

(2017) 02 CAL CK 0017
In the Calcutta High Court
Case No : 28816 (W) of 2013

Santanu Chatterjee

APPELLANT

Vs

The State of West Bengal & Others

RESPONDENT

Date of Decision : 21-02-2017

Acts Referred:

[3998](#) Constitution of India, [3998-309](#) Article 309 -
Recruitment and conditions of service of persons serving the Union or a State
[2895](#) West Bengal Municipal Act, 1993, [2895-54](#) Section 54
a>, [2](#)

Citation : (2017) 02 CAL CK 0017

Hon'ble Judges : Samapti Chatterjee

Bench : SINGLE BENCH

Advocate : Kishore Dutta, ?Lakshmi Kanta Pal, B.B. Bhula, Tapan Kumar Mukherjee, Rabindra Narayan Dutta

Final Decision : Disposed off

Judgement

1. The following issues are to be determined in the present writ petition are :- (i) Whether it is justified to refuse the petitioner pay scale similar to that of Assistant Engineer which the petitioner is otherwise entitled to on the principle of equal pay for equal work?

(ii) Whether the petitioner is entitled to enjoy the benefit of notification dated 19th November, 1974 of which the petitioner has been arbitrarily deprived of by the respondent authority?

2. The petitioner's case in a nutshell is as follows :-

On 29th April, 1989 the petitioner was appointed as Water Works Superintendent under Kanchrapara Municipality. On 30th June, 2009 scale of the Sub-Assistant Engineers was revised. On 5th August, 2009 post facto approval was granted to the appointment of the petitioner by the authority. On 18th August, 2009 Chairman requested the respondent no.3 for revision of pay scale of the petition.

Since nothing was done therefore, on 24th October, 2011 and 16th December, 2011 reminders were given by the Chairman to the respondent no.3. Ultimately on 15th January, 2013 petitioner caused a demand notice thereby ventilating his grievances.

Petitioner thereafter approached before this Hon"ble Court thereby filing a writ petition being W.P no. 2825 (W) of 2013. That writ petition was disposed of on 13th May, 2013 by this Hon"ble Court thereby directing the concerned Joint Secretary to see that the appropriate authority to decide the petitioner"s grievances within eight weeks from the date of the service of the order.

It was further directed that the appropriate authority shall send the decision to all the concerned without any delay.

It is also submitted that by the memo dated 12th March, 2013 issued by the Director of Local Bodies West Bengal to the Joint Secretary Municipal Affairs Department wherein fact of discrimination in case of the petitioner was subsequently admitted by the authority and a reply has been sought for in respect of the discrimination ventilated by the petitioner. That fact was duly brought to the notice of the department of Municipal Affairs vide letter dated 27th November, 2009 and subsequently reminder was given on 2nd September, 2011 but the petitioner"s representations were considered and rejected by the authority on the ground that "without approval of the Finance Department it is not possible to alter the pay structure attached to any post and since Finance Department has expressed their inability to consider the proposal the pay parity between the post of nomenclature and the SAE and the posts mentioned at Paragraph 4 cannot be acceded at this point of time and accordingly the proposal is precluded". Though the authority admitted that there is a pay parity being created in the matter but ultimately equated in the above manner. That triggered the present writ petition.

3. Mr. Kishore Dutta, learned senior counsel appearing for the petitioner vehemently urged that the notification dated 19th November, 1974 was framed under Article 309. On one hand by the subsequent memorandum dated 30th June, 2009 the Assistant Engineers scale of pay was revised and pay band was fixed at Rs. 9000/- -- Rs.40,500/- with grade pay Rs.4400/- but on the other hand the petitioner was refused to enjoy the same benefit as was provided to the Sub Assistant Engineers being equally qualified and discharging the same nature of work. Therefore, the petitioner is entitled to enjoy the same pay scale as has been granted to his counterpart.

4. Mr. Dutta further contended that though the petitioner has been working under the respondent authorities for more than 23 years till date no promotion has been provided to the petitioner.

5. Mr. Dutta further strongly submitted that though the petitioner is performing equal nature of work but he has been denied to enjoy equal pay at par with his counterpart i.e. the Sub Divisional Engineers which clearly hits the principle of

equal pay for equal work.

