

CASE NO.:

Appeal (civil) 6356 of 1998

Special Leave Petition (civil) 15062 of 1998

PETITIONER:

NILANGSHU BHUSAN BASU

Vs.

RESPONDENT:

DEB K. SINHA & ORS.

DATE OF JUDGMENT: 31/08/2001

BENCH:

S.R.Babu, Brijesh Kumar

JUDGMENT:

BRIJESH KUMAR, J.

The present appeal is preferred against the judgment and order dated September 18, 1998 passed by a Division Bench of the Calcutta High Court, allowing the writ petition and setting aside the selection of the appellant for the post of Chief Municipal Engineer (Civil) of the Calcutta Municipal Corporation.

Whereas the S.L.P. No.. 15062/98 is preferred against another judgment of the Calcutta High Court dated August 11, 1998, dismissing the writ petition filed by Subhendu Maiti & Ors. challenging the same selection though on different grounds. Since both the matters relate to the same selection and for the same post, they have been listed and heard together. Hence, common order.

The post of Chief Municipal Engineer (Civil) fell vacant in Calcutta Municipal Corporation. The recruitment to such posts is made in accordance with the provisions of the Calcutta Municipal Corporation Act 1980 and Calcutta Municipal Corporation (Recruitment of officers appointed by Mayor-in-Council) Rules 1985. Section 14 of the Calcutta Municipal Corporation Act ('Act' for short) deals with officers and employees of the Corporation. Clause (f) of Section 14 (1) provides for such number of Deputy Municipal Commissioners and Chief Municipal Engineers as the Mayor-in-Council may, from time to time, determine. Sub-sections (3) and (4) of Section 14 of the Act are quoted below:

"(3) The other officers referred to in clauses (e) to (j) of sub-section (1) shall be appointed -

(a) by the Mayor-in-Council in consultation with the State Public Service Commission, or

(b) by the State Government in consultation with the Mayor-in-Council, by notification, from

amongst persons who are or have been in the service of Government, if the Mayor-in-Council so decides.

(4) The method of, and the qualifications required for, recruitment, and the terms and conditions of service including conduct, discipline and control of officers appointed by the Mayor-in-Council shall be such as may be prescribed.

The posts of Chief Municipal Engineers are referable to clause (f) of sub-section (1) of Section 14. Hence the appointment to the said posts is to be made in accordance with clauses (a) and (b) of sub-section (3) of Section 14.

The Calcutta Municipal (Recruitment of officers appointed by Mayor-in-Council) Rules 1985 (For short, "Rules") lay down the qualification and other conditions for recruitment of the officers of the Municipal Corporation. The post of Chief Municipal Engineer (Civil) is at Sl. No.8 of the Appendix VII to the Rules. It lays down qualification for selection and appointment of Chief Municipal Engineer (Civil) by direct recruitment as well as for appointment by promotion. These qualifications are as follows:

"8. Chief Municipal Engineer (Civil)
Rs.2000-125/2-2,2375:

Qualifications and age under clause (a) of sub-section (3) of Section 14 of the said Act:-

(A) For direct recruitment - Essential

(a) A citizen of India.

(b) (A degree in Civil Engineering from a recognized University or its equivalent.

(c) 12 years' experience as an Engineer in a responsible post or posts in Government service or Statutory Bodies or in an Engineering or Construction concerns of repute, last basic pay drawn being not less than Rs.1,800/-;

(d) Age not more than 45 years on the 1st day of January of the year of recruitment, relaxable for well-qualified or well experienced candidates.

Desirable: A post graduate degree or diploma in Civil Engineering Public Health Engineering,

B. For promotion:

(a) From officers possessing 2 years experience in the post immediately below and total 10 years experience in Municipal Engineering Service with a Civil Engineering degree or diploma

from a recognized University or its equivalent;

(b) No age bar. "

