

(2015) 09 GAU CK 0072
In the Gauhati High Court
Case No : WP (C) No. 95 of 2014

B. Lalengliani

APPELLANT

Vs

Mizoram khadi and Village Industries Board

RESPONDENT

Date of Decision : 30-09-2015

Acts Referred:

Constitution of India, 1950 — Article 226

Citation : (2017) 1 GauLR 146

Hon'ble Judges : Michael Zothankhuma, J.

Bench : Single Bench

Advocate : Mr. C. Lalramzauva, Sr. Advocate and Mr. A.R. Malhotra, Advocate, for the Respondents Nos. 1 & 2; Mr. H. Lalrinthanga, Sr. Advocate, for the Petitioner

Final Decision : Allowed

Judgement

Michael Zothankhuma, J. (CAV) - Heard Mr. H. Lalrinthanga, learned counsel for the petitioner. Also heard Mr. C. Lalramzauva, learned senior counsel assisted by Mr. Benjamin Lalthlamuana, learned counsel for the respondent Nos. 1 and 2.

2. Mr. H. Lalrinthanga, counsel for the petitioner submits that the petitioner was appointed to the post of Fiber Instructor in the Mizoram Khadi & Village Industries Board (MKVIB) on 19.09.1986. The petitioner was regularized in the said post on 24.10.1988. The petitioner was thereafter promoted to the post of Fiber Supervisor on 31.07.1989.

3. The petitioner's counsel submits that the respondent No. 2 was appointed to the post of Statistical Assistant on 15.11.1990. He also submits that the post of Fiber Supervisor and Statistical Assistant was having the same grade pay. The petitioner was promoted to the post of Development Officer (MKVIB) on 31.01.1994 while the respondent No. 2 was promoted to the post of Development Officer (MKVIB) on 09.05.1995. The petitioner and the respondent No. 2 were confirmed in their post on 24.03.2004 with effect from 24.03.2004.

The petitioner and the respondent No. 2 were thereafter promoted to the post of Executive Officer (MKVIB) on 15.10.2007.

4. The MKVIB issued a provisional seniority list dated 25.09.2013 wherein the petitioner was placed at Serial No. 6 and the respondent No. 2 was placed at Serial No. 5. The petitioner submitted a representation dated 03.10.2013 ventilating his grievances regarding her placement in the seniority list. The MKVIB without making any reply to the petitioner's representation thereafter issued a final inter-se-seniority list dated 05.03.2014 wherein the petitioner was again placed below the respondent No. 2. The petitioner submitted her grievances against the final inter-se-seniority list by way of 2 (two) representations dated 09.04.2014 and 29.04.2014.

5. The respondent No. 1 by way of letter dated 29.04.2014 informed the petitioner that the inter-se-seniority list of all employees of the Board had been drawn on the basis of the Departmental Promotion Committee Minutes of the Mizoram KVI Board which had been notified as approved by the Board in its 156th meeting held on 21.02.2014.

6. The petitioner's counsel submits that in view of the fact that the petitioner was senior than the respondent No. 2, the petitioner should have been placed above the respondent No. 2 in the final seniority list on 05.03.2014, inasmuch as the selection to the promotional post of Executive Officer (MKVIB) had to be done on the basis of seniority in the absence of any Recruitment Rules.

The petitioner's counsel has submitted that Section 41 of the MKVIB Act 1982 requires:-

"41. Every rule or regulation made under this Act shall be laid, as soon as may be after it is made, before the Legislative Assembly of Mizoram while it is in session for a total period of seven days which may be comprised in one session or in two successive sessions, and if, before the expiry of the session in which it is laid or the session immediately following, the Legislative Assembly of Mizoram makes any modification in the rule or regulation, or the Legislative Assembly of Mizoram decides that the rule or regulation should not be made, the rule or regulation shall thereafter have effect only in such modified form or be of no effect, as the case may be ; so however, that any such, identification or annulment shall be without prejudice to the validity of anything previously done under the rule or regulation."

