

(1988) 04 GAU CK 0015
In the Gauhati High Court
Case No : Civil Rule No. 528 of 1982

Benu Gohain

APPELLANT

Vs

North Eastern Electric Power Corporation Ltd.

RESPONDENT

Date of Decision : 05-04-1988

Acts Referred:

Constitution of India, 1950 — Article 226, 226

Citation : (1988) 2 GLJ 400

Hon'ble Judges : B.L.Hansaria, J and S.N.Phukan, J

Bench : Division Bench

Advocate : P.K.Goswami, N.M.Lahiri, M.Z.Ahmed, J.P.Bhattacharjee,
G.N.Sahewalla, A.C.Bora, Advocates appearing for Parties

Judgement

Phukan, J.—The petitioner joined as an Assistant Engineer (Elect) under the North Eastern Electric Power Corporation, for short the Corporation, respondent No. 1, on 1.12.76. Respondent Nos. 7 and 6 also joined in the said posts under the Corporation in January, 1977 and on 4.4.77 respectively. On 22.2.77 the petitioner was declared as SubDivisional Officer whereas the respondent Nos. 6 and 7 were so declared on 1.1.78 and in the year 1979 respectively. Respondent No. 1 published a provisional interse seniority list of Executive Engineers/subDivisional Officers Assistant Engineers/Junior Engineers, Gr. I/ Gr. II/ Gr. III in respect of which, it is alleged, that the petitioner submitted a representation. Again on 8.5.80 respondent No 1 published another provisional seniority list of Sub Divisional Officers (Elect) and Assistant Engineers (Elect) against which also, it is alleged, the petitioner submitted a representation. On 4.8.80, the petitioner was appointed as Executive Engineer (Elect) on adhoc basis along with respondent Nos. 4, 6 and 7 and the petitioner joined his duties in the above capacity on 7.8.80. Thereafter by the order dated 20.5.82 (Annexure "C" to the petition) the petitioner was reverted back to his original post of SubDivisional Officer on the ground that his adhoc appointment could not be allowed to be continued after "regular appointment/promotion has already been finalised" in the capacity of Executive Engineer (Elect). Being aggrieved, the petitioner has

approached this Court for appropriate Writ for quashing the above order dated 20.5.82, Annexure"C" and also office order dated 26.4.82, Annexure"M", by which respondent Nos. 4, 5, 6 and 7 were promoted to the post of Executive Engineer of the Corporation. The petitioner has also challenged the advertisement dated 18.6.81 Annexure"J" to the petition, by which the Corporation invited applications for the posts of Executive Engineer.

2. According to the Corporation, which is a Government of India Undertaking, the petitioner and respondent Nos. 5, 6 and 7 were selected by a Selection Committee and the said Committee fixed the seniority in order of merit and respondent No. 4 was also selected by such Committee on 15.7.76, and as such, he was No. 1 Assistant Engineer in the Corporation. It has further been alleged that the fact that respondent Nos. 4, 5, 6 and 7 are senior to the present petitioner was all along notified in the provisional seniority list and hence he is estopped from challenging the said seniority list. The petitioner was duly informed about the advertisement for the posts of Executive Engineer but he failed to appear before the Selection Committee, and as such, he cannot claim any seniority over the officers who were selected by direct recruitment in pursuance to the said advertisement. It is admitted by the Corporation that no service rules have been framed, and the draft service rules have been sent to the Bureau of Public Enterprise, Government of India at New Delhi for approval. It was, however, decided by the Corporation that during the interim period the draft service rules shall be taken as a guide line. According to Corporation, though the petitioner was allowed to hold the post of SubDivisional Officer before other respondents, the posts of Assistant Engineer and SubDivisional Officer being in the same cadre the petitioner cannot claim any benefit and only on 1.7.78 a separate payscale was provided for the post of SubDivisional Officer. It has also been alleged that the impugned reversion order, Annexure "O" to the petition was legally and validly made; as considering his seniority the Departmental Promotion Committee did not promote him to the post of Executive Engineer.

3. Before we take up the submissions made on behalf of the petitioner we would dispose of the preliminary points raised by Mr. Lahiri, learned counsel for the Corporation.