The Corporation proceeded to select a candidate for the post of Chief Municipal Engineer (Civil) by direct recruitment, in consultation with the Public Service Commission. The selection was held and the present appellant (Respondent No.5 in the Writ Petition) was duly selected. The High Court has set aside the selection on the ground that recruitment to the post of Chief Municipal Engineer (Civil) can either be by direct recruitment or by promotion. It has been held that there is no guideline as to in what circumstances recruitment should be through process of direct selection or by promotion. Therefore, there is an element of arbitrariness in deciding as to which mode of recruitment should be adopted. The High Court was of the view when both modes are available, process for recruitment by promotion from amongst the departmental candidates should be resorted to first and in case suitable candidates are not available, method of direct recruitment should be adopted otherwise it will amount to arbitrary and discriminatory exercise of power as against the departmental officers as the departmental candidates also have some legitimate expectations of being considered for appointment to the higher posts. The relevant observations and the findings of the High Court is quoted below:

"....We have no hesitation in saying and holding that whenever such an eventuality arises or may arise, the Corporation should first consider the case of appointment by promotion and, only when it decides in consultation with the Commission that appointment by promotion is not desirable or feasible or not required for any purpose or reason, it will have the option of adopting the method of direct recruitment for filling up such post. There is a logic behind exercising first option in favour of promotion. The logic is that when you have a whole lot of officers down below in the hierarchy available to you, is it not your duty to first consider their worth, merit and suitability, in consultation with the Commission and only then to decide whether any one of them is worthy and suitable of holding that office and, only after such decision is taken and you find that none is suitable to be promoted, to go in for direct recruitment."

The provisions of the Act or the Rules do not substantiate the above proposition, as laid. According to the High Court, taking a decision straightaway for direct recruitment without first examining the worth of the departmental candidates, is arbitrary. It has also been held that the Public Service Commission should have been consulted by the Corporation while taking a decision as to whether recruitment should be by direct recruitment or by promotion.

We feel that once the rules permit recruitment

to a post either by direct recruitment or by promotion leaving the decision to the appropriate authority, it will be difficult to say or lay down that process of recruitment by promotion must necessarily be adopted first. As a matter of fact, it would amount to legislating a provision in the Statute.

In absence of any rules to that effect, it would be an administrative function of the appointing/appropriate authority to take a decision as to which method should be adopted for recruitment on any particular post. It may depend on various factors relevant for the purpose e.g. status of the post, its responsibilities and job requirement, the suitable qualifications as well as the age as may be desirable may also be taken into consideration while making such an administrative decision. In this connection, on behalf of the appellant- the selected candidate a decision reported in AIR 1989 S.C. 2060 State of Andhra Pradesh and another versus Sadanandam and others has been relied upon. It has been observed as also quoted in the impugned judgment "...We need only point out that the mode of recruitment and the category from which the recruitment to a service should be made are all matters which are exclusively within the domain of the executive. It is not for the judicial bodies to sit in judgment over the wisdom of the executive in choosing the mode of recruitment or the categories from which the recruitment should be made as they are matters of policy decision falling exclusively within the purview of the executive."

From the above observations it is clear that such a decision is purely administrative in nature. The High Court on perusal of the record found that the matter was considered, and has also reproduced an official note in that connection from the record of the Corporation. The note of the Municipal Commissioner is also quoted. It is dated 26.3.1997 and reads as follows:

"As discussed in MIC, we should go in for selection of the best candidate through open competition"

The above note of the Municipal Commissioner indicates that the question of mode of recruitment to the post of Chief Municipal Engineer (Civil), was discussed by the Mayor-in-Council and thereafter and on the basis thereof it was decided to have best candidate through open competition. It is difficult for the Court and also not feasible to further go into the matter doubting the 'note' quoted above or about the sufficiency of the discussion in the MIC or correctness of the decisions taken. The fact thus remains that the Mayor-in-Council discussed the matter and decided to go in for direct recruitment. It has not been submitted before us that the MIC had no authority to take such a decision or that the decision taken suffers from mala-fides. There is no basis to come to a conclusion that process of promotion must necessarily be adopted first and in the event of non-availability of suitable candidate, the direct recruitment can be resorted to.