The petitioner's counsel submits that as no such exercise has been held by the MKVIB and as no Recruitment Rules has been published in the Official Gazette, the DPC Minutes dated 05.10.2007 have to be modified showing the petitioner above the respondent No. 2 as the selection has to be done on the basis of seniority and not on merit.

7. The petitioner's counsel submits that a perusal of the Notification dated 5.3.2014 which is a part of the final seniority list dated 5.3.2014 shows that the

Departmental Promotion Committee minutes dated 5.10.2007 have been approved by the respondent No.1 in its meeting held on 17.1.2014 to be the basis of the seniority list of Executive Officer. He thus submits that there is no delay and laches on the part of the petitioner in approaching this Court in 2014.

8. Mr. H. Lalrinthanga, petitioner's counsel therefore submits that the seniority list dated 05.03.2014 should be set aside and a fresh seniority list should be drawn up showing the petitioner to be senior than the respondent No. 2.

9. Mr. C. Lalramzauva, learned senior counsel for the respondent Nos. 1 and 2 submits that the petitioner not having challenged the DPC minutes dated 05.10.2007, which has been made on the basis of merit, the petitioner cannot be allowed to challenge the consequential seniority list issued on 05.03.2014. In this regard the respondent's counsel has relied upon the decision of the Apex Court rendered in *Government of Maharashtra and Ors. v. Deokar*'s Distillery reported in 2003 5SCC 669.

The respondent's counsel submits that the selection list was made by the DPC on the basis of merit in accordance with the Recruitment Rule as has been reflected in para-5 of their affidavit-in-opposition. He thus submits that as the seniority list was made on the basis of the merit position obtained in the DPC minutes, the petitioner has not made out a case for interference.

10. Mr. C. Lalramzauva, learned senior counsel for the respondents relying upon the decision of the Apex Court in the case of *Amarjeet Singh and Others v. Devi Ratan and Others* reported in 2010 1SCC 417 has submitted that unless the DPC minutes dated 5.10.2007, promotion order of the petitioner and the private respondent are challenged, the seniority list which was consequential to the DPC minutes dated 5.10.2007 could not be challenged. The counsel for the respondents has also relied upon the judgment of the Apex Court in *Edukanti Kistamma and Others v. S. Venkatareddy and Others* reported in 2010 1SCC 756 to submit that unless the basic order is challenged, the consequential order cannot be challenged. The counsel for the respondents has also relied upon the judgment of the Apex Court in *Premlata Joshi v. Chief Secretary, State of Uttarakhand and Others* reported in 2013 16 SCC 482 to support his arguments that when promotions are made on the basis of merit alone, seniority would come into play only if the candidates are of equal merit. The respondents' counsel has also relied upon the decisions of the Apex Court in *Union of India and Others v. Jai Prakash Singh and Another* reported in 2007 10 SCC 712 and *Messrs. Trojan & Co. v. RM. N. N. Nagappa Chettiar* reported in AIR 1953 Supreme Court 235 to buttress his argument that the Court should not travel beyond the pleadings of the parties. The respondents' counsel submits that the petitioner in the present case has gone beyond his pleadings with regard to whether the DPC should have selected the candidates on the basis of seniority or merit.

11. I have heard the learned counsel for the parties. The question that has to be

decided is whether the Recruitment Rule mentioned in para-5 of the affidavit-in-opposition has been made under any of the provisions of the MKVIB Act 1982. The further question is whether the Board of the MKVIB have pin-pointed any post or class of post as selection post in which promotion shall be made on the basis of merit only, inasmuch as regulation 7 of the MKVIB regulations 1988 states that promotions shall be made generally on the basis of seniority. The regulation 7 is reproduced below:-

"7. Promotion and increment : Having due regard to merit, promotion and increment shall be made generally on the basis of seniority. The Board may treat any post or class of posts as selection post or posts to which promotion shall be made in the basis of merit only."