4. At the time of hearing, Mr. Lahiri placed before us a letter dated 22. 1.87 issued by Manager, Personnel circulating the seniority list of Executive Engineers (Civil/Elect/Mech). Mr. Lahiri has submitted that officers who are senior to the petitioner according to the said list are necessary parties and as they have not been impleaded the petition is liable to be dismissed. According to Mr. Bhattacharjee, learned counsel for the petitioner, the above officers are not necessary parties as the petitioner has challenged the policy of the Corporation and that apart the Corporation and respondent Nos.4 to 15 who are before this Court are competent enough to look after the interest of the above officers.

5. In *Udin Narain Singh Malpaharia vs. Additional Member, Board of Revenue, Bihar* and another, AIR 1963 SC 786, the question of necessary and proper

parties was considered and Apex Court held that a necessary party is one without whom no order can be made effectively ; a proper party is one in whose absence an effective order can be made but whose presence is necessary for a complete and final decision on the question involved. In *General Manager, South Central Railway, Secundrabad vs. A V.R. Siddhanti and others*, AIR 1974 SC 1755 it was held that where the validity of the policy decision of the Railway Board regulating seniority of Railway staff was challenged on the ground of being violative of Articles 14 and 16 of the Constitution and the relief was claimed only against the Railway Board ; it is sufficient if the Railway was impleaded and that nonjoinder of the employees likely to be affected by the decision in the case was not fatal. According to their Lordships those employees were at the most proper parties and no necessary parties. A Division Bench of this Court in *Dilip Kumar Dutta vs. State of Tripura* (1986) 1 GLR 367 relying on the decisions of the Apex Court held that in the petition where an order is challenged by which a large number of persons are affected, even if some individual affected parties are impleaded the petition is maintainable as the interests, which are identical, are sufficiently well represented.

6. Mr. Lahiri has further submitted that this writ petition can be dismissed if necessary parties have not been impleaded and in support has placed reliance in *R. S. Makashi and others vs. I. M. Menon and others*, AIR 1982 SC 101, wherein it was held that the view of the High Court that a Writ Petition filed under Article 226 of the Constitution seeking redress on the ground of alleged infringement of fundamental rights cannot be dismissed under any circumstances, is inconsistent with the pronouncements on the subject by the Apex Court, and as such, the said view of the High Court cannot be accepted as correct and sound.

7. There cannot be any dispute that if necessary parties are not impleaded for proper adjudication of the present dispute the petition is liable to be dismissed. We find that the grievance of the present petitioner is regarding the policy decision of the Corporation and his main grievance is against the order of reversion, which, according to the petitioner, was passed on the basis of an incorrect seniority list that too a provisional one. The dispute regarding seniority of the petitioner is in respect of respondent Nos. 4, 5, 6 and 7. We are, therefore, of the opinion that as the petitioner has challenged the orders passed by the Corporation, viz., reversion to the post of SubDivisional Officer and the provisional seniority lists of Assistant Engineers and SubDivisional Officers, the officers who have been shown senior to the petitioner in the rank of Executive Engineers are not necessary parties for the present purpose. We, therefore, find no force in the contention of Mr. Lahiri. We are also of the opinion that other respondents who are before us are competent to look after the interest of the above officers.

8. The next point urged by Mr. Lahiri is that the petition is liable to be dismissed on the ground of delay and laches and in support reliance has been placed in *K. R. Mudgal and others vs. R.P. Singh and others*, 1986 (4) S C C 531. In that case

the appointments of officers were questioned after 32 years. The Apex Court accepted the observation made in *R. S. Makashi (supra)* wherein it was held that the High Court ought to have dismissed the petition on the preliminary ground of delay and laches, inasmuch as, it was sought to disrupt vested rights regarding the seniority, rank and promotion which had accrued to a large number of officers during the period of 8 years which had intervened between the passing of the impugned resolution and filing of the writ petition. In the case in hand, we find that seniority lists were provisional, and as such, it did not give any cause of action to the petitioner to approach this Court. Only when the petitioner was reverted to the post of SubDivisional Officer by the order dated 20.5.82 Annexure "O", he got the right to approach this Court by filing the present petition on 31.5.82. In other words, the petition was filed after about 10 days the petitioner was reverted, and as such there was no delay or laches on the part of the petitioner. We are, therefore, of the opinion that the ratio laid down by the Apex Court in the above two decisions are not applicable to the present case and hence the contention of Mr. Lahiri is rejected.

