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**(2013) 05 GAU CK 0081**

**In the Gauhati High Court**

**Case No :** Writ Appeal No. 232 of 2011

Assam State Agricultural Marketing Board and Another — APPELLANT

Vs

Sri Sarbeswar Patir — RESPONDENT

**Date of Decision :** 21-05-2013

**Acts Referred:**

**Citation :** (2013) 3 GLD 444 : (2013) 5 GLT 439

**Hon'ble Judges :** Ujjal Bhuyan, J;Adarsh Kumar Goel, J

**Bench :** Division Bench

**Advocate :** K.N. Choudhury and Ms. R. Kakati, for the Appellant; D.C. Borah and Ms. B.M. Lahkar, for the Respondent

## Judgement

Ujjal Bhuyan, J.—Issue involved in Writ Appeal Nos. 232/2011, 233/2011 and 4/2012 being the same and since all the writ appeals arise out of a common judgment and order of the learned Single Judge, the three appeals were heard together and are being disposed of by this common order. By the common judgment and order dated 19-04-2010, learned Single Judge allowed the three writ petitions filed by the three respondents as writ petitioners in terms of earlier judgment of the Court dated 03-02-2005 directing consideration of their cases for promotion as Marketing Inspector from the date when their juniors were so promoted.

2. Assam State Agricultural Marketing Board and its Chief Executive Officer were respondents in the writ petitions. They have filed the three writ appeals as appellants. Writ Appeal No. 232/2011 arises out of Writ Petition (C) No. 4168/2009, Writ Appeal No. 233/2011 arises out of Writ Petition (C) No. 4167/2009 and Writ Appeal No. 4/2012 arises out of Writ Petition (C) No. 4165/2009.

3. Petitioner in W.P. (C) No. 4168/2009 filed the writ petition stating that he was appointed as Contingency Menial in the Assam State Agricultural Marketing Board (Board) on 18-08-1998. In the course of his service, he was promoted to the

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post of Accounts Assistant. Thereafter, he was further promoted to the post of Internal Auditor. Subsequently, on transfer, he was given the posting of Accountant.

4. Petitioner in W.P. (C) No. 4167/2009 was appointed as Lower Division Assistant (LDA) in the Board on 11-07-2000. Thereafter, he was promoted to the post of Accounts Assistant. Additionally, he was given field duties of Marketing Inspector.

5. Petitioner in W.P. (C) No. 4165/2009 was appointed as Contingency Manual in the Board on 12-10-1990. Thereafter, he was posted as Accounts Assistant. He was given further promotion to the post of Accountant.

6. All the three writ petitioners raised the common grievance that there have been anomalies in filling up vacancies in the post of Marketing Inspector. Vacancies in the post of Marketing Inspector were filled up by pick and choose method from amongst Grade-III and Grade-IV employees without having any regard to their seniority. They prayed for issuance of necessary direction to the Board to promote them to the post of Marketing Inspector contending that their juniors were already promoted as Marketing Inspector. They based their case on a judgment of this Court dated 03-02-2005 passed in W.P. (C) No. 737/2000 and other connected cases. They contended that the above judgment was again followed by this Court in W.P. (C) No. 3699/2002 and W.P. (C) No. 853/2007 by passing similar direction.

7. Board filed affidavit opposing the writ petitions. Main contention advanced was that earlier, vacancies in the post of Marketing Inspector were filled up when no service bye-laws were in force and those were done on the basis of administrative exigency. At the time when directions were issued by this Court on 03-02-2005, service bye-laws were not in force. As per order of this Court, petitioners of the earlier writ petitions were promoted to the post of Marketing Inspector. But the claims of the petitioners were resisted on the ground that in the meanwhile service bye-laws had already come into force which would govern the promotion of the petitioners. It was averred that petitioners were not entitled for promotion to the post of Marketing Inspector as per the service bye-laws and also as per the administrative structure of the Board which provided for different branches in the administration of the Board.

8. Learned Single Judge heard all the three writ petitions together and by the common order dated 19-04-2010 allowed the writ petitions in terms of the earlier judgment dated 03-02-2005.

9. Heard Mr. K.N. Choudhury learned Senior Additional Advocate General, Assam appearing for the appellant Board and Mr. D.C. Borah, learned Counsel appearing for the respondents/writ petitioners.

10. Mr. Choudhury learned Senior Counsel appearing for the appellants submits that the direction of the learned Single Judge cannot be sustained as the posts

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presently being held by the petitioners are not the feeder cadre for promotion to the post of Marketing Inspector. Posts of Accountant and Marketing Inspector belong to different branches of the Board. He submits that while there can be reasonable justification to even question the previous judgment of this Court dated 03-02-2005, more fundamentally, the difference between the earlier round of litigation and present round of litigation is that in the intervening period the service bye-laws came into force and the promotion of the officers and staff of the Board will now be governed by the service bye-laws. He further submits that the claim of the petitioners is a negative one as the earlier promotions are all questionable and, therefore, they cannot seek promotion on the analogy of such questionable promotions. He, therefore, prays for setting aside of the impugned judgment of the learned Single Judge. In support of his submissions, learned Senior Counsel for the appellant places reliance on two judgments of the Hon''ble Supreme Court in Gursharan Singh and others etc. Vs. New Delhi Municipal Committee and others, and Mahmood Hasan and others, etc. etc. Vs. State of U.P. and others, .

