

IN THE HIGH COURT AT CALCUTTA

Civil Appellate Jurisdiction
(Appellate Side)

M.A.T. 890 of 2022

With

I.A. No. CAN/1/2022

State of West Bengal & Anr.

Vs.

Dr. Saktibal Choudhury & Ors.

Before: The Hon'ble Justice Arijit Banerjee

&

The Hon'ble Justice Apurba Sinha Ray

For the Appellants / : Mr. Amal Kr. Sen, Ld. AGP.

State Mr. Lal Mohan Basu, Adv.

For the Dum Dum : Mr. Amalesh Ray, Adv.

Municipality Ms. Mousumi Bhowal, Adv.

For the Respondent : Mr. Saptarshi Roy, Adv.

No. 1 Mr. Siddhartha Roy, Adv.

Mr. Arka Dipta Sengupta, Adv.

Ms. Kakali Das Chakraborty, Adv.

Judgment On : 13.10.2023

Arijit Banerjee, J.:

1. This appeal is directed against a judgment and order dated March 23, 2022, whereby the writ petition of the respondent no. 1 herein being WPA 4259 of 2016, was disposed of by a learned Judge of this Court.

2. The respondent no. 1/writ petitioner was temporarily appointed in the post of Resident Medical Officer (in short RMO) in Dum Dum Municipality, by letter dated June 6, 1998, on probation for a period of 6 months. He was placed in the scale of pay of Rs. 2,200/- – 4,000/-. By a resolution dated December 29, 1998, the Municipality confirmed the writ petitioner's service as RMO with effect from December 1, 1998, in the scale of pay which he was then enjoying.

3. The writ petitioner retired from service upon superannuation on August 31, 2015.

4. The writ petitioner's claim for pensionary benefits was however negated by the State Authorities on the ground that he was not appointed in a sanctioned post. Prior approval of the State Government was not obtained for his appointment.

5. This prompted the writ petitioner to approach the writ Court by filing W.P.A 4259 of 2016. The writ petition was allowed by a learned Single Judge by a judgment and order dated November 10, 2016 by relying on a Division Bench judgment dated January 30, 2008, passed in ***M.A.T 704 of 2007 (Chairman, Dum Dum Municipality and Ors. v. Dr. Debranjana Biswas and Anr.)***. The learned Judge directed the State respondent authorities to release the petitioner's retiral benefits.

6. That order was carried in appeal by the State respondents by way of M.A.T 588 of 2017. The Division Bench disposed of the appeal by a judgment and order dated November 27, 2017, setting aside the order of the learned

Single Judge on the ground that the case of Dr. Deb Ranjan Biswas was not similar to the case of the writ petitioner. The writ petition was remanded for fresh hearing by the learned Single Judge having determination in the matter, after exchange of affidavits.

7. The basic point that was urged by the State before the learned Single Judge as also before us is that the appointment of the writ petitioner was not in a sanctioned post.

8. The writ petitioner relied on a Government Order dated August 19, 2009, whereby an earlier Government Order dated May 7, 2009 was amended. The said two Government Orders are extracted below:-
“

GOVERNMENT OF WEST BENGAL
DEPARTMENT OF MUNICIPAL AFFAIRS
WRITERS' BUILDINGS, KOLKATA

ORDER

No. 207/MA/O/C-4/1A-7/2000

Dated, Kolkata, the 7th Day of May, 2009.

WHEREAS it appears that a considerable number of appointments/promotions were made in a number of Municipalities against sanctioned vacancies holding erstwhile Scale of Pay of Rs. 380-910/-, since revised to Rs. 4000-8850/-, and below between the period from the 14th day of July, 1994 to the 15th Day of October, 2000 (hereinafter referred to as the aforesaid period);

AND WHEREAS in absence of approval of the State Government the Municipalities are facing difficulties relating to the finalisation of pension cases of the retired employees;

AND WHEREAS processing of such cases by the Directorate of Local Bodies, with the approval of this Department, taking considerable time;

NOW, THEREFORE, the Governor, for quick disposal of all pending cases, is pleased hereby to authorise the Director of Local Bodies, West Bengal to issue orders according post-facto approval of appointments/promotions made by the Municipalities against sanctioned vacancies holding erstwhile Scale of Pay of Rs. 380-910/-, since revised to Rs. 4000-8850/-, and below within the aforesaid period on case to case basis after due examination/enquiry.”