6. Mr. Dutta further emphasized that since the petitioner has been discharging the same nature of work as his counterpart therefore he ought to have been provided with the similar pay scale and opportunity of consideration for promotion which admittedly have been denied to the petitioner without assigning any reason. Though the authority admitted that the petitioner is working like other Sub Assistant Engineers in respect of that the pay scale of Sub Assistant Engineers has not been offered to the petitioner on the ground that his designation was not the same like the Sub Assistant Engineers.

7. Mr. Dutta further contended that the pay scale of the Sub Assistant Engineers and the Water Work Superintendent was same and identical. Qualification of the petitioner is diploma holder and qualification of the post of Sub Assistant Engineers is also diploma holder.

8. Mr. Dutta further vehemently urged that by notification dated 19th November, 1974 ROPA was amended thereby recommending that the diploma holder would be designated as Sub Assistant Engineer. Therefore, petitioner is entitled to enjoy the pay scale of Sub Assistant Engineer, but in the present case petitioner has not been designated as Sub Assistant Engineer. On top of that the petitioner has not been given promotion to the post of Assistant Engineer. In support of his contention Mr. Dutta relied on the amended notification dated 19th November, 1974. Some extract of the amended notification is quoted below :-

"(i) Sub Assistant Engineers having engineering degree shall have an initial start in the existing scale of Rs.300-600 at the stage of Rs.360/- per month. They will also get the benefit of age relaxation or direct recruitment either through the Public Service Commission or for Ad-hoc appointments.

(ii) All test relief overseers, and other diploma holder engineers will henceforth be ...as Sub-Assistant Engineers.

(iii) Sub-Assistant Engineers with L.E.E, who have supervisor's license from the commerce and Industries Department will get a qualification pay of Rs.50/- per month."

In support of his contention Mr. Dutta further relied on a decision reported in 1991 Supp (1) Supreme Court Cases Page-138 Paragraphs 5, 6 ,7 & 13 (State of West Bengal And Others vs Debdas Kumar And Others) where the Supreme Court interalia held that the respondents petitioner have been discriminated and the State Government had acted arbitrarily without any rational basis by not conferring benefit of the said notification dated 19th November, 1974 in favour of the petitioner where as the benefit of the said notification had been allowed to other employees, thus depriving the respondents. Therefore, the appeal preferred by the State of West Bengal was dismissed by the Hon"ble Apex Court. Para 13 is quoted below :-

"Para-13-The appellants, in our opinion, cannot however, succeed on the merits.

The basis of the respondents' claim is that they are diploma holder Engineers who are to be designated as Sub- Assistant Engineers for the purpose of the revised pay scale by virtue of the Notification dated November 19, 1974. The learned Single Judge had construed the expression "other diploma holder Engineers" in clause (ii) of Para IV of the said notification as covering persons like the respondents who are holders of diploma in Engineering. The Division Bench in holding a contrary view overlooked the fact that the posts of Overseers, Estimators and Sub- Overseers were already covered under the category of Sub- Assistant Engineers even under the un-amended rules and were in the pay scale of Rs.300-600 whereas the respondents holding the post of Operator-cum-Mechanics/Electricians were diploma holder Engineers in the scale of pay of Rs.230-425. As noticed by the learned Single Judge, the reasons for amending the 1970 Rules by the Notifications dated March 11, 1974 and November 19, 1974 was the decision of the government to remove the anomalies in the existing rule so as to attract men of quality and also with a view to remove frustration among those having specialised knowledge of a technical nature. This factual background was not considered by the Division Bench while considering the scope of the amended provisions. The appellants admitted that in 1970 the pay scale of Overseers and Sub-Overseers was revised and both Overseers and Sub-Overseers were brought within the scale of Rs.300-600. The Division Bench has recorded a finding to the effect that the Overseers, Estimators and Sub-Overseers were already included in the categories of Sub-Assistant Engineers under Schedule I Part B of the 1970 Rules even before the same was amended by the notification."

9. Before parting with his argument Mr. Dutta submitted that the respondent authority should be directed to extend the benefit to the petitioner as provided to other Sub Assistant Engineers by paying the petitioner the pay scale at par with the Sub Assistant Engineers giving notional effect from date it became due. He also further submitted to consider the petitioner's case for promotion to the immediate promotional post of Assistant Engineer.