So far the contention that Mayor-in-Council should have consulted the Public Service Commission, in taking a decision as to whether recruitment is to be

made by direct recruitment or by promotion, in our view has no force. All that is provided in clause (a) of sub-section (3) of Section 14 is that appointment to the given posts shall be made by Mayor-in-Council in consultation with the State Public Service Commission and clause (b) provides for appointment by State Government in consultation with Mayor-in-Council from among the persons who are or have been in the service of the Government, if the Mayor-in-Council so decide. A reading of sub-sections (3) and (4) of Section 14 by no means leads us to the conclusion that Public Service Commission is to be consulted for taking a decision as to which mode of recruitment should be adopted. In this connection learned counsel for the Respondent has referred to a decision reported in 1994 Supp (1) S.C.C. 44 K. Narayanan and others versus State of Karnataka and others. Our attention has been particularly drawn to Paragraph 6 of the judgment where it is observed : "The word 'recruitment' is comprehensive to include any method provided for inducting a person into a public service. Appointment, selection, promotion, deputation are all well-known methods of recruitment".

This observation only indicates the extent of the meaning of the word 'recruitment' which may include appointment as well within its folds besides other steps necessary for making an appointment. But in Section 14 (3) it is provided that such officers shall be "appointed" by the Mayor-in-Council in consultation with the State Public Service Commission. The word 'recruitment' has not been used. Therefore, the observations made in the case of Narayanan & Ors. (Supra) would not help the respondents in support of their contention that the State Public Service Commission should have been consulted even for taking the decision as to which mode of recruitment namely, direct recruitment or by promotion, should be adopted. It is also to be noticed that another mode of appointment is provided in clause (b) of sub-section (3) of Section 14 of the Act, namely, the State Government in consultation with the Mayor-in-Council may make an appointment from amongst persons who are or have been in the service of the Government. This method of appointment would be adopted if "the Mayor-in-Council so decides" (emphasis supplied). It may further be pointed out that sub-section (4) of Section 14 of the Act, amongst other things, provides that method of recruitment shall be such as may be prescribed. The provisions indicated above namely sub-sections (3) it clauses (a) and (b) and sub-section (4) of Section 14, leave no scope for the argument that Mayor-in-Council should have consulted the Public Service Commission before taking a decision as to whether the appointment is to be made by direct recruitment or by promotion.

It has next been submitted that the departmental officers have been discriminated against since only those departmental officers could apply who responded to the qualification laid down for the candidates for direct recruitment more particularly about the age, since maximum age limit was 45 years. In this connection it may be observed that the qualifications have been prescribed in the rules including the upper age limit for an applicant. It is informed that there were forty outside candidates and

eight others working in the Department. From amongst the 48 candidates, the appellant was selected, who is said to have been working as an Executive Engineer in the department. According to the learned counsel for the respondent he would become senior and an officer even higher to the Dy. Chief Engineer, who have either not been selected or were not able to apply because of the age bar or for any such reason. It is submitted that ignoring the senior officers working in the department or placing junior officers above them would lead to only unreasonable results. It may be observed that method of direct recruitment was adopted as permissible under the rules. Anyone responding to the qualification was free to apply including the departmental candidates. Some of the petitioners in the other Writ Petition are those who had applied but remained unsuccessful. It was an open selection based on merit and not seniority. Therefore, it cannot be argued that method of direct recruitment as adopted brought about any unreasonable results or it was discriminatory. In this connection it may also be mentioned here that learned counsel for the appellant submitted that post graduate qualification was one of the desirable qualification prescribed under the rules. It is further submitted that the appellant was the only candidate who possessed the post graduate qualification. We are however not on the merit of the selection. The Selection Committee made the selection of the candidate whom it thought to be the best among the applicants. We therefore find no force in this submission too as raised on behalf of the respondents.

We don't find that there has been violation of Article 16 of the Constitution in any manner as sought to be argued on behalf of the respondents. We further find no ground for the High Court to have held that first the process for promotion should be resorted to and in case no candidate fit to be promoted was available then alone direct recruitment could be resorted to. It is not a correct approach. The order of the High Court is not sustainable.

We may now advert to Special Leave Petition NO. 15062 of 1998. It may be noted that all the appellants in the S.L.P. took chance and participated in the selection but they remained unsuccessful.