9. Relying on the decisions of the Apex Court in *Amrit Lal Berl t? . Collector of Central Excise, Central Revenue, AIR 1975 SC 538* and *Roshanlal vs. International Airport Authority of India, AIR 1981 SC 597*, Mr. Lahiri has further urged that this is not a fit case for exercising discretionary power of this Court under extraordinary writ jurisdiction. We are unable to agree with Mr. Lahiri, inasmuch as, if we hold that there is violation of the fundamental rights this Court is legally bound to exercise the writ jurisdiction for the ends of justice.

10. According to Mr. Lahiri as all the affected persons have not been made parties, the persons who are shown senior to the petitioner in the seniority list of Executive Engineers, no writ is maintainable. Learned counsel has placed reliance in *B. Prabhakar Rao vs. State of A. Pradesh, AIR 1986 SC 210* and *Probhodh Verma vs. State of U.P. AIR 1985 SC 167*. In this petition we are concerned with the reversion order of the petitioner from the post of Executive Engineer to the post of SubDivisional Officer, and as such, all the persons who have been shown senior to the petitioner in the rank of Executive Engineers are not necessary parties, and as such, the contention of Mr. Lahiri is rejected.

11. Out of 14 post, of Executive Engineer, the Corporation decided that 25% of the posts, i.e., 4 posts, would be filled up by promotion and rest by direct recruitment. Accordingly, respondent Nos. 8 to 15 were recruited directly and the petitioner did not avail of the opportunity for consideration of his case by direct recruitment, and as such, he cannot have any grievance against the said direct appointment.

12. The main dispute in the present petition which requires to be examined is regarding seniority of the petitioner and respondent Nos. 6 and 7 both in the cadre of Assistant Engineers and SubDivisional Officers as according to the Corporation the petitioner was reverted back to the post of SubDivisional Officer by the impugned order dated 20th May, 1982 as the Departmental Promotion

Committee did not recommend the name of the petitioner for the post of Executive Engineer. From the note which was sent to the Departmental Promotion Committee, vide Annexure "K" to the petition, we find that it was stated as follows :

"Seniority list of S.D. Os. (Civil) and S.D. Os. (Elect/Mech) is enclosed for the perusal of the D.P.C. since the promotion to the posts of Executive Engineers from S D.O. is on seniority cum suitability basis, therefore, merit of the candidate as per A.C.R. does not come to foreplay".

Thus it appears that name of the petitioner was not recommended for the post of Executive Engineer. (Elect) on the ground that respondent Nos. 6 and 7 were senior.

13. The main thrust of the contention of Mr. Bhattacharjee, learned counsel for the petitioner is that the seniority list prepared by the Corporation was a provisional one, and as such, the Departmental Promotion Committee erred in taking the said seniority list as final. Mr. Bhattacharjee has also urged that in any event as there is no service rules the petitioner having joined his service of Assistant Engineer earlier and being promoted to the post of SubDivisional Officer before respondent Nos. 6 and 7 his position should have been shown above respondent Nos. 6 and 7. Mr. Lahiri has submitted that Selection Committee selected the petitioner and respondent Nos. 6 and 7 showing their respective position according to merit and the Corporation rightly placed them in the provisional seniority list above the petitioner. Another contention of Mr. Lahiri is that there is no separate seniority list for the post of SubDivisional Officer and the combined seniority list for the posts of SubDivisional Officer and Assistant Engineers has been taken into consideration.