10. Per contra, Mr. Tapan Kumar Mukherjee learned senior counsel appearing for the respondent authority vehemently argued that the petitioner is not entitled to get the benefit of the concerned ROPA of the notification as amended on 19th November, 1974 under Article 309 of the Constitution of India.

11. Mr. Mukherjee further contended that under Section 53 of the Bengal Municipal Act, 1993 and Sub Section 3 & 4 of Section 54 the petitioner is also not entitled to enjoy the benefit of the amended notification dated 19th November, 1974. Section 53 of the Bengal Municipal Act 1993 and Sub Section 3 and 4 of Section 54 of the said Act are quoted below : "Section 53-Municipal establishments.-(1) Save as otherwise provided in this Act, a Municipality may have the following officers :

(a) an Executive Officer;

- (b) a Health Officer;
- (c) an Engineer;
- (d) a Finance Officer;
- (e) a Medical Officer;
- (f) a Secretary;
- (g) an office Superintendent;
- (h) one or more than one Sub-Assistant Engineer;
- (i) one or more than one Sanitary Inspector;
- (j) a Head Clerk;
- (k) a Head Assistant;
- (l) an Accountant;
- (m) a Surveyor;
- (n) a Draftsman;
- (o) Such other officers as may be designated by the State Government in this behalf."

"Sub Section 3 & 4 of Section 54- Cadre of common municipal service, appointments etc.

(3) The appointment of all other officers and employees not included in sub-section (1) shall be made by the Municipality with the prior approval of the State Government.

(4) Save as otherwise provided in this Act, the State Government may by rules provide for the qualifications for appointment, conditions of service and other allied matters relating to the officers and employees of Municipalities."

12. Mr. Mukherjee further contended that the notification is not applicable to the petitioner as the petitioner was appointed by the board of the said Municipality and not by the Governor.

13. Mr. Mukherjee further submitted that the petitioner did not challenge the reasoned order dated 29th August, 2013 issued by Director of Local Bodies West Bengal thereby holding that without the approval of Finance Department it is not possible to change the pay structure attached to any post and since the Finance Department have expressed their inability to consider the proposal of pay parity between the post of nomenclature of SAEs and the post mentioned at Paragraph 4 cannot be accepted at this point of time and accordingly the proposal is precluded. Therefore, petitioner is debarred to pray the same relief in the present writ petition without challenging the reasoned order dated 29th August, 2013. In

support of his contention Mr. Mukherjee relied on one Hon"ble Apex Court decision reported in 2011 (3) SCC Page-436 Paragraphs-55 and 56 (State of Orissa And Another vs Mamata Mohanty)

14. Mr. Mukherjee further drew the attention of the Court to the appointment letter of the petitioner which is quoted below :-

"Government of West Bengal

DIRECTORATE OF LOCAL BODIES

PURTA BHAVAN (1ST FLOOR)

BIDHANNAGAR, Kolkata-700 091

No.1051/DLB/P-201/15-96(1) Dated, Kolkata, the 5th August, 2009

From: The Director of Local Bodies

West Bengal

To : The Chairman,

Kancharapara Municipality

P.O. Kancharapara, Dist-North 24-Parganas

Sub: Approval of appointment in the post of Water Works Superintendent

Sir,

The undersigned is directed to say that the Governor has been pleased to accord post facto approval to the appointment of Shri Santanu Chatterjee, in the post of Water Works Superintendent under Kancharapara Municipality w.e.f 29.04.1989 in the scale of pay Rs.1390? 2970/- under ROPA/90 subsequently revised as Rs.4500-9700/- under ROPA/98 and then as PB-3 (Rs.7100-37000)/- with Grade Pay of Rs.3900/- under Ropa"09 by way of retaining the said post of Water Works Superintendent as personal one to the incumbent concerned till his retirement or otherwise.

This issues with the concurrence of the Finance Department Govt. of West Bengal, vide U.O. No.2123 Gr. P (Service) dated 22.07.2009.

Yours faithfully,

Director of Local Bodies

West Bengal"

15. Mr. Mukherjee further emphasized in his argument that knowing fully well that the appointment of the petitioner to the post of Water Work Superintendent has been treated as a personnel one to the incumbent till his retirement or otherwise. Therefore, the petitioner is entitled to enjoy the said post till his retirement as per the condition of his appointment. Therefore, he has no

authority to get the benefit at par with the Sub Assistant Engineer on the basis of the amendment dated 19th November, 1974.

