
(1989) 12 GAU CK 0010
In the Gauhati High Court
Case No : Civil Rule Nos. 753 and 754 of 1985

Abdul Fazal

APPELLANT

Vs

Assam Administrative Tribunal

RESPONDENT

Date of Decision : 01-12-1989

Acts Referred:

Assam Engineering (Irrigation Department) Service Rules, 1978 — Rule 13(5), 13(5)

Citation : (1990) 1 GLJ 108

Hon'ble Judges : B.L.Hansaria, J and J.Sangma, J

Bench : Division Bench

Advocate : N.Dutta, A.K.Phukan, K.K.Mahanta, K.H.Choudhary,
J.P.Bhattacharjee, D.N.Choudhary, D.Majumdar, B.K.Das, N.Islam, B.Kalita,
Advocates appearing for Parties

Judgement

B. L. Hansaria, J.—These two writ petitions have impugned the judgment and order of the learned Assam Administrative Tribunal dt. 18.5.85 which is related to the appointment of the two writ petitioners to the posts of Additional Chief Engineer in the Irrigation Department. The appellant before the learned Tribunal was respondent No. 2, Arunava Choudhuri, who was then holding the post of Superintending Engineer. His grievance was that his case was not considered by the Selection Board for promotion to the post of Additional Chief Engineer in accordance with the provisions contained in Rules 12 and 13 of the Assam Engineering (Irrigation, Department) Service Rules, 19/8, hereinafter the Rules. The grievance has been accepted by the learned Tribunal which desired fresh consideration by the Selection Board. Feeling aggrieved, these two petitions have been filed by the two incumbents who were appointed as Additional Chief Engineer pursuant to the recommendations of the Selection Board.

2. A perusal of the impugned judgment of the learned Tribunal shows that the recommendations of the Selection Board did not find favour with it principally for two reasons: (i) Some adverse remarks which were not communicated to respondent No. 2 were taken into consideration by the Selection Board ; and (ii)

no reasons were recorded by the Selection Board for its recommendations. Something has also been said by the learned Tribunal as to why the Selection Board confined its attention to the Annual Confidential Reports (ACRs) of five years preceding the year in which the selection was made.

3. It is apparent from a reading of Rule 13 (2) (c) of the Rules that only those adverse remarks recorded in the Character Roll which have; been communicated to the person concerned can be looked into at the time of promotion. That the concerned adverse remarks were not communicated to respondent No. 2 is an admitted position and we would also accept that Selection Board was influenced by uncommunicated adverse remarks which were in the Character Roll of respondent No. 2. It may be stated that the adverse remarks recorded against respondent No, 2 were expunged by an order of the Tribunal passed on 26, 10, 85. The recommendation based on uncommunicated adverse remarks was rightly not accepted by the Tribunal.

4. So far as nonrecording of reasons is concerned, it has been argued by Shri Choudhury appearing for the writ petitioners and Shri Das appearing for the intervenor Shri A. S. Abdullah that the same is not required in a case of the present nature. Shri Bhattacharjee who is ably assisted by Shri Dutta has, however, urged that apart from the requirement of natural justice, reasons are required to be recorded in view of what has been stated in Rule 13 (5) of the Rules. This submission of Shri Bhattacharjee has not been accepted by the aforesaid two learned counsel inasmuch as this part of the Rule reads :

"In case the Board "(meaning the Selection Board) does not consider an officer suitable for promotion according to seniority, it shall record the reasons thereof in writing and forward these reasons to the appointing authority together with the list".

It is contended that recording of reasons is required by this part of the Rule only when promotion has to be on the basis of seniority, which is not so in case of promotions to the rank of Superintending Engineer and above which has to be on the basis of merit only as stated in Rule 13 (4) (d) of the Rules. Shri Bhattacharjee however contends that as seniority demarcates the zone of consideration in view of what has been provided in Rule 13(2) which requires furnishing of opinion to the Board with regard to as many officers in the order of seniority as four times the number of vacancies, seniority does play its part in selection.

4A. In support of his submission Shri Buattacharjee has referred to the wellknown case of Gurdial Singh Fijji vs. State of Punjab, AIR 1979 SC 1622 and Union of India vs. M. L. Capoor, AIR 1974 SC 87. It is, however, submitted by Shri Choudhuri that the view taken in M. L. Capoor (supra) owes its origin to the fact that the concerned Rule required the Selection Committee to record its reasons for the proposed supersession. Our attention has also been invited by Shri Chouohuri to R. S. Dass vs. Union of India, AIR 1987 SC 593, wherein in

view of the amended provisions finding place in the Indian Administrative Service; (Appointment by Promotion) Regulation, 1955, recording of reasons was not considered necessary. The learned counsel has further urged that in cases where Promotion is made on the basis of merit as distinguished from seniority there is really no supersession as states in the Union Public Service Commission vs. Hiranyalal Dev, AIR 1988 SC 1069,

5. We have duly considered these rival submissions and, according to us seniority does play its part in the process of selection and the language of Rule 13(5) of the Rules being what it is, the Selection Board has to give its reasons when an officer suitable for promotion is not promoted. Because of the express provision in Rule 13(5), the decision in R. S. Dass would not apply. Even if there be no supersession, recording of reason is required by Rule 13(5).