GOVERNMENT OF WEST BENGAL

DEPARTMENT OF MUNICIPAL AFFAIRS

WRITERS' BUILDINGS, KOLKATA

ORDER

No. 422/MA/O/C-4/1A-7/2000

Dtd, Kolkata, the 19th Day of August, 2009.

The Governor is pleased hereby to make the following amendment to this Department Order No. 207/MA/O/C-4/1A-7/2000 dated the 7th Day of May, 2009 (hereinafter referred to as the said order.)

Amendments

In the said order-

1] In the last para for the words "Scale of pay of Rs. 380-910/- since revised to Rs. 4000-8850/- and below the words scales of pay from Scale of pay of Rs. 380-910/- since revised in Rs. 4000-8850/- to the Scale of pay of Rs. 245-455/- since revised to Rs. 2850-4880/- shall be substituted.

2] After the last para the following new paragraph shall be inserted.

The Governor to further pleased to direct that no approval of the State Government is required in the cases of appointments/promotions made by the Municipalities within the aforesaid period against sanctioned vacancies holding erstwhile scales of pay from Scale of pay of Rs. 230-414/-. Since revised to Rs. 2700-4400/- to the Scale of pay of Rs. 220-288/- Since revised to Rs. 2600-4150/- (hereinafter referred to as the said Scales of pay). Or in the cases where the resolutions adopted by the Board of Councillors of the Municipalities for making appointments/promotions against the sanctioned vacant posts holding the aforesaid Scales of Pay but implementation of such resolution has been kept pending till obtaining Government approval during the aforesaid period."

9. The Writ petitioner contended that since he was appointed on June 1, 1998, he was squarely covered by the aforesaid two Government Orders. In other words, his appointment would be deemed to have received post-facto approval from the Government.

10. After noting the submissions made on behalf of the parties, the learned Single Judge disposed of the writ petition with the following observations:-

"On careful consideration of the rival contentions of the parties it appears to this Court that the order dated 19th August, 2009

passed by the authority amending the previous order dated 7th May, 2009, comes in aid of the petitioner while determining the issue of appointment of the petitioner qua approval thereof by the State-respondents. Since, the petitioner's date of appointment is 1st June, 1998 and he was placed in the scale of pay of Rs. 2,200/- - 4,000/- therefore this Court finds that there is no bar in applying the said order dated 19th August, 2009 while deciding the issue of grant of approval against the appointment of the petitioner in the said post of RMO.

It also does not escape the notice of this Court on chronological analysis of the facts enumerated above that from the date of appointment of the petitioner he was placed in the regular scale of pay and his scale of pay got periodically re-fixed in terms of the rules relating to fixation of pay applicable to the approved employees of the Municipalities.

In addition thereto at no point of time during tenure of the petitioner he was intimated that he was holding the post which is not being approved by the concerned State-respondents since his appointment was not against the sanctioned post; therefore from the perspective of the writ petitioner it appears to this Court that it was not possible for him to comprehend that he was not holding the sanctioned post on substantive basis.

In the above conspectus, this Court finds it apposite to direct the respondent authorities to process the pension case of the petitioner and sanction his entire retiral dues which is admissible to him upon completing the necessary formalities and issue Pension Payment Order accordingly. While disposing of the pension case of the petitioner the concerned respondent authorities is also directed to issue post facto approval, if necessary, in favour of the petitioner and release the retiral dues including pension within a period of 12 (twelve) weeks from the date of communication of this order.”

11. Being aggrieved the State has come up in appeal.

12. Appearing for the State, Mr. Amal Kumar Sen, learned Senior Counsel, argued that the Government Order Dated May 7, 2009, as amended by the Government Order dated August 19, 2009, would not apply to the writ petitioner firstly, because the writ petitioner’s initial pay scale was much higher than what is mentioned in the said Government Orders; and secondly, because the appointment of the writ petitioner was not in a sanctioned post. Hence, post-facto approval cannot be deemed to have been given to the appointment of the writ petitioner.

