-Parganas Zilla Parishad, upon coming to a decision in the matter, shall also give the petitioner benefit of notional seniority and such other benefits which he may be entitled to, in accordance with law. The writ petition stands disposed of accordingly.

Urgent photostat certified copy of this order, if applied for, be given to the learned advocates for the parties.