

(2018) 10 CAL CK 0034
In the Calcutta High Court
Case No : Writ Petition No.645 (W) Of 2016

Tapan Kumar Bhattacharya @APPELLANT@Hash State of West Bengal & Ors

Date of Decision : 05-10-2018

Acts Referred:

West Bengal Service Rules, 1971 — Rule 42A

Citation : (2018) 10 CAL CK 0034

Hon'ble Judges : Amrita Sinha, J

Bench : Single Bench

Advocate : Sumit Kumar Panja, Taraprasad Halder, Sadhan Kumar Halder, Tapash Kumar Mondal, Swapan Kumar Dutta, Gourav Das

Final Decision : Disposed Off

Judgement

Amrita Sinha, J.

The petitioner was appointed in the post of Work Sarkar under Zilla Parishad, 24 Parganas South on 30th August, 1988. After completion of two years

of satisfactory service his service was declared confirmed with effect from 30th August, 1990.

A notice was published inviting applications from eligible Zilla Parishad employees for the post of Sub-Assistant Engineer (Civil and Electrical) on 14th

May, 1998. The petitioner possessing necessary qualification for the said post applied for the same. A written as well as oral test was held by the Zilla

Parishad and the petitioner stood first in the said examination.

A writ petition being WP No. 17783 (W) of 2001 was moved before this Court by some of the temporary employees of the said Zilla Parishad who

were working on contractual basis in the post of Sub-Assistant Engineers (Civil) challenging the said notice for filling up the vacancies in which they

were working. The petitioner herein was a party in the aforesaid writ petition.

The said writ petition was disposed of directing the authorities to take steps in accordance with the circular.

The petitioner herein stood first in the panel and was selected for appointment. A contempt application was filed alleging violation of the order of the Honâ??ble Court. The said contempt application was disposed of on 4th April, 2003 directing that the authorities may select the best candidate or take such steps as they may think fit and proper.

The order passed in the contempt application was appealed by the private respondent therein being the writ petitioner herein. Vide judgment dated 9th February, 2009 the Honâ??ble Appeal Court allowed the appeal and set aside the contempt application as well as the impugned judgment under appeal. The Honâ??ble Court made it clear that the judgment was confined only with reference to the eligibility of the respondent no. 6 (writ petitioner herein) to appear in the oral interview and written examination in terms of the recruitment rule for the post and had been further pleased to direct the Zilla Parishad to proceed with the selection by declaring the result and giving effect to the same.

The petitioner being the first empanelled candidate was given appointment in the post of Sub-Assistant Engineer (Civil) on 20th October, 2009. The petitioner joined and had been working in the said post on and from 4th November, 2009. By a letter dated 1st January, 2010 the petitioner made an application before the Additional District Magistrate and the Additional Executive Officer South 24 Parganas, Zilla Parishad requesting pay protection benefit. In the said letter it was mentioned that the basic pay of the petitioner in the Pay Band-3 as working assistant was Rs.11,710/- per month.

After joining the post of Sub-Assistant Engineer (Civil) in the Pay Band-4 the petitioner was drawing Rs.9,000/- per month. As he was drawing less salary he made the application praying pay protection. The petitioner went on giving regular reminders reiterating his prayer for pay protection.

As the grievance of the petitioner was not redressed by the respondent authorities he filed a writ petition before this Court. The said petition being WP No. 22365 (W) of 2012 was heard and disposed of by judgment dated 13th May, 2013 directing the Joint Secretary, Panchayat and Rural

Development Department, Government of West Bengal to take a decision on the memo dated 18th March, 2010 as expeditiously as possible but

preferably within a period of six weeks but not later than eight weeks from the date of communication of a photostat certified copy of the order. The

aforesaid judgment was passed taking into consideration the memo dated 18th March, 2010 whereby the Zilla Parishad recommended the case of the

petitioner for being entitled to pay protection for working as Sub-Assistant Engineer (Civil) with effect from 4th November, 2009. The said

recommendation was addressed to the Joint Secretary, Panchayat and Rural Development Department, Government of West Bengal.