13. Referring to Section 53(1) of the West Bengal Municipal Act, 1993, learned Counsel submitted that a Municipality can have only one Medical Officer. As on the date of appointment of the writ petitioner as RMO, Dr. Deb Ranjan was the Medical Officer. Hence, it cannot be said that the writ petitioner was appointed in any sanctioned vacant post.

14. Learned Counsel relied on the decision of the Hon'ble Supreme Court in the case of ***State of Rajasthan & Ors. v. Daya Lal & Ors., reported at (2011) 2 SCC 429*** and in particular paragraph 12 of the reported judgment in support of his submission that the High Courts, in exercise of power under Article 226 of the Constitution will not issue directions for regularisation, absorption or permanent continuance, unless the employees claiming regularisation had been appointed in pursuance of a regular recruitment in accordance with relevant rules in an open competitive process, against sanctioned vacant posts. Even temporary, ad hoc or daily-wage service for a long number of years, let alone service for one or two years, will not entitle such employee to claim regularisation, if he is not working against a sanctioned post. Sympathy and sentiment cannot be grounds for passing any order of regularisation in the absence of a legal right.

15. Learned Counsel also relied on the decision of the Hon'ble Apex Court in the case of ***State of Karnataka & Ors. v. M.L. Kesari & Ors., reported at (2010) 9 SCC 247*** and in particular on paragraph 7 of the reported judgment, in support of his submission that regularization of an employee may be allowed when the appointment of such employee should not be illegal, even if irregular. Where the appointments are not made or continued against sanctioned posts or where the persons appointed do not possess the prescribed minimum qualifications, the appointments will be considered to be illegal. But where the person employed possessed the prescribed qualifications and was working against sanctioned posts, but had been

selected without undergoing the process of open competitive selection, such appointments are considered to be irregular.

16. Finally, Mr. Sen relied on the decision of a Coordinate Bench rendered on March 11, 2021 in ***MAT 1671 of 2019 (Calcutta State Transport Corporation & Ors. v. Bimal Chandra Roy & Ors.)*** and in particular on paragraphs 17 and 18 of the judgment to buttress his submission that the appointments made without following the due process or the rules relating thereof do not confer any right on the appointees and the Courts cannot direct their absorption, regularization or re-engagement nor make their service permanent and the High Court in exercise of jurisdiction under Article 226 of the Constitution should not issue directions for absorption, regularization or permanent continuance unless the recruitment had been done in a regular manner in terms of the constitutional scheme and that the Courts must be careful that they should not lend themselves to facilitate the bypassing of the constitutional and statutory mandates.

17. Appearing for the respondent/writ petitioner, Mr. Saptarshi Roy, Learned Advocate, submitted that the Government Order dated May 7, 2009, as amended by the Government Order dated August 19, 2009, squarely covers the case of the writ petitioner. Hence, his appointment would be deemed to have been accorded post-facto approval. Therefore, there can be no reason for not releasing the pensionary benefits of the writ petitioner.

18. The alternative argument of learned Counsel was that Sections 53 (3) and (4) of the West Bengal Municipal Act, 1993, as they stood prior to the

amendment of sub-section 4 by West Bengal Act 16 of 2002, with effect from 2/9/2002, permitted the Board of Councillors of a Municipality to create the post of an officer or other employee without prior sanction of the State Government, if the number of posts to be so created in a year was not more than one per cent of the total number of sanctioned posts of officers and other employees in existence in the immediately preceding year. It would be helpful to extract sub-sections 3 and 4 of Section 53 of the 1993 Act, as they read prior to the 2002 amendment ;-

“(3) The Board of Councillors at a meeting may, subject to the norms regulating the size of the municipal establishment for each Municipality and the categories or designations of officers and other employees of each Municipality with their scales of pay as may be fixed by the State Government from time to time, determine what officers and other employees, other than the officers mentioned in sub-section (1), are necessary for a Municipality, create posts of such officers and other employees, and fix the salaries and allowances to be paid and granted to such officers and other employees.

