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HIGH COURT OF CHHATTISGARH, BILASPUR

Writ Petition (S) No.1066 of 2012

R.P. Sonkar, S/o Late Shri J.L. Sonkar, aged about 49 years, presently posted as Assistant Engineer, Municipal Corporation, Chirmiri, District Korea, Chhattisgarh

---- Petitioner

Versus

1. State of Chhattisgarh, Through the Secretary, Government of Chhattisgarh, Urban Administration & Development Department, DKS Bhawan, Mantralaya, Raipur, Chhattisgarh
2. The Commissioner, Municipal Corporation, Chirmiri, District Korea, Chhattisgarh

---- Respondents

AND

Writ Petition (S) No.1187 of 2012

S.K. Majumdar, S/o Shri Jaggananth Majumdar, aged about 56 years, presently posted as Administrative Officer, Municipal Corporation, Chirmiri, District Korea, Chhattisgarh

---- Petitioner

Versus

1. State of Chhattisgarh, Through the Secretary, Government of Chhattisgarh, Urban Administration & Development Department, DKS Bhawan, Mantralaya, Raipur, Chhattisgarh
2. The Commissioner, Municipal Corporation, Chirmiri, District Korea, Chhattisgarh
3. The Commissioner, Municipal Corporation, Ambikapur, District Surguja, Chhattisgarh

---- Respondents

For Petitioners: Mr. Sabyasachi Bhaduri, Advocate.

For Respondent No.1 / State: -

Mr. Siddharth Dubey, Deputy Govt. Advocate.

For Respondent No.2 in both the writ petitions and Respondent No.3 in W.P. (S)No.1187/2012: None present though served.

Hon'ble Shri Justice Sanjay K. Agrawal

Order On Board
(Through Video Conferencing)

03/09/2021

1. Since common question of law and fact is involved in both the writ petitions, they have been clubbed together and heard together and are being disposed of by this common order.
2. The petitioners, by way of these petitions, challenge the order dated 9-8-2011 (Annexure P-1) passed by respondent No.1 and the resolution dated 30-1-2012 (Annexure P-2) passed by respondent No.2. By order dated 9-8-2011, the State Government has held that the petitioners are not entitled for the benefit of 6th Pay Commission and by order dated 30-1-2012, the Municipal Corporation, Chirmiri directed for demotion of the petitioners on their original posts of Sub-Engineer and Office Superintendent, respectively.
3. In the meeting of the Departmental Promotion Committee (DPC) duly constituted, the case of the petitioner in W.P.(S)No.1066/2012 namely, R.P. Sonkar was considered and he was recommended to be promoted on the post of Assistant Engineer from the post of Sub-Engineer on 30-4-2008 in accordance with the Chhattisgarh Municipal Corporation (Appointment and Conditions of Service of Officers and Servants) Rules, 2007 (for short, 'the Rules of 2007'). Similarly, the case of the petitioner in W.P.(S)No.1187/2012 namely, S.K. Majumdar was considered and he was recommended by the DPC to be promoted on the post of Administrative Officer from the post of Office Superintendent. Accordingly, the Municipal Corporation by order dated 30-4-2008 promoted them on the said posts to which they joined also and started working on the promoted post. On 18-7-2008, the matter was sent to the State Government for confirmation in accordance with proviso (iii)

appended to Section 58(1) of the Chhattisgarh Municipal Corporation Act, 1956 (for short, 'the Act of 1956'), but nothing could be heard about confirmation from the State Government. In the meanwhile, the petitioners were refused the benefit of 6th Pay Commission by order Annexure P-1 dated 9-8-2011 on the ground that their appointments by promotion on the post of Assistant Engineer and Administrative Officer have not been confirmed by the State Government and therefore they are not entitled for the benefit of 6th Pay Commission and thereafter, acting upon that order, on 30-1-2012, their promotion on the post of Assistant Engineer and Administration Officer has been cancelled by respondent No.2 and recovery has been sought to be made against them, feeling aggrieved against those orders, these two writ petitions have been preferred.

4. Mr. Sabyasachi Bhaduri, learned counsel appearing for the petitioners, would submit that the State Government is absolutely unjustified in passing the impugned order holding that the petitioners are not entitled for the benefit of 6th Pay Commission stating that their promotion has not been confirmed by the State Government and further, it ought to have been considered as it has been sent to the State Government on 18-7-2008 and the State Government is sitting tight over the matter and passed the order impugned not extending the benefit of 6th Pay Commission to which they are otherwise entitled to. He would further submit that the Municipal Corporation, Chirmiri, is also unjustified in ordering recovery and cancelling promotion of the petitioners, it is the Municipal Corporation, who granted promotion pursuant to the recommendation of the DPC which the Mayor-in-Council accepted and thereafter, the petitioners have joined on the said post and thereafter

salary has been drawn against promoted post which cannot be recovered. As such, the impugned orders Annexures P-1 & P-2 are liable to be set aside.