16. Mr. Mukherjee further vehemently contended that the petitioner was appointed as Water Works Superintendent under Kanchrapara Municipality from 29th April 1989 which was not under the purview of Chapter II of the West Bengal Recruitment Rules 2005 following the Section 54 of the West Bengal Municipal Act, 1993 and also the memorandum dated 5th August, 2009.

17. Mr. Mukherjee further argued that the petitioner's appointment as Water Works Superintendent was subsequently approved by the Government with effect from 29th April, 1989 in the scale of Pay Rs.1390-2970/- as per ROPA-1990 subsequently revised on Rs.4500-9700/- under ROPA/1998 and then on PB-3 (Rs.7100-37600/-) with Grade Pay Rs.3900/- under ROPA 2009 by way of retaining the said post of Water Work Superintendent as personal one to the incumbent concerned to his retirement.

18. Mr. Mukherjee vehemently argued that the benefit of SAE by the ROPA projected as discriminatory between similarly placed officers or that the benefit of said ROPA is wholly violative of constitutional mandate under equal work for equal pay.

19. Mr. Mukherjee also relied on West Bengal Municipal Recruitment Rules 2005 Rule V Schedule 24 which is quoted below :-

" V. Water Supply Department: : by direct recruitment;

24. SUB-ASSISTANT ENGINEER: : the candidate have Diploma in Civil/Electrical/Mechanical

(a) Method of recruitment Engineering from any Institution

(b) Qualification recognized by the Government.

Preference shall be given to them having experience in the Civil/Electrical/Mechanical Engineering.

The minimum age limit for such recruitment shall be 24 years.

Any permanent employee with the educational qualification of direct recruitment, with at least five years experience may also apply."

20. Mr. Mukherjee further emphasized that since the said post of Sub Assistant Engineer is the post for direct recruitment as per the recruitment rules, therefore Court cannot direct the authority to give promotion to the petitioner to the post of Sub Assistant Engineer thereby by passing the recruitment rule.

21. Mr. Mukherjee also vehemently argued that the petitioner knowing fully well accepted the condition of his appointment letter. In support of his contention Mr. Mukherjee relied on a Hon"ble Supreme Court decision reported in 2007 (8) SCC Page-279 Paragraphs-21, 26, 27 & 28 (S.C. Chandra And Others vs State of

Jharkhand And Others) On the same point Mr. Mukherjee also relied on another Hon"ble Supreme Court decision reported in 2004 (1) SCC Page-347 Paragraphs-14, 15, 20 & 21 (Government of West Bengal vs Tarun K. Roy And Others).

22. Before parting with his argument Mr. Mukherjee submitted that there is no merit in the said writ petition which deserves interference by this Hon"ble Court. Therefore, this writ petition should be dismissed.

23. Considering the submissions advanced by the learned Advocates appearing for the parties and after perusing the records I find that in the letter of approval of the petitioner's appointment dated 5th August, 2009 by way of retaining the said post of Water Works Superintendent as personal one to the incumbent concerned till his "retirement" or "otherwise". The said rider in the approval letter cannot be projected to the effect that the petitioner has been debarred by the approval letter to pray for his legitimate claim. This portion of the said approval letter merely indicated that after the retirement "or otherwise" of the petitioner this post would be abolished. Furthermore, it indicates that after the petitioner other incumbent cannot claim to be promoted to the said post of Water Works Superintendent.

Since the petitioner has joined the said post of Water Works Superintendent of the said Kanchrapara Municipality with same qualification and same nature of work i.e. diploma in mechanical engineering like the Sub Assistant Engineer of ULBs, therefore, when the pay scale of the Sub Assistant Engineers have been revised from scale no.9 to scale no.11 with notional effect from 1.1.1996 under ROPA, therefore, the pay scale of the petitioner is also required to be revised in the line of the pay scale of Sub Assistant Engineers. But by the order dated 29th August, 2013 rejection of the petitioner's prayer was made on the ground interalia is as follows : "This is a proposal for awarding the scale of pay of Sub-Assistant Engineers to the Diploma holder technical personnel of other nomenclature of Urban Local Bodies. There is no recommendation of the 5th Pay Commission in this regard. The ground adduced in support of the proposal that those technical personnel also hold diploma in Engineering like SAEs does not hold good as qualification is not the sole criteria as regards scale of pay. It is the job of the post which is the prime factor for the same. Mere similarity that those posts are also technical and some of their functions are like that of SAEs do not justify same scale of pay.