12. Regulation 7 of the MKVIB Regulations 1988 requires that promotion should generally be made on the basis of seniority. The official records have been produced and on perusal of the same, I do not find any order made by the respondent No. 1 to the effect that promotion to the post of Executive Officer (MKVIB) should be made on the basis of merit only. Mr. C. Lalramzauva, senior counsel for the respondents submits that the MKVIB has not made any resolution or order specifying the post of Executive Officer to be made on the basis of merit. The official records also do not show that any Recruitment Rules has been made or has come into force in the matter of promotion to the post of Executive Officer (MKVIB). In this respect, Mr. C. Lalramzauva, senior counsel for the respondents has submitted that though the respondent No.1 has made Recruitment Rules for the said purpose, the said Recruitment Rules has not been published in the Official Gazette till date. The Recruitment Rules annexed to the affidavit-in-opposition submitted by the respondent No. 1 as Annexure-I accordingly could not be applied by the DPC for promotion to the post of Executive Officer. Even assuming that Recruitment Rules annexed as Annexure-I of the affidavit-in-opposition of the respondent No. 1 was applicable, the said Recruitment Rules requires that promotion shall be effected by way of merit selection-cum-seniority with departmental exam. The parties have submitted that no departmental exam had taken place. If the promotion is made on the basis of merit selection-cum-seniority as per Recruitment Rule which was not notified, then also, the petitioner having been recommended for promotion on merit, his seniority in the feeder grade would have to be taken into account for promotion to the post of Executive Officer. However, as stated earlier, there was no Recruitment Rules or Order/resolution made by the respondent No. 1 to treat any post or class of post as selection post to which promotion could be made to the post on the basis of merit only. In *Pune Municipal Corporation and Another v. Harakchand Misrimal Solanki And Others* reported in 2014 3 SCC 183, it has been held by the Hon'ble Supreme Court that "It is settled proposition of law that where a power is given to do a certain thing in a certain way, the thing must be done in that way or not at all. Other methods of performance are necessarily forbidden."

Accordingly, I hold that the DPC proceedings dated 05.10.2007 was in violation of regulation 7 of the MKVIB regulations 1988. The selection of the candidates for promotion to the post of Executive Officer should have been done on the basis of seniority and not on the basis of merit as reflected in the DPC Minutes.

13. The next question that has to be decided is whether the petitioner's prayer for setting aside the seniority list, wherein, he has been placed below the private respondent can be allowed as the petitioner has not challenged the DPC Minutes dated 05.10.2007 or the promotion orders of the petitioner and the respondent No. 2. The promotion order of the petitioner is reproduced below:-

"In exercise of Board's power to make appointment and promotion as contained in clause 6 and 7 of Mizoram KVI Board Regulation 1988, the Chairman is pleased to promote Miss B. Lalengliani to the post of Executive Officer which carry a payscale of Rs. 8000-275-13500/- p.m with effect from 16.10.2007.

This appointment is made in line with the recommendation of Departmental Promotion Committee (D.P.C) vide D.P.C Minute dated 5.10.2007.

She shall submit joining report within 10 days to the undersigned."

14. The respondents have not produced the promotion order of the respondent No. 2. However, the counsels for the parties have submitted that the promotion orders would be the same for the petitioner and the private respondent No. 2.

15. The petitioner was not aware of the DPC Minutes dated 05.10.2007 prior to the filing of the writ petition inasmuch as the promotion order of the petitioner does not give any indication that promotion was made on the basis of merit or that he was placed below the respondent No. 2 in the DPC Minutes dated 05.10.2007.

16. The first indication that the petitioner was placed below the private respondent on the basis of the DPC Minutes was made known to the petitioner on 29.04.2014 when the petitioner was told of the same by the respondent No. 1 vide letter dated 29.04.2014. I also find that the respondent No.1 in its meeting held on 17.1.2014 had approved the Departmental Promotion Committee minutes dated 5.10.2007 to be the basis for fixation of seniority of Executive Officer. The Notification dated 5.3.2014 is reproduced below :-

"NOTIFICATION

In pursuance of the Mizoram KVI Board in its 156th meeting held on 21.2.2014 at Resolution No.2, it is hereby notified that the Board approved the inter-se-Seniority list of Mizoram KVI Board Employees proposed by the Departmental Promotion Committee in its meeting held on 17.1.2014 as enclosed".