In compliance of the aforesaid order of this Court the Joint Secretary, Government of West Bengal, Panchayat and Rural Development Department

vide his order dated 5th February, 2014 passed order that the Finance Department being the competent authority may be moved to accord

concurrence to pay protection in respect of the petitioner with effect from 4th November, 2009 and notional benefit from 22nd July, 2004 i.e. the date

on which one of the successful candidates joined as Sub-Assistant Engineer in the same Zilla Parishad.

Vide a note dated 13th November, 2014 the office of the Principal Accountant General (General and Social Sector Audit) West Bengal informed the

Additional Executive Officer that as the pay protection is entirely based on the pay rules and where all the conditions had been clarified in the

fundamental rules therefore further clarification in this regard need not be required from the Finance Department. The compliance of the Honâ??ble

High Courtâ??s order as sought for by the Joint Secretary of the Panchayat and Rural Development Department from the Finance Department

being stated to be the competent authority regarding implementing the pay protection was not justified.

Even though the Senior Audit Officer opined that no further clarification was required from Finance Department for implementing the pay protection,

the petitioner was not given the said benefit. The petitioner made an application under the Right to Information Act enquiring about the status of his

representation praying for pay protection. In reply to the said query the petitioner was forwarded a copy of the file note sheet of the Panchayat and

Rural Development Department dated 16th April, 2015 wherein it was mentioned that as departmental candidate the petitioner was required to fulfil

the eligibility criteria as laid down in the Labour Department memo dated 9th March, 2000 and 26th September, 2001. It was further mentioned that as

the petitioner had exceeded the maximum age limit on 21st May, 2002 the date on which the petitioner was selected as a departmental candidate his

selection was irregular ab initio. It was also mentioned that the maximum age limit for general category candidate was 37 years whereas the petitioner

attained 42 years on 21st May, 2002. A copy of the aforesaid file sheet being no. 26 was also forwarded to the petitioner by the Joint Secretary,

Department of Panchayat and Rural Development vide memo dated 16th November, 2015.

The petitioner has filed this instant writ application praying for a writ of mandamus commanding the responding authorities not to give effect to the

noting in the file sheet at page no. 26 dated 16th April, 2015 and a further prayer not to give effect to the impugned communication dated 16th

November, 2015.

Pursuant to a direction passed by the Court the Secretary in-charge of the Zilla Parishad filed a report in the form of an affidavit on behalf of the

respondent no. 4. In the said report it was specifically mentioned that the Zilla Parishad had opined for pay protection in favour of the petitioner with

retrospective effect but the Finance Department had turned down the same on the plea that the selection was in violation of the rules. A copy of the

memo dated 18th March, 2010 issued by the Additional District Magistrate and Additional Executive Officer to the Joint Secretary, Panchayat and

Rural Development Department had been annexed with the report. In the said memo it was specifically mentioned that the petitioner had been

working satisfactorily in the Zilla Parishad and there was no adverse report during his service period. It was mentioned that the case of the petitioner

may be considered as per rule 42A of the West Bengal Service Rules. Opinion was sought for giving retrospective effect to the date of appointment

of the petitioner in the post of Sub-Assistant Engineer with effect from 28th October, 2003 i.e. the date of declaration of the result of examination.

The Joint Secretary, Government of West Bengal Panchayat and Rural Development Department vide his memo dated 5th February, 2014 passed

order in favour of extending pay protection benefit to the petitioner.

The learned Advocate appearing on behalf of the State respondents opposed the prayer of the petitioner on the ground that the petitioner was age-

barred on the date of the examination and accordingly his appointment was void

ab initio. It has been submitted that the petitioner had been appointed in a new post in accordance with the fresh selection procedure and as the initial appointment of the petitioner in the post of Sub Assistant engineer was not in accordance with law no equity was created in his favour and he was not entitled to pay protection.

