

(2009) 08 CAL CK 0038

In the Calcutta High Court

Case No : Writ Petition No. 28805 (W) of 1997

Buddhadev Santra and Another

APPELLANT

Vs

West Bengal State Minor Irrigation Corporation Limited and
Another

RESPONDENT

Date of Decision : 12-08-2009

Acts Referred:

Citation : (2009) 08 CAL CK 0038

Hon'ble Judges : Dipankar Datta, J

Bench : Single Bench

Advocate : S.C. Bose and P. Bose, for the Appellant; S.P. Ghosh and Jolly Chakraborty, for the Respondent

Final Decision : Allowed

Judgement

Dipankar Datta, J.—The short question that arises for determination on this petition is whether the respondents were justified in denying the petitioners the benefits of Career Advancement Scheme.

2. The petitioners are employees of West Bengal State Minor Irrigation Corporation Limited, an undertaking of the State Government (hereafter the Corporation). It is under the administrative control of the Department of Water Investigation and Development.

3. The petitioners are graduate engineers (civil). In 1972 they were engaged as Junior Engineers in Rural Engineering Services Scheme under the then Agriculture and Community Department Development of the State Government. The scheme having been wound up, both of them were appointed as Sub-Assistant Engineer (Civil) in the Corporation, in the scale of pay of Rs. 300-600/ with a higher initial pay of Rs. 330/-. Such appointments were purely on temporary and ad-hoc basis for a period of six months with effect from 1.2.1975, terminable with one month notice from either side.

4. It is the claim of the petitioners that while they were working on ad-hoc basis,

along with other incumbents holding the post of Sub-Assistant Engineer, they were called upon to appear on 10.5.1977 before a Selection Committee in connection with interview for recruitment to the post of Sub-Divisional Engineer in the Corporation. It is their further claim that along with them outsider candidates intending to be directly recruited to the post of Sub-Divisional Engineer also appeared before the Selection Committee for interview. A panel was thereafter prepared by the Selection Committee wherein the two petitioners secured the first and second positions respectively.

5. In conformity with the panel position, the first petitioner Buddhadev Santra was appointed as Sub-Divisional Engineer with effect from 1.7.1977 by an order dated 30.6.1977. The second petitioner Kalyan Kishore Biswas was also offered appointment as Sub-Divisional Engineer with effect from 1.5.1978 by an order dated 24.6.1978. They duly accepted the offers of appointment and joined the respective posts. It is noted that in the offers of appointment it was observed that the petitioners were being appointed to the posts on promotion. By orders dated 30.3.1987 and 14.9.1994, Buddhadev and Kalyan Kishore respectively were confirmed in service with effect from 1.7.1978 and 1.5.1979 respectively.

6. Subsequently, by an order dated 25.8.1994 issued by the Managing Director of the Corporation, Buddhadev was appointed on promotion to the post of Divisional Engineer in the scale of pay of Rs. 3000-4750/- with effect from the date of taking over charge.

7. While Buddhadev and Kalyan Kishore were functioning as Sub-Divisional Engineer, the Government of West Bengal in order to improve the standard of administration and career prospects of its employees at all levels introduced a scheme known as the Career Advancement Scheme (hereafter the CAS) in the year 1990 and duly implemented it. The CAS was intended to ameliorate the grievance of those employees who had been stagnating in a particular post for years without any avenue for promotion. Those stagnating incumbents, in terms of the CAS, upon completion of a prescribed period of service with a particular scale of pay were entitled to move to the next higher scale of pay.

8. So far as the Corporation is concerned, it is claimed by the petitioners that CAS was introduced and implemented on the same lines as the government employees. Since Buddhadev had completed 17 years of service as Sub-Divisional Engineer from 1.7.1977 to 24.8.1994 and Kalyan Kishore had completed almost 20 years of service as Sub-Divisional Engineer from 1.5.1978 till 1997, they claimed that they were entitled to move to the next higher scale of pay. Buddhadev, receiving pay in scale No. 18 (Rs. 3000-4750/-) claimed scale No. 19 (Rs. 3700-5700/-) while Kalyan Kishore, who was drawing pay in scale No. 17 (Rs. 2200-4000) claimed scale No. 18 (Rs. 3000-4750/-) for having rendered prescribed requisite service.

9. Buddhadev had represented before the Corporation for granting him benefit under the CAS.

10. Kalyan Kishore had also submitted a representation dated 6.2.1996 contending, inter alia, that he is entitled to benefits under the CAS. However, his representation was never considered.