14. It is not disputed that at the relevant time there was no rule for fixation of seniority. In *G.P. Doval and others vs. Chief Secretary, Government of U.P. and others*, (1984) 4 SCC 329, it was held that in absence of any specific rule of seniority governing a cadre of service, length of continuous officiation will provide a more objective and fair rule of seniority. In *Nirmal Kumar Chaudhury vs. State of Bihar and others*, 1988 (56) FLR 141(SC), it was held that it is a well settled position in law that seniority would ordinarily depend upon the length of service, subject, of course to rules holding the field. Their Lordships quoted with approval the following observation made by the Apex Court in *A. Janardhana vs. Union of India*, (1983) 2 SCR 936 : "It is an equally well recognised canon of service jurisprudence that in absence of any other valid rules for determining inter se seniority of members belonging to the same service, the rule of continuous officiation or the length of service or the date of entering the service and continuous uninterrupted service thereafter would be valid and would satisfy the tests of Article 16. In a recent decision of the Apex Court in *K. V. Subha Rao and others vs. The Government of Andhra Pradesh* 1988 I SLVR (L) 21 the same principle was also reiterated.

15. We are, therefore, of the opinion that in the case in hand at there is no service rule for fixation of seniority, the seniority would depend upon the length of service provided it is continuous and without any interruption.

16. From the dates mentioned above it is clear that the petitioner joined the post of Asstt. Engineer (Elect) under the Corporation before respondent Nos. 6 and 7 and he is in continuous service. That apart the petitioner was declared as SubDivisional Officer on 22.2.77 whereas the respondent Nos. 6 and 7 were so declared on 1.1.78 and 1979 respectively. From these facts it is absolutely clear to us that the petitioner not only joined the post of Assistant Engineer before respondent Nos. 6 and 7 but he was also declared as SubDivisional Officer before them. As there is no service rules we are constrained to hold that in the seniority list the position of the petitioner should come above respondent Nos. 6 and 7.

17. The contention of Mr. Lahiri that while selecting the petitioner and respondent Nos. 6 and 7 the Selection Committee fixed their seniority in order of merit has no force at all as nothing has been placed before us to show that the Selection Committee had such power.

18. Mr. Lahiri has urged before us that the post of SubDivisional Officer and the Assistant Engineer being the same the seniority of the officers as Assistant Engineer should be taken for the purpose of selection for the post of Executive Engineer. From the office order dated 8.5.80, Annexure"G" to the petition, we find that a separate seniority list was prepared for SubDivisional Officers though the said list was provisional. That apart, initially a special pay of Rs. 50/ was granted to the SubDivisional Officers and thereafter from 1st of July, 1978 a separate payscale was provided for these officers. We are, therefore, constrained to hold that the posts of SubDivisional Officer under the Corporation come under a separate cadre and it cannot be equated with that of the Assistant Engineers. As the petitioner was allowed to hold the said post before respondent Nos. 6 and 7, he is senior to respondent Nos. 6 and 7.

19. The Departmental Selection Committee considered the case of promotion of the SubDivisional Officers to the post of Executive Engineer purely on the basis of seniority. As the petitioner was not given seniority from the date of his appointment as Assistant Engineer thereafter from the date he was allowed to hold the charge of SubDivisional Officer, we are of the opinion, that showing petitioner in the provisional seniority list below the respondent Nos. 6 and 7 is unjustified and consequently the decision of the Departmental Promotion Committee in not selecting the petitioner for the post of Executive Engineer is illegal and cannot stand. We, therefore, hold that the impugned order dated 20.5.82, Annexure"O" to the petition, reverting the petitioner to the post of SubDivisional Officer is illegal and liable to be set aside which we hereby do.

20. From what has been stated above we hold that the seniority of the petitioner should be fixed in the cadre of SubDivisional Officer above respondent Nos. 6 and 7 and accordingly we set aside the impugned order of reversion of the petitioner

to the post of subDivisional Officer, Annexure "O" to the petition. It is stated that petitioner has already been promoted and. therefore, we direct that the petitioner shall be deemed to have been promoted notionally before respondent Nos. 6 and 7, who were promoted by office order No. 58 dated 26.4.1982 vide Annexure "M" to the petition.

21. In the result, the petition is allowed to the extent indicated above and the Rule is made absolute. No. costs.

Hansaria, C. J. (Acting) I agree.