The learned Advocate relies upon the judgment passed by the Honâ??ble Supreme Court in the case of Ram Chandra Keshav Adke (dead) by LRS

vs. Govind Joti Chavare & Ors. reported in AIR 1975 SC 915 on the proposition that where a power is given to do a certain thing in a certain way the

thing must be done in that way or not at all and that other methods of performance are necessarily forbidden.

It is undisputed that the appointment of the petitioner was under challenge before this Court. Vide judgment dated 9th February, 2009 the Honâ??ble

Appeal Court categorically held that the Zilla Parishad had followed rule 9 of the Recruitments Rules and included the name of the appellant (the writ

petitioner herein) in the panel and there was no illegality done by the Zilla Parishad in doing such. The Appeal Court further held that the appellant was

eligible to appear in the oral interview and the written examination in terms of the recruitment rule for the said post. The Appeal Court directed for

declaring the result and giving effect thereto. It is only after the judgment of the Honâ??ble Appeal Court the petitioner was given appointment and

he joined the said post on and from 4th November, 2009. The petitioner had been working in the said post satisfactorily without any adverse report as

will appear from the report of the Additional District Magistrate and Additional Executive Officer, South 24 Parganas Zilla Parishad. It is also not in

dispute that the Panchayat and Rural Development Department have all along opined in favour of pay protection to be granted in favour of the

petitioner. It had been opined that pay protection of the petitioner may be considered as per rule 42A of the West Bengal Service Rules.

The file note sheet page no. 26 which have been relied by the State respondents for the purpose of rejection of the case of the petitioner clearly

mentions that as a departmental candidate the petitioner was required to fulfil the eligibility criteria laid down in the Labour Department memo dated

9th March, 2000 and 26th September, 2001. It further states that the date on which the petitioner was selected the maximum age limit was 37 years.

The notice inviting applications was published on 14th May, 1998. The petitioner applied for the said post on 21st May, 1998. As the eligibility of the

petitioner was challenged before this Honâ??ble Court the issue remained pending from 1998 till the date of his appointment i.e. 20th October, 2009.

The petitioner was no way responsible for the delay in the process of his selection. Had the eligibility of the petitioner not been challenged then the

petitioner being the first empanelled candidate would have been selected and given appointment long back in the regular course when one of the other

candidates was given appointment on 27th July, 2004.

The learned Advocate for the State strenuously contended that though the petitioner had been selected for the post but he was not eligible for the

same. The eligibility of the petitioner was tested by the writ Court in WP No. 17783 (W) of 2001 and thereafter by the Honâ??ble Appeal Court in

FMA No. 1906 of 2003. The eligibility of the petitioner being upheld by the Honâ??ble Court way back vide judgment dated 9th February, 2009 ought

not be reopened in the year 2015 when admittedly the petitioner had been working in the said post on and from 4th November, 2009. The issue of

eligibility of the petitioner for being appointed in the post of Sub-Assistant Engineer had been decided in favour of the petitioner and the said issue had

been put at rest by the Honâ??ble Appeal Court vide its judgment dated 9th February, 2009. The said judgment attained finality.

Moreover it is not the case that the petitioner joined the post forcefully. He had applied for the post pursuant to an advertisement. The department

Â perused his application and only upon being satisfied permitted the petitioner to take the written test as well as the interview. Had the petitioner

been ineligible the department ought not to have allowed the petitioner to appear in the test and ought to have rejected his application at the very first

instance. In the writ petition filed challenging the eligibility of the petitioner the State was a party respondent. The State never raised any objection as

regards the eligibility of the petitioner. The petitioner fought the battle for nearly eight long years (2001-2009). The petitioner joined and worked in the

said post for six long years (2009 to 2015). The petitioner received his salary in the pay band 4 for so many years. The Panchayat and Rural welfare

department opined in favour of granting pay protection to the petitioner. At such a late stage the Finance department suddenly rises up and puts up a

note in the file questioning the very appointment of the petitioner. It is highly doubtful whether the Finance department is aware of the background of the case and the circumstances under which the appointment letter was issued in favour of the petitioner. Is it at all open for the department to raise the question of eligibility of the petitioner in getting the said appointment? In my considered opinion the State is estopped from raising such a plea at this stage.

