

(2002) 12 CAL CK 0015
In the Calcutta High Court
Case No : W.P.S.T. No. 1044 of 2002

Biswanath Chakraborty and Others

APPELLANT

Vs

State of West Bengal and Others

RESPONDENT

Date of Decision : 11-12-2002

Acts Referred:

Constitution of India, 1950 — Article 14, 16, 21, 226

West Bengal Services (Appointment, Probation and Confirmation) Rules, 1979 — Rule 5

Citation : (2003) 2 CALLT 129

Hon'ble Judges : Sailendra Prasad Talukdar, J;Altamas Kabir, J

Bench : Division Bench

Advocate : Bikash Ranjan Bhattacharjee and Nandini Mitra, for the Appellant;A.C. Kar and Jaydeep Kar, for the Respondent

Final Decision : Allowed

Judgement

This Judgment has been overruled by : Sankar Deb Acharya and Others Vs. Biswanath Chakraborty and Others, (2006) 9 JT 370 : (2006) 10 SCALE 528 : (2007) 1 SCC 309 : (2007) 1 SCC(L&S) 192 : (2006) 7 SCR 651 Supp

A. Kabir, J.—The writ petitioners herein challenged Government Order No. 250-F(LAW)/IN-186/96 dated 28th March, 2001 issued purportedly in compliance with the order dated 5th May, 2000, passed by this Court in W.P.S.T. No. 8 of 1998 before the West Bengal Administrative Tribunal in case No. O.A.-636/2001. By its judgment and order dated 10th April, 2002, the learned Tribunal disposed of the petitioners said application by setting aside the impugned order and remanding the matter to the concerned authority for a fresh decision in accordance with the Rules and the judgments of this Court referred to in its order and in particular the Judgment and order passed in W.P.S.T. No. 8 of 1998 and the order of the tribunal in O.A. No. 759 of 1996, after giving an opportunity of hearing to the representatives of the parties and/or the individuals, as the case may be.

2. Aggrieved by the aforesaid order of the learned tribunal, the petitioners have

filed the instant writ application, inter alia, for setting aside the portion of the judgment remanding the matter to the authorities and also for a direction upon the respondents to declare the petitioners who had completed two years of service in the West Bengal Food and Supplies Services before 1st April, 1981 as confirmed in terms of Rule 5(b) of the West Bengal Services (Appointment, Probation and Confirmation Rules), 1971, and to pay the writ petitioners all service benefits which had been withheld on the ground of non-confirmation.

3. Briefly stated, the petitioners' case is that they were appointed in the cadre of West Bengal Food and Supplies Service on various dates from on or about the year 1973, through the Public Service Commission. According to the writ petitioners, during the period from 1966, when the aforesaid service was constituted till September, 1991, the provisions of the Training and Examination Rules, 1953, were not made applicable to the officers of the said cadre. Pursuant to a Memo dated 31st July, 1978, yearly increments were never withheld to the petitioners and the system of departmental examination was not implemented so far as the said cadre was concerned and the concerned authority had relaxed the application of the said Rules. It was the further case of the petitioners that they were not appointed on probation and as a result the provisions of the said Training and Examination Rules, 1953, relating to passing the departmental examination as a pre-condition for confirmation was relaxed in their case.

4. In 1981, the pay of State Government employees, including those of the petitioners, was revised and consequent upon the introduction of the promotion policy under the West Bengal Services (Revision of Pay and Allowance) Rules, 1981, the distribution of scales for the officers of the West Bengal Food and Supplies Services was shown as follows:

Scale No. 17..... 150 officers.

Scale No. 18..... 61 officers.

Scale No. 19..... 9 officers.

5. Pursuant to a Notification dated 12th October, 1983, the concerned authority stipulated a time bar for obtaining the said higher scale and in keeping therewith officers of the basic cadre would have to complete at least six years' or service to achieve scale No. 18 and thirteen years' of service to achieve scale No. 19. According to the petitioners, although, no post in the Food and Supplies Department was declared to be a promotional post, because of such bar and/or limitation, though there were vacancies in scale Nos. 18 and 19 with effect from 1st April, 1981, the petitioners were deprived of the said benefits and were given the same only after completion of six years' and thirteen years' service, respectively, till that period.

