
(2006) 03 CAL CK 0067
In the Calcutta High Court
Case No : W.P.S.T. No. 1187 (W) of 2001

Smt. Bhabani Bhattacharjee	Vs	APPELLANT
State of West Bengal and Others		RESPONDENT

Date of Decision : 27-03-2006

Acts Referred:

Citation : (2006) 03 CAL CK 0067

Hon'ble Judges : Asok Kumar Ganguly, J;Aniruddha Bose, J

Bench : Division Bench

Advocate : Jayanta Mitra, Pronab Kumar Dutt and Kunal Chatterjee, for the Appellant;Subhobrata Bose and Prafulla Ghosh for Respondent No. 5 and Prafulla Kumar Ghosh, for the Respondent

Final Decision : Allowed

Judgement

Asok Kumar Ganguly, J.—The subject matter of challenge in this writ petition is n judgment and order dated 26thSeptember, 2001 passed by the West Bengal Administrative Tribunal (hereinafter referred to as (he "said Tribunal") in Transferred Application (TA) No. 1602 of 1997. By the said judgment and order the Tribunal was pleased to dismiss the T.A.

2. By filing the T.A. the writ petitioner, who was the applieant before the Tribunal, challenged the promotion given to the respondent No. 5, the private respondent, to the post of Telephone (Operator Grade - I. The Tribunal was, inter-alia, pleased to hold that the writ petitioner was definitely senior to the private respondent No. 5 and the qualifications of the writ petitioner are better. But the Tribunal came to the conclusion that in the matter of promotion seniority or better qualification has nothing in connection with promotion to the category of post to which promotion has been given. The Tribunal further came to the conclusion that promotion has been given by the respondents correctly and after considering various aspects of the matter and the rules and provisions of West Bengal Scheduled Castes and Scheduled Tribes (Reservation of Vacancy of Services and Post) Act, 1976, the Tribunal refused to pass any order in favour of

the petitioner.

3. The Tribunal also found that the name of the private respondent No. 5 appears at serial No. 5. As such she was within the zone of consideration. Even that the Tribunal came to the finding that the Scheduled Castes and Scheduled Tribes Depnrlmenl made clear observation that material dale of consideration shall be a deciding factor and not the date of occurrence of vacancy regarding the eligibility of candidates for promotion. Proceeding on the aforesaid basis the Tribunal had that in the instant case vacancy of promotion occurred on 01/11/1994 and the consideration was made on 24/4/1995 when respondent No. 5 was confirmed and eligible for consideration as a reserved candidate and there is no dispute about: the status of private respondent No. 5 that she belongs to Scheduled Caste category.

4. In view of the aforesaid findings the Tribunal decided in favour of the private respondent No. 5 and dismissed the T.A. The aforesaid findings have been challenged before us by the writ petitioner.

5. The case of the petitioner is that she is a graduate in the University of Calcutta and stood first in the selection test for recruitment: to the post of Telephone Operator (Basic Grade) in the PBX of Pood & Supplies Department, Government of West Bengal. She joined the said post on 31StMay, 1988.

6. In this matter reliance was placed by the petitioner on a memorandum No. 176-TW/EC dated 17thApril, 1990. The said memorandum was issued by way clarification of principles which are to be followed in matters for filling up of Scheduled Castes and Scheduled Tribes vacancies. The clarification is to the following effect:

In case the matter of Tilling up of those 8 (eight) vacancies are taken up for consideration by the appointing authority concerned on a date prior to 4/6/84. Both "A" and "B" were not eligible to be considered for promotion as they were not at all confirmed in the lower feeder post at that time and the vacancies could be filled up by general candidates. But, in that case, the provision of carrying forward of reserved vacancies as contained in this Deptt."s notification No. 48-TW/EC, dated 10.3.80 should be observed.

7. Another circular No. 180 (60) - TW/EC dated 17thApril, 1990 was also placed for consideration before the Court. The said circular also provides that in terms of 50 point roster the 1st,7th,11th,15th,18th,21th, 28th, 32nd, 36th, 40th and 47th shall be reserved for members belonging to Scheduled Castes and other points namely 4th, 24th and 43nd points shall be reserved for members belonging to Scheduled Tribes. Attention of the Court was also drawn to a further circular dated 28thAugust, 1990 issued by the Scheduled Castes and Tribes Welfare Department, Writers Buildings. The said circular was issued in order to clarify the points arising out of introduction of 50 point rosier vacancies and in the said circular it was made clear that in the cases of promotion the date of occurrence of vacancy in the promotional post should be the guiding factor. The

relevant part of the said circular is set out below:

(ii) "In cases of promotion, the date of occurrence of the vacancy in the promotion-post should be the guiding factor. In other words, vacancies occurring before 27.3.90 should be filled in accordance with the erstwhile 20-point roster and vacancies occurring on or after 27.3.90 should be filled up on the basis of the 50-point roster.