11. Both of them pointed out that a mistake had crept in the orders appointing them to the posts of Sub-Divisional Engineer to the extent it described the appointments as on promotion. Since their appointment in the posts of Sub-Divisional Engineer were fresh appointments, they ought to be considered for grant of career advancement benefits.

12. It has, however, been averred in the petition that the claim of Buddhadev was considered by the Board of Directors of the Corporation in its 93rd meeting held on 23.8.1996 when it was resolved that since the matter is very old, the same need not be reopened.

13. Feeling aggrieved by the refusal on the part of the Corporation to extend career advancement benefits to the petitioners, they approached this Court with the present petition claiming the following relief:

a) A Writ in the nature of Mandamus commanding the respondents to cancel, rescind or set aside its decisions taken in its 93rd meeting held on 23-8-1996 and to extend the benefit available under the Career Advancement Scheme to the petitioners in accordance with law;

b) A writ in the nature of Certiorari directing the Respondents to send to this Hon'ble High Court entire records relating to its resolution/decision taken in the 93rd meeting held on 23-8-1996 including the resolution dated 23-8 1996 for quashing of the same;

c) A declaration that the petitioners are entitled to the benefits under the Career Advancement Scheme as implemented in the WBSMIC Limited.

14. The claims of the petitioners have been opposed by the Corporation by filing a counter affidavit. It is asserted therein that since the petitioners were appointed as Sub-Assistant Engineers and, thereafter, promoted as Sub-Divisional Engineers, it cannot be validly contended that they have been stagnating in a particular post. An avenue for promotion was open to them, which was duly availed. The petitioners having accepted the offers of appointment on promotion to the posts of Sub-Divisional Engineer without raising any demur, at this distant point of time they cannot take a stand that their appointments to the posts of Sub-Divisional Engineer were not by way of promotion but by direct recruitment. It has been further averred that due to availability of eligible Sub-Assistant Engineers fit to be considered for promotion to the post of Sub-Divisional Engineer, a policy decision was taken by the Corporation that the posts of Sub-Divisional Engineer would be filled up either by direct recruitment or by giving promotion to eligible Sub-Assistant Engineers. For the said purpose, a Selection Committee, comprising members referred to in paragraph 4(a) of the counter affidavit, was constituted. The Corporation had

further decided that the posts of Sub-Divisional Engineer would be filled by promotion and the eligibility would be five years experience either in the present post and/or in posts of corresponding status and responsibility in other organization(s) [pleaded in paragraph 4(c)]. That two outsider candidates were also called for interview on 15.10.1977 has been admitted [in paragraph 4(d)]. Since the Selection Committee considered the petitioners fit for promotion, the Corporation on the basis of its recommendation filled up the vacancies in the posts of Sub-Divisional Engineers by promotion and, accordingly, the orders dated 30.6.1977 and 26.4.1978 were issued. The petitioners accepted the offers of appointment on promotion without raising any objection and, therefore, are precluded in law from contending to the contrary. The Board of Directors of the Corporation upon consideration of the representation of Buddhadev, made in the mid-1990s, resolved not to reopen the issue since it was a very old case (pleaded in paragraph 12). The appointment of the petitioners as Sub-Divisional Engineers being appointments on promotion, it has been contended that they are not entitled to benefits of the CAS.

15. Mr. Bose, learned senior counsel appearing for the petitioners, urged that merely because the offers of appointment refer to "promotion" would not by itself lead to the conclusion that the petitioners were promoted to the posts of Sub-Divisional Engineer. For the purpose of promotion, he contends, there must be a policy containing details of qualification and experience required for the post as well as the procedure to regulate such promotion. Also, earmarking of certain number of posts to be filled up by promotion and by direct recruitment is also provided by rules/executive instructions. The Corporation, it is contended, has miserably failed to bring on record any such policy or rules/executive instructions. That apart, it had permitted outsiders to compete for appointment to the post of Sub-Divisional Engineer along with the Sub-Assistant Engineers. Had the appointment been made by way of promotion, question of allowing outsiders for being directly recruited would not have arisen. In support of his contention, Mr. Bose relied on the decision of the Apex Court in *Dr. Jai Narain Misra Vs. State of Bihar and Others*, wherein the Supreme Court ruled as follows :

5. The post of Director of Agriculture is admittedly an ex-cadre post. The selection to that post is made solely on the basis of merit. Merely because the Government in its letter to the Commission used the word "promotion", the High Court should not have treated the case as one of "promotion". The word "promotion" used in the Government's letter was an inappropriate word. What the Government really meant was selection of a person to be posted as the Director. The nature of the post cannot be changed by the Government's using the word "promotion". The post remains to be a selection post.