6. Aggrieved by the said Notification dated 12th October, 1983, the petitioners challenged the same in this Court in Matter No. 590 of 1998. The learned single Judge by his judgment and order dated 13th November, 1990, quashed the said

Notification with a further direction to the respondent to allow the petitioners the scale Nos. 18 and 19 with effect from 1st April, 1981, on the basis of their respective merit-cum-seniority within the specified time.

7. Inasmuch as, the direction given by the learned single Judge was not being complied with by the authority concerned, the petitioners filed a contempt application, being Matter No. 3266 of 1999, in which the contemnors entered appearance and gave an undertaking to the Court that they would comply with the said directions. Consequent upon such undertaking, the concerned authority issued a Memorandum dated 11th September, 1991, giving the petitioners promotion as directed by this Court. Thereafter, a Circular was issued by the State Government on 19th September, 1991, indicating that monetary benefits would be given to the petitioners after they passed the departmental examination and further indicating that the petitioners who had not passed their departmental examination would not be given case benefit and instead their pay would be fixed notionally from the date of their eligibility.

8. In the meantime, the respondents preferred an appeal against the judgment and order passed by the learned single Judge and the same was dismissed by the Division Bench on 19th November, 1991.

9. In view of the Circular dated 9th September, 1991, the petitioners, moved another contempt application, being Matter No. 472 of 1992, which, according to the petitioners is still pending.

10. It is also the case of the petitioners that in or about the year 1993 one Nalini Kanta Bera and several others filed a writ petitioner in this Court, inter alia, challenging the mode of fixation of pay by the said respondents in the higher scale of pay. In the said writ petition it was contended that the higher pay could not be granted to an officer who was not confirmed on that date. Since the prayer for interim order of injunction in the said application was refused, the said writ petitioners filed an appeal, being F.M.A.T. No. 589 of 1993, which was disposed of on 27th November, 1995, with a direction upon the said respondents to consider the prayer of the appellants in accordance with law. Pursuant to the direction given in the appeal the concerned authority disposed of the representation made by the said writ petitioners by negating their claim by an order dated 16th February, 1996. Some of the said writ petitioners, who were impleaded as respondents before the learned tribunal, filed an application, being O.A. No. 759 of 1996, before the learned tribunal challenging the order passed by the concerned authority negating their for seniority. The said application was disposed of by the learned tribunal with a direction upon the concerned respondents to consider the petitioners' case afresh.

11. Being aggrieved by the said order, the said petitioners filed a writ petition, being W.P. No. 8 of 1998, before this Court and the same was disposed of by the Division Bench with the following observation:-

"Having heard the learned counsel, we are of the opinion that keeping in view

the fact that in the instant case confirmation is not to be granted automatically or being not a fortuitous circumstances, as a result whereof the seniority of the respective employees would be normally determined from the date of their initial appointment, this aspect of the matter may also be considered by the authorities concerned afresh. The said consideration will be made at an early date and preferably within a period of eight weeks from the date of communication of the order. The order of the learned tribunal is modified to the aforesaid extent and the writ petition is disposed of."

12. Pursuant to the said order of the Division Bench, the respondents issued a fresh order, being No. 250-F(LAW)/IN-186/96-8 dated 28th March, 2001, purporting to give an impression that the order passed by the learned single Judge on 13th February, 1990, in Matter No. 590 of 1988, had been appealed against by the private respondents in F.M.A.T. No. 589 of 1993 and that the same had been modified by the Division Bench.

13. As mentioned hereinbefore, it is the said Government order which was the subject matter of challenge before the learned tribunal.