4) Subject to the norms regulating the size of a municipal establishment as may be fixed by the State Government under sub-section (3), no post of an officer or other employee shall be created under sub-section (3) by the Board of Councillors of a Municipality without the prior sanction of the State Government if the number of posts to be so created in a year for a Municipality is more than one

per cent of the total number of sanctioned posts of officers and other employees in existence in the year immediately preceding.

19. Mr. Roy submitted that it would appear from the affidavits affirmed on January 6, 2023, on behalf of the Dum Dum Municipality, that there were 341 sanctioned posts in Dum Dum Municipality as on 1.7.1998. Out of such posts, seven posts were filled up by the officers referred to in Sub-Section 1 of Section 53 of the 1993 Act. In the year 1998 only three persons were appointed by the Board of Councils of the Municipality which was less than 1% of 341. Hence, prior sanction of the State Government was not required for appointing the writ petitioner. Consequently, his retrial benefits cannot be withheld.

20. Mr. Roy relied on the decision of a learned Single Judge of the Court in the case of ***Ranaghat Municipal Employees' Association & Ors. v. State of West Bengal & Ors., reported at (2003) 4 CHN 55*** and in particular on paragraph 5 thereof wherein the learned Judge observed that Section 53(4) of the 1993 Act permitted a Municipality to create a limited number of posts without the sanction of the Government.

21. Learned Counsel also relied on the decision of a Coordinate bench of this Court in the case of ***The State of West Bengal & Ors. v. Tapas Chakraborty & Ors., reported at (2019) 1 CHN 684***. It may not be necessary to discuss the said judgment for the purpose of deciding the present appeal.

22. Appearing for the Municipality, Mr. Amalesh Ray, learned Advocate drew our attention to certain paragraphs of the Municipality's affidavit affirmed on January 6, 2023. It would be helpful to set out a few paragraphs from the said affidavit:-

“6. (c) On a scrutiny of the said chart, it appears that there were 341 sanctioned posts (139+202) in Dum Dum Municipality as on 01.07.1998. Out of 341 sanctioned posts, 7 sanctioned posts were filled up by the officers referred to in sub-section 1 of Section 53 of the said Act, 1993.

7 (a). I say that the names of residential medical officers / medical officers/ dental surgeon/ resident physician have been sent to the office of Directorate of Local Bodies in connection with the instant case which are as follows:-

Dum Dum Municipality

Sl No.	Name of Staff	Designation	Date of appointment	Remarks
1.	Dr. Bidhan Ch. Mondal	R.M.O	04.10.1991	
2.	Dr. Amitesh Sarkar	R.M.O	01.07.1991	31.07.2022 (Retired)
3.	Smt. Purnima Biswas, Wife of late Dr. Nitya Gopal Biswas	M.O.	01.03.1994	29.07.2016 (Expired)
4.	Dr. Rafiqul Hasan	R.M.O	01.03.1994	31.07.2016 (Retired)
5.	Dr. Subhajit Bhattacharjee	Dental Surgeon	01.05.1997	

6.	Dr. Amlan Kanti Majumder	R.M.O	01.11.1994	
7.	Dr. Asit Ranjan Kundu	R.M.O	01.09.1998	
8.	Dr. Priyadarsi Sarkar	R.M.O	03.09.1998	
9.	Dr. Sukhendu Bhaumik	R.M.O	15.01.1994	
10.	Dr. Ananda Bagchi	Resident Physician	01.03.1988	C.P.F.
11.	Dr. Sakti Chakraborty	R.M.O	01.02.1986	C.P.F. (Retired on 31.10.2014)
12.	Dr. Ashoke Kumar Mondal	R.M.O	01.05.1986	C.P.F. (Retired on 30.11.2016)
13.	Dr. Chandana Ghosal	R.M.O	01.04.1991	
14.	Dr. Sakti Lal Choudhury	R.M.O	01.06.1998	31.08.2015 (RETIRED)
15.	Smt. Barnali Malakar, wife of Late Dr. Samir Malakar	R.M.O	03.05.1983	Getting pension as per Court order, Dr. Malakar retired on 31.05.2014.
16.	Dr. Deb Ranjan Biswas	R.M.O	02.05.1983	Has got pension as per Court order, Dr. Biswas and his wife now deceased.
17.	Amarendra Chatterjee	M.O (Pathological Dept.)	02.01.1975	Retired on 31.10.2002 Getting Pension
18.	Dilip Kumar Sadhu	M.O.	01.12.1972	Retired on 30.06.2005 getting pension