Accordingly, the petitioner filed the present writ petition on 12.09.2014. As such, I do not find that the present writ petition suffers from delay and laches. However, the question remains whether the prayer of the petitioner for setting aside the provisional seniority list dated 05.03.2014 and final seniority list

29.04.2014 can be allowed without the petitioner challenging the DPC Minutes dated 05.10.2007, which was made on merit and in which the petitioner was placed below the respondent No. 2 for promotion to the post of Executive Officer.

The Apex Court in *Amarjeet Singh and Others v. Devi Ratan and Others* (Supra) has held at paras 28, 29 and 31 as follows:

"28. In the instant case, promotions had been made by two different DPCs held on 19.02.1998 and 22.1.1999. Both DPCs had made promotions under different Rules on different criterion and their promotions had been made with retrospective effect with different dates notionally. In the writ petition before the High Court, the promotion of the appellants had not been under challenge. The seniority which is consequential to the promotions could not be challenged without challenging the promotions. Challenging the consequential order without challenging the basic order is not permissible.

29. In *Roshan Lal v. International Airport Authority of India* the petitions were primarily confined to the seniority list and this Court held that challenge to appointment orders could not be entertained because of inordinate delay and in absence of the same, validity of consequential seniority could not be examined. In such a case, a party is under a legal obligation to challenge the basic order and if and only if the same is found to be wrong, consequential orders may be examined.

31. These appeals are squarely covered by the aforesaid judgments. We are of the considered opinion that in absence of challenge to the promotions of the appellants, relief of quashing the consequential seniority list could not have been granted."

17. The Apex Court decision is with regard to challenging the promotion order. However, the petitioner's promotion order gives no indication that the petitioner's promotion and selection by the DPC was made on the basis of merit or that he was placed below the respondent No. 2 by the DPC at the time of selection.

18. On perusal of the official records, I also find that no departmental examination was held for selection of candidates for promotion to the post of Executive Officer as per the Recruitment Rules (Annexure-I), which has not been notified in the Official Gazette. As such, there was no question of the Recruitment Rules being followed for selection to the post Executive Officer by the DPC.

19. The basic question that has to be decided in this case is whether the placement of the petitioner and the respondent in the DPC Minutes dated 05.10.2007 can be said to mean that the seniority of the petitioner and the private respondent have to be as per the DPC Minutes. It is settled law that the placement of candidates at the time of selection by the Selection Committee, which is in order of merit will be a precursor to their placement in the seniority list to be made. However, this settled law is with regard to selection made by the