5. Mr. Siddharth Dubey, learned State counsel, would submit that order dated 30-4-2008 promoting the petitioners on the posts of Assistant Engineer & Administrative Officer runs contrary to proviso (iii) appended to Section 58(1) of the Act of 1956 which prescribes that promotion to be made by the Mayor-in-Council is subject to the prior confirmation of the State Government and unless prior confirmation is accorded by the State Government in compliance of third proviso to Section 58(1) of the Act of 1956, no order for promotion could have been issued by respondent No.2 on 30-4-2008 promoting the petitioners on the post of Assistant Engineer & Administrative Officer. As such, on that ground these writ petitions are liable to be dismissed.
6. None appeared for respondent No.2 in both the writ petitions and for respondent No.3 in W.P.(S)No.1187/2012 as well, though served.
7. I have heard learned counsel for the parties and considered their rival submissions made herein-above and also went through the record with utmost circumspection.
8. In order to decide the dispute, it would be appropriate to notice Section 58(1) of the Act of 1956 which states as under: -

“58. Appointment and condition of service of Corporation officers and servants.—(1) Subject to the rules made by the State Government in respect of the Set-up, Strength, Recruitment, Appointment, Pay-scales, Allowances and other conditions of service of officers and servants of the Corporation, the Corporation shall appoint such officers and servants as may be necessary for the efficient performance of the functions of the Corporation:

Provided that,

(i) the power of appointing any person on a municipal post which carries a maximum scale of pay as the State Government may, from time to time, by an order in writing specify, shall vest in the Mayor-in-Council or the Commissioner.

(ii) any appointment made within his power by the Commissioner shall be reported for information to the Mayor-in-Council;

(iii) every appointment to be made by the Mayor-in-Council shall be subject to the prior confirmation for the State Government. The decision of the State Government in this behalf shall be final.”

9. A careful perusal of Section 58(1) of the Act of 1956 would show that subject to the rules made by the State Government in respect of the set-up, strength, recruitment, appointment, pay-scales, allowances and other conditions of service of officers and servants of the Corporation, the Corporation is competent to appoint such officers and servants as may be necessary for the efficient performance of the functions of the Corporation, but every appointment to be made by the Mayor-in-Council shall be subject to the prior confirmation of the State Government and the decision of the State Government in this behalf shall be final. As such, proviso (iii) to Section 58(1) of the Act of 1956 clearly provides that for every appointment to be made by the Mayor-in-Council, prior confirmation of the State Government is necessary, rather it is mandatory and even the subsequent approval, if any, could not make the order of the Mayor-in-Council valid and prior confirmation of the State Government would be absolutely necessary before passing the order of appointment including promotion by the Mayor-in-Council. As such, third proviso to sub-section (1) of Section 58 of the Act of 1956 is mandatory in nature.

10. It is settled law that a power to be exercised after 'prior approval' of a named authority cannot be validly exercised without such approval. (See Principles of Statutory Interpretation by Justice G.P. Singh, 12th Edition 2010, page 425.)
11. The Supreme Court in the matter of Nandkishore Ganesh Joshi v. Commissioner, Municipal Corporation of Kalyan & Dombivali and others¹ held that when statute requires prior approval before entering into contract, it cannot be said to be an empty formality and it was observed as under: -

“17. Although the Commissioner is entitled to execute contracts on behalf of the Corporation but a statutory embargo is placed thereupon by reason of clause (c) of Section 73 of the Act. A contract which may be entered into by the Commissioner requires prior approval of the Standing Committee. It is, thus, not a case where an action taken by a statutory authority requires approval which may be granted at a later stage. The approval of the Standing Committee, a bare perusal of clause (c) would show, is required to be granted before any contract is entered into. The approval of a contract and that too with previous approval by the Standing Committee cannot, thus, be said to be an empty formality. (See *Canbank Financial Services Ltd. v. Custodian*² SCALE para 35.) The Standing Committee is required to perform its functions in terms of the provisions of the said Act. A statutory authority has also a duty to act in public interest as also fairly and in a reasonable manner.”