14. The learned tribunal took note of the case of the petitioners that they had never been appointed on probation and that in the impugned order before the learned tribunal it had been specifically stated that the gradation list bears no infirmity and the seniority had been rightly determined. The learned tribunal also took note of the petitioners' claim that they had never been appointed on probation and that such claim had been duly endorsed by the concerned authorities by Memo dated 31st July, 1978, wherein it was specifically stated that none of the direct recruits were working in the department as probationary officers and that in the case of the petitioners the Training and Examination Rules or the West Bengal Services (Appointment, Probation and Confirmation) Rules, 1979, had not been implemented at least till the benefit of scale Nos. 18 and 19 was extended to them in terms of the order passed by the learned single Judge in Matter No. 590 of 1988, or till 1995, when the Services (Training and Examination) Rules were amended vide Notification dated 10th January, 1995. The learned tribunal observed that the aforesaid controversies had not been decided by the impugned Memo and it was also apparent from the order itself that the writ petitioners herein had not been heard in the matter since they were not parties therein. Relying on the principle that if a benefit is given to a person pursuant to orders passed by the Court, such benefit could not be taken away by the authorities without giving the beneficiaries an opportunity of hearing, the learned tribunal while setting aside the impugned order and the annexures thereto, remanded the matter to the concerned authority for a fresh decision in accordance with the Rules and judgments of this Court referred to and in particular the judgment and order passed in W.P.S.T. 8 of 1998, and the order of the tribunal in O.A. No. 759 of 1996.

15. Appearing in support of the writ application, Mr. Bikash Ranjan Bhattacharjee, learned advocate, submitted that having accepted the case of the

writ petitioners that the order dated 28th March, 2001, was not maintainable and had to be quashed, the learned tribunal ought not to have remanded the matter to the concerned authorities for a fresh decision since the judgment of the learned single Judge in Matter No. 590 of 1988 had reached finality and had not been altered. The orders passed by the Division Bench subsequently did not also interfere with the promotional benefits already granted but only directed the respondents concerned to reconsider the question of seniority. Mr. Bhattacharjee submitted that the orders passed in the two appeals referred to hereinabove did not empower the respondents to re-open the matter of seniority and to unsettle the settled position.

16. Referring to the relevant provisions of the Services (Training and Examination) Rules, West Bengal, Mr. Bhattacharjee submitted that Rule 2 of the said Rules provides that where it is intended that appointment to a service or post shall normally be on probation, the period of probation shall be prescribed in the Rule regulating the pay or service or post. Mr. Bhattacharjee submitted that when the petitioners were initially appointed there was no such stipulation regarding probation. As observed by the learned tribunal, the claim of the petitioners that they had never been appointed on probation had been duly endorsed by the concerned authorities in Memo dated 31st July, 1978, wherein it was specifically stated that none of the direct recruits were working in the department as probationary officers.

17. Mr. Bhattacharjee submitted that if it had been the intention of the respondent authorities that the petitioners are to be appointed on probation, the same would have been indicated in their appointment letters.

18. Referring to the Constitution Bench judgment of the Hon"ble Supreme Court in the case of The Direct Recruit Class-II Engineering Officers" Association and others Vs. State of Maharashtra and others, , Mr. Bhattacharjee submitted that it had been observed therein that once an incumbent is appointed to a post according to rules, his seniority is to be counted from the date of his appointment and not according to the date of his confirmation.

19. Mr. Bhattacharjee submitted that it was settled law that seniority depended not on confirmation and would have to be counted from the date of appointment.

20. Mr. Bhattacharjee then urged that probation, even if intended to be a condition at the time of initial appointment, could not be allowed to continue indefinitely and once the incumbent had been allowed to continue in the post for some time, it was no longer permissible to take advantage of the fact that no confirmation order had been passed and to treat the said incumbent as having continued on probation.

21. In support of his said submission Mr. Bhattacharjee referred to another Constitution Bench decision of the Hon"ble Supreme Court in State of Punjab Vs. Dharam Singh, , wherein while considering the provisions of the Punjab Educational Services (Provincials Cadre) Class-III Rules 61, the Hon"ble Supreme

Court observed that when there was a specific rule preventing extension of probationary period beyond three years and the incumbent was allowed to continue after the expiry of three years, even if no express order of confirmation had been passed, he must be deemed to have been confirmed in that post.