7(b) I say that the names of residential medical officers of Dum Dum Municipal Specialized Hospital and Cancer Research Centre which have been produced before the Hon'ble Court on 14.12.2022 from the year 1991 to 1998 are as follows:-

Sl No.	Date of Resolution of the Meeting of Dum Dum Municipality/Date of Appointment	Name of Medical Officer/ Residential Medical Officer.
1.	18.03.1991	Dr. Chandan Bhattacharya (Ghosal)
2.	01.07.1991	Dr. Amitesh Sarkar
3.	13.08.1993	Dr. Bidhan Chandra Mondal
4.	12.01.1994	Dr. Sukhendu Bhowmick
5.	26.02.1994	Dr. Rafiqul Hasan
6.	26.02.1994	Dr. Nitya Gopal Biswas
7.	31.10.1994	Dr. Amlan Kanti Majumdar
8.	29.04.1997	Dr. Subhajit Bhattacharya (Dental Surgeon)
9.	02.06.1998	Dr. Sakti Lal Chowdhury
10.	31.08.1998	Dr. Asit Ranjan Kundu
11.	31.08.1998	Dr. Priyadarshi Sarkar

7(c) Copies of the appointment letters of the aforesaid residential medical officer/medical officer are annexed hereto and marked as “ANNEXURE-R/4”.

8. On verification of the records lying in the Establishment and Accounts Section, Dum Dum Municipality, it is found that the following officers and/or employees, who did not fall within the meaning of the officers as referred to sub-section 1 of Section 53 of the said Act, 1993 have been appointed at the meetings of the Board of Councillors, Dum Dum Municipality within the period stretching from 01.01.1998 to 31.08.1998:

Sl No.	Date of Resolution of the meeting of the Board of Councillors, Dum Dum Municipality/Date of Appointment	Name of Rank of Offices and / or employees
1.	02.06.1998	Dr. Sakti Lal Chowdhury
2.	31.08.1998	Dr. Asit Ranjan Kundu
3.	31.08.1998	Dr. Priyadarshi Sarkar

23. We have carefully considered the rival contentions of the parties.

24. The only issue involved in this case is whether or not the respondent no. 1/writ petitioner is entitled to receive pensionary benefits. The appellants say that the respondent no. 1 was not appointed in a sanctioned vacant post and no prior approval of the State Government was obtained by the Municipality for appointing him in the concerned post. The respondent no. 1 would contend that he is covered by the Government Orders dated May 7, 2009, as amended by the Government Order dated August 19, 2009. Hence *post facto* approval for his appointment is deemed to have been accorded by the State Government. Alternatively, the respondent no. 1 contends that he was appointed by the Municipality in one of the three posts created by the Municipality in exercise of power under sub-sections 3 and 4 of Section 53 of the West Bengal Municipality Act, 1993. Since, the total number of sanctioned posts of officers and other employees in the year immediately preceding the year of appointment of the respondent no. 1 was 341, 3 being a figure not exceeding 1% of 341, no prior approval of the State Government

was necessary under sub section 4 of Section 53 of the 1993 Act as it stood prior to being amended in 2002.

25. We agree with the contention of learned Advocate for the appellants that the respondent no. 1 is not covered by the Government Order dated May 7, 2009, as amended by the Government Order dated August 19, 2009 and he is not entitled to take advantage of the said Government Orders. Although the learned Single Judge allowed the writ petition on the basis that the Government Order dated May 7, 2009, as amended by the Government Order dated August 19, 2009, applies to the respondent no. 1 herein, we respectfully disagree with the learned Single Judge on that score.