8. In the instant case, respondent No. 5 who only passed the School Final Examination joined the service on 17/2/1992 against a Scheduled Castes quota, whereas petitioner joined the service on 31/5/1988. These dates are not disputed. It also appears that when respondent, No. 5 joined the post she did not produce the Scheduled Castes certificate. It has therefore been contended by the learned Counsel for the petitioner that the claim of the respondent No. 5 as a Scheduled Castes candidate is highly doubtful.

9. From the affidavit which has been filed by the respondent No. 5, it appears that she has enclosed a certificate belonging to Scheduled Caste which is dated 17th of March, 1992, whereas respondent No. 5 has joined the post on 17th of February, 1992. In 1991 a final gradation list was prepared of Telephone Operator which was corrected up to 28th February, 1991 and in the said gradation list, the position of the writ petitioner was at No. 2 and the person who was senior to the petitioner was one Smt. Sonali Majumdar. In the said gradation list it has been remarked against the petitioner's name that her position in the panel was at the top in view of her merit position in the list. Thereafter by a memo dated 26th September, 1991, the petitioner was confirmed in the post of Telephone Operator and the said order of confirmation was issued by the Deputy Secretary, Food and Supplies Department, Government of West Bengal under the provisions of the West Bengal Services (Appointment, Probation and Confirmation) Rules, 1979. The said confirmation was with effect from 01/6/1991.

10. When the vacancy arose in the promotional post of Telephone Operator Grade - I. The same was filled by Smt. Sonali Majumdar. The next vacancy arose in the said post after the retirement of Smt. Gilika Ghosh. This vacancy arose on 01/11/1994. On that date the respondent No. 5 was not even confirmed. In terms of West Bengal Services (Appointment, Probation and Confirmation) Rules, 1979. it is not in dispute that on 01/11/1994 the writ petitioner was the senior most confirmed Telephone Operator. Therefore she should have been considered for promotion against that vacancy. In this connection this Court finds that the gradation list which has been produced by the petitioner in. page 39 of the writ petition and revised upto 28/2/1991 was published on 30/3/1991. There has been a subsequent gradation list in continuation thereof. In that revised gradation list dated 7/2/2006 it appears that. next two persons who were borne on such list are Smt. Basanti Dhar and Smt. Shukla Biswas, the respondent No. 5 herein. Smt. Shukla Biswas (Saha) was shown as No. 7 in the list. Against the name of the respondent No. 5 in the gradation list it has been recorded that her scheduled caste certificate dated 17th March, 1992 was submitted on 21/6/2005.

This shows that even though the respondent No. 5 was appointed on 17/2/1992 the Schedule Castes certificate was not submitted at the time of her appointment and the same was submitted on a much later i.e. on 21/6/2005.

11. In the background of this admitted factual position, the question is whether the writ petitioner is entitled to be given the promotion to the post of Telephone Operator Grade - I ahead of respondent No. 5. Therefore the question which falls for consideration before this Court is as soon as a vacancy occurs in the promotional post if the incumbent is confirmed in the feeder post as the writ petitioner whether the writ petitioner has a right of being considered for promotion to the said post.

12. It cannot be disputed that said right cannot be defeated by the authorities concerned by deferring the consideration up to a later point of time. In the instant case the respondent No. 5 was not even confirmed on 01/11/1994 when vacancy arose. The respondent No. 5 was confirmed after much later date i.e. on 17/2/1995. Though she was confirmed against Scheduled Castes quota and her certificate was produced much later. Therefore one thing remains undisputed that on the date when the vacancy occurred the respondent No. 5 was not even confirmed in the feeder post whereas the petitioner was.

13. From the affidavit filed by the department it has been admitted that when one vacancy occurred 5 (five) persons are entitled to be considered. This is the consistent practice followed by the department and has been stated very clearly in paragraph 3 page 8 of the writ petition. It has also been stated in the writ petition that the policy of promotion depends upon Seniority-cum-merit. These averments made in paragraph 3 of the writ petition has not been denied in the Affidavit-in-opposition filed by the department. In this connection the records have been produced before this Court. From the records which have been produced the following notings appear:

The present vacancy is the third one and carried forward for filling up by suitable SC candidate. The vacancy occurred with effect from 1.11.94 when none but Smt. Bhabani Bhattacharya, the seniormost basic grade T.O. came into the zone of consideration on the basis of eligibility though there was a Scheduled castes candidate i.e., Smt. Sukla Saha (fifth in the list) who was yet to earn eligibility due to non completion of the probationary period of three years. Her confirmation in the basic grad post was due on 18.2.95 in terms of WBS (Appointment, Probation & Confirmation) Rules, 1979.

In view of above Smt. Bhabani Bhattacharya, a confirmed basic grade Telephone Operator was considered for promotion to the vacant post of T.O. Grade - I with effect from 1.11.94 but the relevant orders have not yet been issued. In the meantime W.B., F&S Deptt. SC/ST Employees Association have represented (C.P. 49) that Smt. Sukla Saha, T.O., S.C. candidate in the F&S Deptt. is only entitled to get the promotion to the post of T.O. Grade - I as per W.B. SC/ST Reservation Act, 1976 as no post of T.O. Grade - I has yet been filled up by the candidate

after implementation the Roster Point. According to them, Smt. Saha, SC candidate is only the claimer of the promotional post of T.O. Grade - I.