11. On the other hand, Mr. Borah, learned Counsel for the respondents/writ petitioners submits that the stand of the Board is most unfortunate. It had allowed illegalities to be committed by randomly promoting persons to the post of Marketing Inspector by violating the seniority of the employees, which compelled the Court to intervene in the matter. This Court had found that many junior employees were promoted superseding the seniors and, therefore, the Court had to step in and passed the judgment dated 03-02-2005 by applying the "next below rule". In the case of the petitioners also, learned Single Judge found as a matter of fact that persons junior to them were promoted to the post of Marketing Inspector. To rectify this anomalous situation, learned Single Judge passed the impugned order by following the earlier order. He further submits that a review petition filed by the Board for review of one of the subsequent orders passed following the initial judgment dated 03-02-2005 on the ground of coming into force of the service bye-laws was rejected by this Court. He, therefore, seeks dismissal of the writ appeals.

12. Submissions made have been considered.

13. Before proceeding further, we may look into the first judgment of the Court dated 03-02-2005. Learned Single Judge had allowed a batch of writ petitions by the said judgment. Learned Single Judge noted that no definite criteria were adopted towards promotion of the private respondents in those cases to the post of Marketing Inspector. Learned Single Judge agreed with the contention of the petitioners that those juniors were promoted to the post of Marketing Inspector without considering their cases. Applying the principle of "next below rule", learned Single Judge directed the Board to consider the cases of those petitioners by applying the same yardstick as was applied to the case of the private respondents for their promotion to the post of Marketing Inspector from the date the private respondents were so promoted.

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14. This judgment dated 03-02-2005 was followed by this Court in W.P. (C) No. 853/2007, which was disposed of vide order dated 23-02-2007 with a direction to the Board to consider the cases of the petitioners in terms of judgment dated 03-02-2005. Board filed a review petition for review of the above order dated 23-02-2007 on the ground that service bye-laws had come into force in the meanwhile and that the direction of the Court was opposed to the letter and spirit of the service bye-laws. The review petition was dismissed. It was held that the bye-laws had acquired the legal status to be enforced in law only w.e.f. 01-04-2007, which was after the date of the judgment sought to be reviewed.

15. Learned Single Judge noted that the service bye-laws had come into effect from 01-04-2007 but held that such bye-laws cannot take away the vested right of the petitioners for being considered for promotion to the post of Marketing Inspector. Learned Single Judge held as under:--

While disposing of the Review Petition, this Court duly took note of the fact that the bye-law came into effect from 01-04-2007. The petitioners having been deprived to their promotion of the post of Marketing Inspector as per the earlier prevalent practice and procedure, the said bye-law cannot take away the vested right of the petitioners. In fact, the said judgment and order dated 03-02-2005 was rendered in the fact situation that the juniors to the petitioners had been promoted to the post of Marketing Inspector without considering the seniors.

In the instant case, although the petitioners are senior to all the aforementioned officers including the writ petitioners involved in various writ petitions, the respondent Board has not considered their case for promotion at par with their juniors. In fact, the respondent Board ought to have considered the case of the petitioners without requiring them to approach this Court. However, due to the apathy shown by the respondents in the matter, the petitioners were forced to approach this Court.

For all the aforesaid reasons, I have no hesitation to allow the writ petitions in terms of the said judgment and order dated 03-02-2005 referred to above and all other subsequent orders,

Writ petitions are allowed. Consequential orders in terms of this order shall be passed by the respondents without any delay".

16. We are unable to persuade ourselves to agree with the view taken by the learned Single Judge. Without expressing any opinion on the earlier judgment dated 03-02-2005 since no challenge has been made to it, we find that the view taken by the learned Single Judge and the direction issued based thereon cannot be sustained. From the materials on record, more particularly the order dated 02-07-2009 passed in the review petition it is seen that the service bye-laws were framed by the Board in exercise of its power u/s 3(12) of the Assam Agricultural Produce Market Act, 1972. By the Assam Agricultural Produce Market (Amendment) Act, 2006, which came into force w.e.f. 01-01-2007, a provision had been introduced to the effect that if approval to such bye-laws is not

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accorded by the State Government within a period of ninety days from the placement thereof, the same would be deemed to have been approved on the expiry of the said period. Following a note put up by the Chairman, the Board in its meeting held on 29-03-2007 decided to implement the service bye-laws.

17. As per the service bye-laws, the post of Marketing Inspector is a Class-II post. In case of any vacancy, it has to be filled up either by promotion or by direct recruitment in the ratio provided. In case of promotion, the feeder cadre would be the post in Class-II (iii)(a) i.e. Head Assistant and the post in Class-III (ii)(a) i.e. Assistant Marketing Inspector. Moreover, as per the administrative structure of the Board, there are five branches, namely, Development, Engineering, Accounts, Establishment (A) and Establishment (B). The post of Marketing Inspector is under Development Branch whereas the post of Accountant is under the Accounts Branch.

18. There is substance is the submission of the learned Senior Additional Advocate General that after coming into force of the service bye-laws, promotion of officers and staff of the Board shall be governed by the provisions of the service bye-laws. Though the learned Senior Additional Advocate General has pressed into service the decisions of the Hon''ble Supreme Court in the cases of Gursharan Singh (supra) and Mahmood Hasan (supra) to contend that the cases of the writ petitioners or for that matter the petitioners in the earlier writ petitions were based on a negative claim of equality, we are not inclined to enter into an examination of this aspect of the matter since, as already noticed above, the earlier judgment dated 03-02-2005 was not challenged by the Board.

19. Accordingly, we set aside the judgment of the learned Single Judge dated 19-04-2010. Cases of the writ petitioners for promotion shall be considered as per the provisions of the service bye-laws now in force.

20. Writ appeals are allowed. No cost.

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