22. Mr. Bhattacharjee then submitted that even if a person was promoted in violation of rules and the promotee was allowed to continue in the promoted post for a long period, he should be treated as a person regularly appointed to that post and the entire period of acting in the promoted post should be counted for the purpose of seniority.

23. In this regard, Mr. Bhattacharjee referred to a decision of the Hon'ble Supreme Court in the case of Narender Chadha and Others Vs. Union of India and Others, , where the said principle has been considered and it has been held that where a person is allowed to function in a higher post for 15 to 20 years with due deliberation it would be certainly unjust to hold that such person had no sort of claim to such post and he should be reverted unceremoniously and be treated as a person not belonging to the service at all.

24. Mr. Bhattacharjee contended that in any view of the matter, since the petitioners had been appointed from as far back as from 1973 onwards, the seniority now enjoyed by them and the benefit flowing therefrom could not be taken away and the learned tribunal while quashing the impugned Government Order dated 28th March, 2001, ought not to have remanded the matter to the authorities for a fresh decision having regard to the judgment delivered in Matter No. 590 of 1988 which had attained finality up to the appeal stage.

25. Opposing the writ application, Mr. A.C. Kar urged that the petitioners were under a misconception that neither the Services (Training and Examination) Rules, West Bengal, 1953 nor, the West Bengal Services (Appointment, Probation and Confirmation) Rules, 1979, applied to them. Mr. Kar urged that the 1979 Rules came into force with effect from 1st June, 1979, and as stated in Rule 2 thereof, the same would apply in all cases of appointment or entry into Government service and subject to the provisions of Sub-rule (3) would also apply to all persons who were whole-time employees of the Government. Referring to Rule 5 of the said Rules, Mr. Kar pointed out that Sub-rule 1(b) thereof provides as follows:

"5.1 A Government employee-

(a)

(b) shall be confirmed and made permanent on satisfactory completion of the period of probation. Where passing of any departmental examination is essential before confirmation, the provision of Chapter-1 of the Service (Training and Examination) Rules, West Bengal, shall have to be complied with."

26. Mr. Kar also pointed out that the Rules also provide that where a candidate is required to pass a departmental examination before confirmation, no relaxation

should be made in such circumstances.

27. Mr. Kar submitted that there were several other persons similarly circumstanced as the writ petitioners who had passed the departmental examination and had been confirmed in service and that some of the writ petitioners had also appeared for the departmental examination and their services had been confirmed after they passed the same. Mr. Kar urged that the petitioners were fully aware that the Services (Training and Examination) Rules, West Bengal, applied in their case and there could be no relaxation of the said Rules for the purpose of confirmation and promotion.

28. Mr. Kar then contended that the order of the learned single Judge in Matter No. 590 of 1988 must be deemed to have merged with the subsequent order passed by the Division Bench in W.P.S.T. No. 8 of 1998, and he respondents would be required to act in terms of the latter judgment and the directions contained therein.

29. In support of his submission, Mr. Kar referred to the Division Bench decision of the Hon''ble Supreme Court in the case of Kunhayammed and Others Vs. State of Kerala and Another, , wherein it was sought to be explained that the logic under the doctrine of merger is that there cannot be more than one decree or operative order governing the same subject matter at a given point of time.

30. Mr. Kar then referred to another decision of the Hon''ble Supreme Court in the case of Bhagwan Shukla Vs. Union of India and others, , wherein the Hon''ble Supreme Court set aside an order passed by the authorities reducing the petitioner's basic pay with retrospective effect without giving him an opportunity of being heard, upon holding that there had been flagrant violation of the principles of natural justice.

31. Mr. Kar submitted that in order to rectify the injustice caused to the petitioners on account of alteration of the seniority list without giving them an opportunity of hearing, the learned tribunal had directed the respondents to reconsider the matter afresh upon giving the petitioners a proper opportunity of hearing and after taking into consideration all the judgments and the relevant rules.