12. The M.P. High Court in the matter of Lakhanlal Sahu v. State of M.P. and others³ while dealing with similar situation has held as under: -

“It is clear from proviso (iii) to sub-section (1) of Section 58 of the Act of 1956 that every appointment to be made by the Mayor-in-Council shall be subject to the prior confirmation of the State Government and the decision of the State Government in this behalf shall be final. Even for making a stop gap arrangement under sub-section (2) of Section 58 in

1 (2004) 11 SCC 417
2 (2004) 8 SCC 355
3 2002(1) MPJR 246

emergent situation, prior permission of the State Government is necessary. Thus, in either case the appointment is permissible only if there is prior confirmation or prior permission of the State Government for the appointment to be made by the Mayor-in-Council. It is not the case of the petitioners that their appointment was made by the Council with the prior confirmation of the State Government nor is it a case where the appointment was made to meet an emergent situation with prior permission of the State Government. A bare reading of sub-section (1) of Section 58 makes it luculent that no appointment can be made by Mayor-in-Council without the prior confirmation of the State Government or its prior permission, as the case may be. The petitioner cannot, therefore, claim any advantage with regard to the protection of post of Executive Engineer, or the emoluments attached to the post, under sub-section (6) of Section 58 on being transferred under sub-section (5) thereof. The provisions of sub-section (6) are only as regards the post legitimately held by an incumbent and the emoluments attached to it and would not encompass any illegal or irregular promotion or grant of pay scale of higher post without the prior confirmation or prior permission of the State Government to enable the incumbent to claim protection of any illegal, unjust and undeserved advantage of which he has recipient in the parent Corporation. Therefore, it cannot be said that the order of transfer is in violation of sub-section (6) of Section 58 as it puts the petitioner to a disadvantageous position in respect of post, pay and allowances. In fact the position of the petitioner is to be seen only on the post of Assistant Engineer ignoring his appointment by the Mayor-in-Council on the post of Executive Engineer by promotion which suffers from the patent illegality of being without the prior confirmation of the State Government as required under clause (iii) of the proviso to sub-section (1) of Section 58."

13. Reverting to the facts of the present case, in the light of the above-stated statutory provisions requiring prior confirmation of appointment which is mandatory in nature, it appears that in accordance with Rule 10(1), Schedule III, of the Rules of 2007, the Mayor-in-Council is competent to grant promotion on the post of Administrative Officer and Assistant Engineer. Consequently, before passing the order of promotion on the basis of recommendation of the DPC, prior

confirmation of the State Government ought to have been sought by the Municipal Corporation and only thereafter, appointment could have been made. But in the instant case, the DPC made recommendation on 30-4-2008 and on the same day, the order of promotion was passed by the Municipal Corporation, thereafter, it was confirmed by the Mayor-in-Council on 3-5-2008 and thereafter, it was sent to the State Government for confirmation on 18-7-2008. In the meanwhile, the Mayor-in-Council of the Corporation sought permission to grant the benefit of 6th Pay Commission to the petitioners vide memo dated 8-6-2011 to which the State Government, vide the order impugned Annexure P-1 informed that the promotion made by the Mayor-in-Council has not been approved by the State Government, therefore, the benefit of 6th Pay Commission cannot be granted to the petitioners.

14. From the aforesaid narration of facts, it is quite clear that immediately after the recommendation of the DPC, promotion order was issued on 30-4-2008, even the Mayor-in-Council has approved the appointment / promotion of the petitioners on 3-5-2008 and thereafter, it was sent to the State Government on 18-7-2008. As such, no prior confirmation as required by third proviso to Section 58(1) of the Act of 1956 was obtained by the Municipal Corporation, Chirmiri before issuing the order of promotion on 30-4-2008, which was essential before issuing the order of promotion in favour of the petitioners. In the circumstances, it has rightly been held by the State Government that since the petitioners' promotion on the post of Assistant Engineer and Administrative Officer has not been subjected to prior confirmation of the State Government, therefore, the petitioners are not entitled for the benefit of 6th Pay Commission and their promotion has rightly been cancelled by

respondent No.2 vide Annexure P-2, as there is no prior confirmation of the State Government as required under third proviso to Section 58(1) of the Act of 1956.

15. At this stage, Mr. Bhaduri, learned counsel for the petitioners, submits that the order of recovery made against the petitioners is liable to be set aside.
16. It is true that the petitioners were recommended for promotion by the DPC and thereafter, they were given the order of promotion by the Municipal Corporation and they joined and started performing the job of promoted post and they were paid salary against that post. It is not the fault of the petitioners in working on the promoted post and drawing salary against that post and since they have been granted promotion by the Municipal Corporation, Chirmiri and there is no misrepresentation on the part of the petitioners, recovery of salary already paid cannot be directed to be recovered from the petitioners.
17. Consequently, the writ petitions are partly allowed. The order directing recovery from the petitioners on the promoted post is hereby set aside, however, their reversion on the original posts of Sub-Engineer and Office Superintendent for want of prior confirmation by the State Government required under proviso (iii) to Section 58(1) of the Act of 1956, is hereby confirmed. However, it is made clear that this will not bar the State Government from considering the memo dated 18-7-2008 sent by the Municipal Corporation regarding confirmation of their promotion, if not already considered; it will be considered expeditiously now. No order as to cost(s).

Sd/-
(Sanjay K. Agrawal)
Judge

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