6. In assailing the order of the learned Tribunal, it has been further contended by Shri Choudhury that though respondent No. 2 was senior to the writ petitioners as per the provision seniority list, the position has changed in the final seniority list of the concerned incumbents wherein the writ petitioners occupy position against serial Nos, 11 and 12 whereas respondent No. 2 is against serial No. 18. Though a representation was submitted by respondent No. 2 against his aforesaid placement in the final seniority list, it has been brought to our notice by Shri Das that the representation was rejected on 20.11.89. According to us, this would not make any difference inasmuch as even as per the amended seniority list, respondent No. 2 has to be regarded within the zone of consideration inasmuch as the appointing authority has to furnish to the Selection

Board opinion with regard to as many officers as four times the number of vacancies which were said to be 6 (six) by now. This apart, as promotion to the post of Additional Chief Engineer is not determined on the basis of seniority but on the basis of merit, even if respondent No. 2 be junior to the writ petitioners, the same would not stand in the way of his being considered for the post of Additional Chief Engineer by the Selection Board.

7. Shri Das appearing for the intervenor has urged that respondent No. 2 is not qualified to hold the post of Additional Chief Engineer in view of what has been laid down in Rule 12 (4) read with Schedule II of the Rules inasmuch as respondent No. 2 holds a Degree of Agricultural Engineering whereas Schedule II requires Degree in Civil, Mechanical, or Electrical Engineering. It is contended by the learned counsel that the learned Tribunal itself in its judgment in Case No, 64 ATA/86 which was disposed of on 7.12.86 entertained this view because of which some amendments in the Rules were suggested. As the aforesaid case of the Tribunal is the subject matter of a separate writ petition which is pending in this Court, we have not felt it fit to express any opinion on this aspect of the case. We would, however, note the submission of Shri Bhattacharjee that respondent No. 2 cannot be held to be unqualified, which is not the case of the appointing authority also, so far, in view of the fact that he was brought to the amalgamated Irrigation Department along with other Agricultural Engineers of the

Irrigation Wing of Agricultural Department and Flood Control and Irrigation Department as early as January, 1974. Shri Dutta has urged in this connection that one Shri D. C. Hazarika whose name is against serial nj 15 of the final seniority list is also an Agricultural Engineer. His placement in the final seniority list would show that he has been accepted as Superintending Engineer in the new Irrigation Department. It is also contended by the learned counsel that the Selection Board held earlier had not rejected the case of respondent No. 2 on the ground that he was not qualified to hold the post of Additional Chief Engineer. In this context, it is also brought to our notice that the Selection Board which considered the case of some of the Superintending Engineers pursuant to the order passed by this Court on 4.12.87 which had to be rendered to take care of urgent public necessity, the name of the aforesaid Shri D. C. Hazarika was recommended for the post of Additional Chief Engineer.

8. In view of all the above, we are satisfied that it is a fit case where the Selection Board should reconsider the entire matter and decide whether respondent No. 2 deserved to be recommended for promotion to the post of Additional Chief Engineer. This consideration shall be made on the basis of Character Rolls and personal files of the officers concerned as these existed in 1984 when the writ petitioners were promoted to the post of Additional Chief Engineer. For this purpose an overall view of the Character Rolls shall be taken though more importance shall be given to the Character Rolls of the five immediately preceding years. If respondent No. 2 shall be found fit by the Selection Board for promotion to the post of Additional Chief Engineer, the same shall relate back to 18.6.1984 or 4.9.84 as indicated, and for the reason given, in the judgment of the learned Tribunal. While doing so, cases of other eligible Superintending Engineers within the zone of consideration shall also be considered. As, however, Shri Abul Fazal has since retired, we would not like his appointment to be disturbed by the appointing authority. We would make same observation as regards the other writ petitioner Shri B. B. Barooah who is due to retire on 31. 3. 1990. We would also state that as Shri P. P. Sarma and Shri A. S. Abdullah were appointed as adhoc Additional Chief Engineers as was desired by this Court vide its order passed on 5.12.87 in Misc. Case No. 754/87, their cases for regular appointment shall also be duly considered. These incumbents shall, however, continue to hold the post in question till the process of appointment is concluded. As the posts involved are important, we would desire the appointing authority and the Selection Board to undertake the task of appointing regular Additional Chief Engineers as early as possible, preferably within a period of three months from today.

9. Both the writ petitions are disposed of accordingly. The injunction order passed by this Court on 6. 9. 1985 in Misc. Case No. 923/85 stands vacated.