32. There is no denying the fact that apparently there are two divergent orders passed by this Court which have been acted upon within the scope of the directions contained therein. There is also no denying the fact that the beneficiaries of the judgment in Matter No. 590 of 1988 were not parties either in F.M.A.T. No. 589 of 1993 or W.P.S.T. No. 8 of 1998 and the orders made therein were passed in their absence. It is also not denied that from the dates of their initial appointment from 1973 onwards, the writ petitioners were allowed to continue in their posts till issuance of the Notification by the concerned authority on 12th October, 1983, when a time-bar was introduced for obtaining the higher scale Nos. 18 and 19 which were introduced pursuant to the West Bengal Services (Revision of Pay and Allowances) Rules, 1981.

33. Although, on behalf of the respondents it had been contended that seniority would have to be counted from the date of confirmation in service and that such confirmation was compulsory in view of the provisions of Rule 5(1)(b) of the West Bengal Services (Appointment, Probation and Confirmation) Rules, 1979, we are afraid that the law is otherwise. It is well-settled that seniority counts back to the date of initial appointment upon confirmation. In the instant case the question which we have to consider is whether confirmation was at all necessary as far as the writ petitioners are concerned. The writ petitioners were allowed to continue in their respective posts without confirmation and without any stipulation regarding probation as to their appointment being on a probationary basis. In fact, there is a Memo on record dated 31st July, 1978, where it has been specifically stated by the concerned authorities that none of the direct recruits were working in the department as probationary officers. Furthermore, they had successfully established their claim to scale Nos. 18 and 19 before this Court in Matter No. 590 of 1988, and the order of the learned single Judge was confirmed in appeal. Even if by the subsequent order in W.P.S.T. No. 8 of 1998, a direction was given to consider the matter afresh, the said direction, in our view, could not have been intended to undo or unsettle the effects of the judgment and order passed in Matter No. 590 of 1988 which apparently was not before the Division Bench.

34. In our view, the question of confirmation of the services of the writ petitioners having been settled in Matter No. 590 of 1988 upto the appeal stage, the same cannot be taken into consideration while computing their seniority with others and the seniority list as published on 11th September, 1991, should not be disturbed. The petitioners herein, in our view, should be given the benefits accruing to them in terms of the order passed in Matter No. 590 of 1988 on 30th November, 1990.

35. In view of the what has been discussed hereinabove, we are of the view that the Government order dated 28th March, 2001, was not in conformity either with the directions given in Matter No. 590 of 1988 or in the order dated 5th May, 2000 passed in W.P.S.T. No. 8 of 1998. The question involved in Matter No. 590 of 1988 had not been considered in W.P.S.T. No. 8 of 1998, and we are unable to convince ourselves that the order passed by this Court on 5th May, 2000, in W.P.S.T. No. 8 of 1998 could be used to unsettle the decision in Matter No. 590 of 1988 which had attained finality upto the appeal stage.

36. From the materials on record it is evident that the writ petitioners were appointed in service prior to the promulgation of the West Bengal Services (Appointment, Probation and Confirmation) Rules, 1979. Nothing has been shown to us that the writ petitioners had been appointed on a probationary basis subject to confirmation. On the other hand, the writ petitioners were allowed to continue in service from 1973 onwards without any stipulation regarding the applicability of the 1979 Rules to their services, which position was confirmed by the judgment delivered in Matter No. 590 of 1988 which was not considered in

W.P.S.T. No. 8 of 1998.

37. We agree with the learned tribunal that the impugned order dated 28th March, 2001, was required to be set aside, but we are unable to agree with subsequent direction remanding the matter to the authorities concerned for a fresh decision.

38. We accordingly, allow the writ application and while maintaining the first part of the order passed by the learned tribunal setting aside the Government order dated 28th March, 2001, together with all its annexures, we set aside the second part of the order directing the respondents to consider the matter afresh and we direct that the case of the parties be considered in terms of the judgments and order passed on 30th November, 1990, in Matter No. 590 of 1988. We further direct the concerned respondents to act on the basis of the Memorandum issued on 11th September, 1991.

There will be no order as to costs.

If an urgent xerox certified copy of this judgment is applied for, the same is to be supplied to the applicant expeditiously, subject to compliance with all the required formalities.

S.P. Talukdar, J.

I agree.