16. He accordingly submitted that the Corporation should be directed to release admissible benefits to the petitioners under the CAS.

17. Per contra, Mr. Ghosh, learned Counsel representing the Corporation, contended that the petitioners should not be granted any relief. According to

him, it was open to the petitioners not to accept the offers of appointment on promotion to the posts of Sub-Divisional Engineer. For more than a decade, the petitioners did not question the action of the Corporation in treating the posts of Sub-Divisional Engineer as promotional post. It is only after introduction of the CAS that the petitioners woke up from their slumber and started agitating on issues which were rather old and had become stale.

18. He relied on the decisions of the Apex Court reported in *N. Chellappan Vs. Secretary, Kerala State Electricity Board and Another*, . and *Prasun Roy Vs. Calcutta Metropolitan Development Authority and Another*, to contend that a party cannot blow hot and cold at the same time and that acquiescence defeats the right an applicant may have at a later stage. Decisions reported in *Madan Lal and Others Vs. State of Jammu and Kashmir and Others*, *Marripati Nagaraja and Others Vs. The Government of Andhra Pradesh and Others*, and *Dhananjay Malik and Others Vs. State of Uttaranchal and Others*, . were relied on in support of the proposition that a challenge to a procedure of selection or an eligibility criteria for appointment on the ground of it being contrary to Service Rules cannot be raised by candidates who have participated in the selection process. As has been laid down there, he submitted that the petitioners ought to have challenged the process by which they were appointed on promotion if they felt that the posts of Sub-Divisional Engineer were selection posts and not promotional posts. He also relied on the decision of the Delhi High Court reported in 2001 Lab. I.C. 3597 : *Sanjay Sharma and Ors. v. Union of India and Ors.* for the proposition that a party cannot challenge, on equitable grounds, a practice in which he has acquiesced and participated.

19. He thus prayed for dismissal of the writ petition.

20. In reply, Mr. Bose contended that the decisions cited by Mr. Ghosh would have no application on facts and in the circumstances of the case. The petitioners had not challenged the process of selection on any ground whatsoever. The dispute is really as to whether the posts of Sub-Divisional Engineer were sought to be filled up as selection posts or not. There being nothing on record, except certain bald statements, to suggest that the posts of Sub-Divisional Engineer were filled up in accordance with a laid down policy, mere use of the word "promotion" in the offers of appointment would not convert a selection post to a promotional post. He, accordingly, prayed for relief as claimed.

21. This Court has heard learned Counsel for the parties and considered the decisions cited. Before it proceeds to decide the contentious issue, it would be worthwhile to consider agenda item No. 12 in respect of the 92nd Board Meeting of the Corporation. The same reads as follows:

Agenda items of 92nd Board Meeting

Agenda Item No. 12. Prayer of Shree B. Santra, D.E. & P..to M.D. for rectification in the order of his appointment to the post of Sub-Divisional Engineer.

Note :-

Shree Santra, was appointed in this post of Sub- Assistant Engineer in pursuance of order No. MIC/Estab-tech/1448/75 dated 30.10.75 and joined to the post on 03.11.1975. Later on he was selected for appointment to the post of Sub-Divisional Engineer through an interview and he joined in that post on 01.07.1977, in pursuance of order No. MIC/Estab-Tech/1545 dated 30.06.1977. In this order, it is mentioned that Shree Santra was appointed "On promotion" to the post of Sub- Divisional Engineer. Shree Santra along with others are graduate Engineers and started their service life as Sub-Assistant Engineers in this Corporation, No Gradation List was prepared and also there is no provision in the Service-Rule for promotion of the Graduate Engineers working only for a period of one and a half years in the post of Sub-Assistant Engineers. The appointment was made on the basis of selection through interview. Hence the said order appears to be faulty in mentioning that he was appointed "on promotion".

The matter is placed before the Board for kind consideration of his prayer for rectification of the said order by omission of the words "On promotion".