In *Sethi Auto Service vs. Delhi Development Authority* reported in (2009) 1 SCC 180 the Honâ??ble Supreme Court held that noting in a departmental file do not have the sanction of law to be an effective order. A noting by an officer is an expression of his viewpoint on the subject. It is no more than an opinion by an officer for internal use and consideration of the other officials of the department and for the benefit of the final decision-making authority.

In *Union of India vs. Major S.P. Sharma & Ors.* reported in (2014) 6 SCC 351 the Honâ??ble Supreme Court held that in a country governed by the Rule of law finality of judgment is absolutely imperative and great sanctity is attached to the finality of judgment and it is not permissible for the parties to reopen the concluded judgment of the Courts as it would not only tantamount to merely an abuse of the process of the Court but would have far reaching adverse effect on the administration of Justice. It would also nullify the doctrine of stare decisis a well established valuable principle of precedent which cannot be departed from unless there are compelling circumstances to do so. The judgments of the Court and particularly the Apex Court of a country cannot and should not be unsettled lightly.

The notifications of the Labour Department dated 9th March, 2000 and 26th September, 2001 relied upon by the finance department in order to reject the claim of the petitioner were not in existence on the date the notice for appointment was issued. It was also not in existence when the examination was held and the petitioner was selected being the first empanelled candidate. The selection procedure started on 14th. May 1998. On the date of publication of the notice inviting applications for appointment of Sub-Assistant Engineers the West Bengal Panchayat (Recruitment and Conditions of Appointment of Employees of Zilla Parishad) Rules 1997 was in operation. Accordingly the rules prevailing at the time of initiation of the selection

procedure will be applicable in case of the petitioner and not the notifications of the Labour department which do not have any retrospective effect.

It is interesting to note that though the Joint Secretary, Panchayat and Rural Development Department sought to move the Finance Department to

accord concurrence for pay protection in case of the petitioner the office of the Principal Accountant General (General and Social Sector Audit)

specifically observed that as because pay protection was entirely based on the pay rules where all the conditions had been clarified in the fundamental

rules therefore further clarification in this regard need not be required from the Finance Department. It was also stated that in compliance of the

Honâble High Court's order as sought for by the Joint Secretary of the Panchayat and Rural Development Department from the Finance

Department being stated the competent authority regarding implementing of the pay protection was not justified. The Audit Department was

completely aware of the fact that the case of the petitioner was duly recommended by the authority of the Panchayat and Rural Development

Department.

From the above it is absolutely clear that though one department of the State where the petitioner has been serving has accorded and opined for pay

protection in his favour the other department is trying to thwart the same relying upon certain notifications which are not at all applicable in the facts

and circumstances of the instant case. Two departments of the State are singing two different tunes. The infighting between the two departments of

the State should not stand in the way of granting appropriate relief to an employee. Such act should not entangle an employee in unnecessary legal

complications and drag him to court for redressal of his grievances.

The petitioner working in the post of Sub Assistant Engineer on and from November, 2009 is entitled to pay protection. The noting in the file sheet

does not have any statutory force and will not stand in the way of granting relief to the petitioner which he is entitled to in law. The respondent

authorities are directed to act in accordance with law and accord sanction for pay protection of the petitioner in accordance with the West Bengal

Service Rules. The respondent authorities are directed to take steps in accordance with the observations made herein above within a period of two

months from the date of receipt of a copy of this order. All arrear payments

receivable by the petitioner shall be cleared within a period of six months thereafter.

WP No. 645 (W) of 2016 stands disposed of accordingly. There will however be no order as to costs. Urgent certified photocopy of this judgement, if applied for, be supplied to the parties or their advocates on record expeditiously on compliance of usual legal formalities.

(Amrita Sinha, J.)

Later

On the prayer of the learned advocate appearing for the State-respondents, the judgment is stayed for a period of four weeks till after the annual Vacation.