Under the circumstances, we may refer the matter to S.C. & T.W. Deptt. for their considered views in the matter of filling up the vacant post of T.O. Grade - I in this Department.

14. From the above noting in the file it becomes clear when vacancy occurred in the promotional post on 01/11/1994, the respondent No. 5 was not even entitled to be considered and the consideration in favour of the writ petitioner was made but relevant orders were not issued.

15. It is a settled position that just because the order was not issued the right of promotion of the petitioner cannot be taken away. Apart from that from the another portion of the records it appears as follows:

Consequent upon the retirement of Smt. Geetika Ghosh, Telephone Operator Grade - I on superannuation on 31.10.94 a vacancy in the post of T.O. Grade - I has occurred in the PBX of this Department with effect from 01.11.94. This post is to be filled up by promotion from the eligible basic grade T.O.S. in the PBX of this Department. In the process towards filling up this post with effect from 01.11.94 the following basic grade T.Os in the PBX have come, as per seniority list, in the zone of consideration:

SI. Name Date of Category No. joining 1. Smt. Bhabani Bhattacharya 31/5/88 General 2. Shri Biplab Sen Sharma 01/6/88 -do- 3. Smt. Nilima Ghosh 24/5/88 -do- 4. Smt. Saraswati Saha 07/3/90 -do- 5. Smt. Sukla Saha 17/2/92 -do-

16. The aforesaid noting is not correct inasmuch as on 01/11/1994 the respondent No. 5 Smt. Shukla Biswas (Saha) does not come within the zone of consideration as she was not confirmed on that date and the seniority list which has been shown therein is also not correct. A seniority list, in this connection, has been updated by the department on 07/2/2006 shows that the position of the respondent No. 5 is against the serial No. 7. Therefore even on 07/2/2006 in the seniority list the respondent No. 5 does not come within the first five candidates in the feeder post. Therefore the promotion which has been given to the respondent No. 5 superseding the claims of the petitioner was not given in accordance with law nor the same was given in accordance with the 1979 Rules.

17. After the 50 point roster has come into existence the cases of promotion must be considered on the basis of date of occurrence of vacancy in the promotional post. Therefore following those principles it is clear that on 01/11/1994 the date on which the vacancy arose, the respondent No. 5 was not even a confirmed employee in the feeder post and even when she was appointed to the promotional post on that date also she does not come within the first five persons in the feeder post. It also appears from the records, which have been extracted that in favour of the petitioner a consideration was made for promotion to the post of Telephone Operator Grade - I but the order was not issued.

Therefore, on such fortuitous circumstances promotion of the petitioner cannot be denied. This Court therefore is of the opinion that the promotion given in favour of the respondent No. 5 ahead, of the petitioner cannot be sustained as on the date when the vacancy arose in the promotional post, respondent No. 5 was not even eligible to be considered for the said post. Secondly even on the date she was allegedly promoted, the respondent No. 5 does not come within the first five persons in the gradation list as per the revised gradation list dated 07/2/2006. The authenticity of the said gradation list has not been disputed.

18. Apart from that at the time of appointment Respondent No. 5 did not produce the Scheduled Caste certificate. Neither the learned Counsel for the respondent No. 5 nor the learned Counsel for the State respondent could dispute the aforesaid factual position. In the affidavits filed by them also these facts were not disputed. The learned tribunal failed to appreciate this factual position. Nor could the tribunal properly apply the principle of promotion which is attracted in this case and came to an erroneous finding. Therefore promotion given in favour of the respondent No. 5 is set aside and the State respondent are directed to consider the case of promotion of the petitioner to the post of Telephone Operator Grade - I on the basis of seniority position as on 01/11/1994 - the date on which the vacancy occurred in the post of Telephone Operator Grade -I After such consideration the necessary order of promotion is to be issued within a period of three months from the date of service of I his judgment and order to the respondents.

19. It may be mentioned in this connection that when writ petition was filed by the petitioner before this Hon"ble Court and the same was admitted on 29/3/1995 it was made clear by this Hon"ble Court that if during the pendency of the writ petition the respondent No. 5 is promoted the same shall abide by the result of this writ petition. That writ petition was transferred to the Tribunal and was numbered as T.A. No. 1602 of 1997. So far as the petitioner is concerned the promotion which will granted to her pursuant to this order should give her promotion with effect from the date the vacancy occurred in the promotional post along with all attending financial benefits.

20. The order of the tribunal dated 26thSeptember 2001 is quashed.

21. The writ petition is allowed to the extent indicated above.

22. There will be no order as to costs. The records which were produced at the time of hearing are returned to the learned Counsel for the respondent.

23. Urgent certified copy of this order, if applied for, be given to the parties after completing all the formalities.

Sd-/A.K. Ganguly (J)

(Asok Kumar Ganguly, J.)

Aniruddha Bose, J.

24. I agree.