22. The item could not be considered in the 92nd meeting of the Board and was deferred to the 93rd meeting. In the 93rd meeting, held on 23.8.1996, the Board resolved as follows:

Agenda item No. 7

THE BOARD opined that as the related matter are very old, these need not be re-opened now.

23. It is clear on a perusal of the agenda item and the decision thereon that relief claimed by Buddhadev was refused on the ground that being an old matter, there is no need to re-open it now. However, in the process, no observation was made by the Board in respect of the agenda item that it contains incorrect narration of facts. It being the admitted position that there was no provision in the Service Rules of the Corporation for promotion of graduate engineers and that appointment was made on the basis of selection through interview, the conclusion is irresistible that the posts of Sub-Divisional Engineer were not filled up by appointing the petitioners on promotion but it was by way of direct recruitment. The Corporation has not substantiated the statements made in paragraph 4(c) of the counter affidavit by annexing documentary evidence. Law is well settled that if evidence in support of the facts pleaded in a counter affidavit is not annexed thereto, the Court will not entertain the point [see *Bharat Singh and Others Vs. State of Haryana and Others*, It is, therefore, difficult for this Court to accept the stand of the Corporation. On the authority of the decision in *Jai Narayan Mishra (supra)* and having regard to the facts on record, the case of appointments of the petitioners in the posts of Sub-Divisional Engineer cannot be treated as one by way of promotion and this Court holds that the word "promotion" in the respective offers of appointment have been inappropriately used. This Court further holds that the Corporation instead of declining to

consider correction of such inappropriately used term in the offer of appointment issued to Buddhadev on the ground that it is an old matter ought to have considered the same on merits. It is not a case where the relevant records are not available, which would be an impediment for consideration of the petitioners' claims. On the other hand, from the tenor of the agenda item, it is clear that the same was prepared based on records and, therefore, the Corporation would not have been prejudiced in any manner in taking an appropriate decision. That the records were available even on the date the counter affidavit was sworn is manifest from a bare reading thereof.

24. The decisions cited by Mr. Ghosh have been considered. In those cases either a party in arbitration proceedings or a contender for a post had taken a chance by participating in the proceedings/process of selection and having become unsuccessful had turned around and challenged the very proceedings/process of selection. It is in those circumstances that the Apex Court as well as the Delhi High Court held that the party/contender by his conduct is estopped from questioning the proceedings/process of selection having taken part therein without raising any demur. In a case of the present nature where the process of selection has not been challenged, the ratio of the said decisions would have no application.

25. In any event, the Corporation being a State and a model employer ought to be fair in its dealings. An error committed by the Corporation cannot be latched on and used as a lever to deprive benefits to its employees, if otherwise due. A valid plea of acquiescence may be taken where a party despite opportunity to object to a particular act remains silent and by his conduct accepts such act. Here, when the offers of appointment mentioning "promotion" were issued, the petitioners were not really concerned as to whether the appointments were by way of promotion or direct recruitment so long they were allowed to discharge the duties of the higher post and paid emoluments in lieu of due discharge of service. It is only when the CAS was introduced that they had genuine reason to feel aggrieved. Had the CAS not been introduced, the occasion to pray for rectification may not have arisen at all. The moment the petitioners felt that their rights were being infringed, they activated themselves and ventilated their grievance by promptly submitting representations. The petitioners, thus, cannot be held guilty of acquiescence on facts and in the circumstances of the present case.

26. For the foregoing reasons, the resolution adopted by the Board of Directors of the Corporation in its 93rd meeting (held on 23.8.1996) stands set aside. The prayers of the petitioners for effecting correction in their respective offers of appointment dated 30.6.1977 and 26.4.1978, being Annexure "C" to the petition shall be reconsidered in the light of the observations made hereinabove. In the event the petitioners' prayers are accepted, the Board of Directors shall further proceed to consider their claims for release of career advancement benefits strictly in accordance with the CAS.

27. However, if any of the claims of the petitioners as aforesaid is rejected, a reasoned decision shall be given and communicated to the petitioners. Consideration in terms of this order shall be effected as early as possible but not later than 8 weeks from date of receipt of a copy of this judgment and order.

28. It is further made clear that if the petitioners are found entitled to financial benefits in terms of the CAS, the same shall be released in their favour without any delay.

29. The writ petition stands allowed to the extent as mentioned above.

30. There shall be no order as to costs.

31. Urgent photostat certified copy of this judgment, if applied for, be furnished to the applicant within 4 days from date of putting in requisites therefore.