According to the petitioners, the experience as required for being eligible for consideration should be on a responsible post meaning thereby on a post below the one for which the recruitment is being made, that is in the present on the post of the Deputy Municipal Chief Engineer (Civil). The other contention was that at the time of interview there has not been any break-up of marks for different factors. Both these contentions had been rejected by the learned Single Judge and that order has been upheld by the Division Bench in appeal.

Learned counsel for the petitioner failed to substantiate the submission that experience on a "responsible post" would mean experience on the just below post. He referred to a Circular dated April 1, 1992 issued by the Municipal Corporation (Personnel Department). It relates to recruitment to 'A' Category post like that of Medical Officer, Assistant Engineer and Deputy Assessor Collector, Deputy Treasurer etc. It has been provided that experience

on supervisory post would mean the post immediately below the post to which promotion is to be made, for example experience on the post of Assistant Assessor/Assistant Collector/Assistant Treasurer etc. would be experience on a supervisory post for promotion to the post of Deputy Assessor, Deputy Collector, Deputy Treasurer etc. We hardly find that this Circular would be applicable in the case in hand. It is specific about 'A' category posts and not for all categories and ranks. Another Circular dated 21.6.1988 has been referred to which relates to recruitment on the post of Deputy Chief Engineer (Civil), Deputy Chief Engineer (Mechanical) etc. By means of the said circular experience on the post of Executive Engineer or on any similar post was required. It firstly relates to the recruitment to the post of Deputy Chief Engineer. It cannot be applied for recruitment to the post of Chief Municipal Engineer (Civil). Such a condition is not contained in terms of required qualification for the post of Chief Municipal Engineer (Civil). Wherever experience on a post just below is needed, such a provision is specifically contained. On this basis it cannot be generally held that for every post in any rank or category the 'responsible post' must necessarily mean the post next below the post for which recruitment is to be made.

Then our attention has been drawn to Annexure 'Z' to the petition dated August 11, 1998. It is a notice issued by the Municipal Secretary conveying the information that meeting of the Calcutta Municipal Corporation was to be held on August 18, 1998 at 1.00 P.M. It then indicates the agenda according to which recommendations of the MIC were to be considered as also the proposal of the DMC (HQ) regarding framing of recruitment regulation for the post of CMC (P&D). At internal Page 5 of Annexure 'Z' proposed qualification have been indicated and in clause (ii) it is proposed that there should be twelve years experience as an engineer in a Government/semi-government or a statutory body etc. with at least five years experience on a senior post in the rank of Deputy Chief Engineer in the State Government or its equivalent. It is further provided that last scale of pay drawn should not be less than that of Deputy Chief Engineer, Govt. of West Bengal or its equivalent post. This document relied upon by the petitioner is nothing but a mere agenda for consideration containing certain recommendations to frame regulations for recruitment. It was in the state of proposal. Another fact which is noticeable is that even in the proposal no such qualification is suggested for recruitment to the post of Chief Municipal Engineer (Civil). In our view the petitioner have completely failed to substantiate through any of the documents referred to above that the expression "experience on the responsible post" would mean, in the present case, experience on the post of Deputy Chief Engineer which is next below the post of Chief Municipal Engineer (Civil). We find no force in this submission made on behalf of the petitioner.

The other grievance is that no break up of the marks in the interview had been made for different factors taken into consideration for selecting a candidate. We find no substance in this submission also. The Selection Committee awarded

the marks to the different candidates as would be evident on perusal of the judgment of the High Court. The selected candidate had got the highest marks. The selection was by the Public Service Commission. All the candidates responded to the qualifications as prescribed. In our view the selection cannot be thrown out merely on such contentions as raised by the petitioner viz. there was no break up of the marks or it was not as it should have been according to the petitioners. All candidates possessed the required qualification and experience, and they must have been working in different organizations. The assessment of their merit on the basis of their work and experience and personal interview by the expert body cannot be discarded on such grounds. The S.L.P. has thus no force.

In view of the discussion held above, we allow the Civil Appeal No.6356 of 1998 and set aside the judgment passed by the Division Bench of the Calcutta High Court dated September 18, 1998. The Special Leave Petition (Civil) No.15062 preferred against the judgment of the Calcutta High Court dated August 11, 1998 is dismissed.

Costs easy.

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