26. The Government Order dated May 7, 2009, authorised the Director of Local Bodies, West Bengal, to issue relevant orders in respect of those employees who were appointed in Scale of pay of Rs. 380-910/- which was revised to Rs. 4,000- -8,850/- **and below**. The scale of pay of Rs. 380-910/- was the pre-revised scale i.e., the scale applicable to the concerned employees before the pay revision. After pay revision, the employees who were drawing salary in the scale of pay of Rs. 380-910/-, started drawing salary in the scale of pay of Rs. 4,000-8,850. The Government Order dated May 7, 2009, had incorporated the word “below” after the words “since revised to Rs. 4,000-8,850 and”. That means, the Government wanted to extend the benefit of the said Order even to the employees enjoying pay scales lesser than the pay scale of Rs. 4000-8850/-. Hence, going by the Government Order dated May 7, 2009 the respondent no. 1/writ petitioner, who was in the scale of pay of

Rs. 2,200 – 4,000/- (revised) would have been entitled to the benefits under the said Government Order.

27. But by issuing the Government Order dated August 19, 2009, the word 'below' mentioned in the Government Order dated May 7, 2009, was deleted. The effect was that the benefit of post facto approval of appointments or promotion in respect of the employees who were in scale of pay lesser than Rs. 380-910/- (pre revised) or Rs. 4,000-8,850/- (revised) was withdrawn. In other words, by the Government Order dated August 19, 2009, the benefit under the Government Order dated May 7, 2009, was restricted to those employees who were in the scale of pay of Rs. 380-910/- (pre-revised) or Rs. 4,000/- – 8,850/- (revised) and not below. As the respondent no. 1/writ petitioner was in the lesser pay scale of Rs. 2,200 - 4,000/-, he could not claim the benefit of the Government Order dated May 7, 2009 as amended by the Government Order dated August 19, 2009. To be more precise, before the relevant pay revision, the corresponding pay scale of Rs. 2200 – 4000/- was certainly lesser than the pay scale of Rs. 380-910/-

28. However, we have to accept the alternative argument advanced by learned Advocate for the respondent no. 1/writ petitioner.

29. From the affidavit filed by the Municipality, the relevant portion whereof has been extracted above, we find that as on July 1, 1998, i.e., the year immediately preceding the year in which the respondent no. 1 was appointed there were 341 sanctioned posts in Dumdum Municipality. Only 3 appointments were made by creation of posts in exercise of power under sub-

section 4 of Section 53 of the 1993 Act, in the following year. 1% of 341 is 3.41. Hence, the Municipality as per the un-amended sub Section 4 of Section 53 of the 1993 Act, could have created up to 3.41 posts without prior approval of the State Government. Since a fraction of post is in-capable of creation, the logical conclusion is that the Municipality could create up to 3 posts of officers/employees without prior sanction of the State Government. We find from the affidavit of the Municipality that within the period stretching from 01.01.1998 to 31.08.1998, only 3 officers/employees who did not fall within the meaning of officers as referred to in Section 53(1) of the 1993 Act, were appointed in exercise of power under Section 53(4) of the said Act. They are Dr. Saktilal Choudhury (writ petitioner), Dr. Asit Ranjan Kundu and Dr. Priyadarshi Sarkar.

30. In view of the aforesaid we must hold that the respondent no. 1 /writ petitioner was validly appointed by the Municipality in exercise of power under section 53(4) of the 1993 Act as that section stood prior to the 2002 amendment. Hence, neither prior sanction of the State Government for appointment of the writ petitioner was necessary nor can he be denied pensionary benefits. The question of the writ petitioner being appointed in a sanctioned vacant post also does not arise as the post in which he was appointed was one validly created by the Municipality in exercise of power conferred on it by the 1993 Act.

31. Accordingly, we agree with the conclusion reached by the learned Single Judge although we disagree with His Lordship's reasoning. We therefore do not interfere with the order under appeal. We affirm the operative portion of

the order and direct the appellants to release the pensionary benefits of the respondent. No. 1/ writ petitioner in terms of the order of the learned Single Judge. However, we extend the time period to do so by 8 weeks from date.

32. The appeal and the connected application are disposed of accordingly.

33. Urgent certified website copies of this judgment, if applied for, be supplied to the parties subject to compliance with all the requisite formalities.

I agree.

(Apurba Sinha Ray, J.)

(Arijit Banerjee, J.)