We may express our inability to consider the proposal."

But it is evident from record that the respondent authority again sent the file to the Finance Department on 21st June, 2013 narrating interalia that joining of the diploma engineers holding the post in Urban Local Bodies (ULBs) are same to that of Sub Assistant Engineers (SAEs) in ULBs but that proposal was not reconsidered by the Finance Department.

24. It is also revealed that time to time the Chairman, Kanchrapara Municipality

recommended before the Joint Secretary Municipal Affairs Department for upgradation of pay scale of the petitioner, Water Works Superintendent, Kanchrapara Municipality in the line of Sub Assistant Engineers from scale no.9 to 11 with notional effect from 1st January, 1996 as per the memo no.265-MA dated 30th June, 2009 as the petitioner is also having same technical qualification i.e. diploma in mechanical engineering and also performing same nature of work as Sub Assistant Engineers.

25. The Court cannot also ignore the fact that the Government has revised the pay scale of all the Sub Assistant Engineers of the Urban Local Bodies from scale no.9 to 11 with notional effect from 1st January, 1996 as per the aforesaid memo barring the petitioner.

26. For purpose of deciding the present issue it is very much relevant to refer the Government of West Bengal Notification No.10202.F dated 19th November, 1974 amending the West Bengal Services (Revision of Pay and Allowance) Rules, 1970 which is quoted above.

27. Now I have to deal with the decisions cited by Mr. Mukherjee. In respect of S.C. Chandra & Others case (supra) the fact of the said cited case and the fact of the present case is totally different. In the present case it is not disputed that the petitioner is having the equal qualification as that of the Sub Assistant Engineer and it is also not disputed that the petitioner has been discharging the same nature of work as that of the Sub Assistant Engineer but the Sub Assistant Engineers of the ULBs vide the said notification dated 30th June, 2009 have been enjoying the benefit and the petitioner has been deprived of the same. So the cited decision is not applicable in the present case in hand. The other cited decision in Government of West Bengal case (supra) is also not applicable in the case in hand. In that case the respondent was not having the equal qualification of his counterpart but in the present case the petitioner is having the equal qualification like his counterpart as Sub Assistant Engineers and he is also performing equal nature of work like Sub Assistant Engineers and further by virtue of notification dated 30th June, 2009 the other ULBs have already been granted the same benefit thereby enhancing their pay scale to scale no.9 to scale no.11 with notional effect from 1.1.1996 which has not been granted to the petitioner.

28. Therefore, after meticulously considering the records and the Hon''ble Apex Court decisions as cited above by the learned Advocates in State of West Bengal And Others vs Debdas Kumar case (supra), State of Orissa case (supra) , S.C. Chandra case (supra) & Government of West Bengal vs Tarun K. Roy case (supra) I am of the view that since the petitioner possess the same qualification as per with his counterpart i.e. Sub Assistant Engineers and is also performing the same nature of work as Sub Assistant Engineers and not only that by virtue of the notification being no 265-MA dated 30th June, 2009 as well as subsequent memo no. 2539 dated 18th August, 2009 and memo no.2751-2752 dated 24th October, 2011 the Government has already revised the pay scale of all the Sub Assistant

Engineers of the ULBs from scale no.9 to scale no.11 with notional effect from 1st January, 1996. Therefore, the petitioner is also entitled to enjoy the same benefit like his counterpart thereby upgrading the his pay scale from scale no.9 to scale no.11 with notional fixation from 1st January, 1996.

29. That being the scenario on the basis of the above discussions I direct the Director of Local Bodies Government of West Bengal to revisit the issue in the light of the discussions as above within six weeks from the date of communication of this order after giving an opportunity of hearing to the petitioner or his authorised representation and thereafter communicate the decision to the petitioner within one week.

30. With these directions this writ petition is disposed of without any order as to costs.

31. Urgent photostat certified copy of this judgment, if applied for, be supplied to the parties after fulfilling all the formalities.