Selection Committee/DPC at the time of initial recruitment to the service or post. In the present case, the selection made by the DPC is for promotion to a higher post. As such, the placement of the petitioner and the private respondent in the DPC Minutes dated 05.10.2007 could not be made the basis of their seniority in the promotional post. Even if the DPC had made the selection on the basis of merit for promotion to the next higher post of Executive Officer, the petitioner though being placed lower than the private respondent in the DPC Minutes, the selection only goes to show that the private respondent was more meritorious than the petitioner. As the petitioner and the respondent No.2 had both been selected and promoted, the DPC Minutes dated 05.10.2007 could not be made the basis for the seniority placement of the petitioner and the private respondent. The importance of placement in order of merit would have arisen only if one post was to be filled up, which however, is not the case in this writ petition. In any event, the selection made by the DPC for promotion to the next higher post of Executive Officer was to be made on the basis of seniority. In that regard, the petitioner would have been selected as the first candidate as he was more senior than the private respondent. On perusing the Notification dated 5.3.2014, I find that the respondent No.1 had approved the Departmental Promotion Committee meeting dated 5.10.2007 to be the basis for fixing the inter-se-seniority of Executive Officer. This approval given by the respondent No.1 to the Departmental Promotion Committee minutes dated 5.10.2007 for fixation of seniority, in my view is totally wrong inasmuch as the Apex Court has held that in the absence of Rules, the length of continuous service has to be considered to be the basis for fixation of seniority. The respondent No.1 cannot, in my view, apply the Departmental Promotion Committee minutes dated 5.10.2007 for fixation of seniority. I find that the Departmental Promotion Committee minutes dated 5.10.2007 has not fixed the seniority position of the petitioner and the private respondent and thus such, I do not find any fault in the petitioner not challenging the DPC minute dated 5.10.2007. As the petitioner has challenged the basic Order i.e. the Notification dated 5.3.2014, by which the DPC minutes dated 5.10.2007 has been approved for fixation of seniority, I do not find any fault in the petitioner not challenging the DPC minutes. The DPC minutes dated 5.10.2007, which though made on merit, cannot be made the basis for fixation of seniority by the Respondent No.1. Just because the respondent No. 1 has approved the DPC Minutes dated 05.10.2007 to be the basis for fixation of seniority, the DPC Minutes dated 05.10.2007 cannot be said to be the basic Order. The notification dated 05.03.2014 is the basic Order as it has applied the DPC Minutes to be the basis for fixation of seniority, and that has been challenged by the writ petitioner.

This Court is also of the opinion that the DPC Minutes dated 15.10.2007 need not be challenged by the petitioner as the petitioner has also been selected along with the respondent No. 2 for the next promotional post. The merit position given in the DPC Minutes for promotion to the next promotional post cannot be made the basis for seniority of the petitioner and the private respondent as stated

above. The merit position given by the DPC is only for the purpose of selection. As the petitioner and the respondent No.2 were reportedly promoted to the post of the Executive Officer on the same day, the seniority position existing in the feeder post would have to be taken into account for the purpose of inter-seniority between the petitioner and the respondent No.2, in which case, the petitioner is to be treated as senior to the respondent No.2.

20. It is settled law that seniority has to be made as per the Rules. However, the petitioner and the private respondent have not been able to show this Court that there is any Rule or guideline on the basis of which seniority has to be counted in the MKVIB. It has been held by the Hon"ble Supreme Court that in the absence of rules, the length of continuous service would be one of the criteria for placement in the seniority list. In the present case, the petitioner had joined the MKVIB in 1986 while the private respondent joined the MKVIB on 15.11.1990. It is also not in dispute that the petitioner was promoted to the feeder post of Development Officer on 31.01.1994 while the private respondent was promoted to the feeder post of Development Officer on 09.05.1995. The petitioner and the private respondent having both been selected by the DPC on 05.10.2007, the placement of the private respondent above the petitioner in the DPC Minutes dated 05.10.2007 could not be made the basis for putting the respondent No. 2 above the petitioner in the seniority list dated 05.09.2013 and the final seniority list dated 05.03.2014. As stated earlier, the seniority position of the petitioner and the respondent could not be made on the basis of DPC Minutes in respect of the next promotional post and the same would have been applicable only for initial recruitment to the service or organization. The petitioner is undoubtedly to be considered to be senior than the respondent No.2 in the post of Executive Officer. It is also to be noted that the respondent No.1 has not made any valid Recruitment Rules or made any order treating the post of Executive Officer to be filled on the basis of merit only at the relevant time.

21. Accordingly, I find that the petitioner has made out a case wherein his legal rights have been violated and accordingly, the Notification dated 5.3.2014 issued by the respondent No.1, the provisional seniority list dated 25.09.2013 and final seniority list dated 05.03.2014 are hereby set aside. The respondent No. 1 shall publish a fresh seniority list placing the petitioner above the respondent No. 2. in the grade of Executive Officer.

22. Accordingly, the writ petition is allowed. No cost.