
(2009) 09 GAU CK 0065
In the Gauhati High Court

Bikash Paul Chowdhury

APPELLANT

Vs

State of Meghalaya and Others

RESPONDENT

Date of Decision : 02-09-2009

Acts Referred:

Citation : (2010) 2 GLR 851

Hon'ble Judges : Hrishikesh Roy, J

Bench : Single Bench

Final Decision : Allowed

Judgement

Hrishikesh Roy, J.—Heard Mr. B.N. Dutta, learned senior Counsel assisted by Mr. B.K. Das, learned Counsel appearing for the petitioner. Also heard Mr. A.S. Siddique, learned Counsel appearing for the respondent Nos. 1, 2 and 3. The private respondents although served have chosen not to participate in the proceeding.

2. The petitioner complains of denial of promotion to the post of Executive Engineer in the Public Health Engineering (PHE) Department at the appropriate time and his supercession by his juniors in the cadre of Assistant Engineers (AE). The supercession is alleged to have been made on three occasions in the year 1995, 1996 and 1998 and all the juniors alleged to have superseded the writ petitioner, have been arrayed as respondents in the instant case.

3. The petitioner joined service in the PHE Department as an Assistant Engineer in August 1981. The promotions to the post of Executive Engineer is to be given on the basis of the recommendation of the DPC on the criteria of seniority-cum-merit by considering service records of the previous five years of the eligible incumbents in the feeder cadre.

3.1 In 1995, the first supercession was made when six juniors of the petitioner were promoted to the posts of Executive Engineer on the basis of the recommendation made by the DPC which sat on 16.8.1995 and 2.9.1995. On this occasion, although the name of the petitioner was also considered by the DPC,

he was denied promotion because of adverse remarks recorded in his service book for the years 1991, 1993 and 1994. The petitioner contends that the adverse entries recorded for the later 2 years (1993 and 1994) were not objectively recorded but was recorded by the Reporting Officer (R.17) at the dictate of the then Chief Engineer of the PHE Department who is arrayed herein as respondent No. 4.

3.2 During the promotions made in the year 1996 three juniors superseded the writ petitioner. On this occasion, the petitioner's case was never considered by the DPC in its sitting on 4.9.1996.

3.3 On the third occasion, in the year 1998 three more juniors were promoted on the basis of the recommendation of the DPC which sat on 16.6.1997 and 27.6.1997. On this occasion, the petitioner was not recommended because of the same adverse entries for the year 1993 and 1994. It is pointed out by Mr. Dutta that the adverse entries recorded for the year 1997, (communicated on 17.9.1998), was wrongly taken into account by the DPC when it sat in June, 1997, although the ACR of that year (1997) could not have been taken into account by the DPC, and promotion was to be considered on ACRs of the previous 5 years.

4. Significantly, while the petitioner was overlooked for promotion on three different occasions in the year 1995, 1996 and 1998, while the respondent No. 4 was the Chief Engineer of the department, soon after the retirement of respondent No. 4, when consideration was again made in the year 2000, the writ petitioner was recommended for promotion by the DPC and the instant petition has been filed for getting retrospective benefit of promotion, from the date the petitioner's juniors were given promotion to the cadre of Executive Engineer.

4.1 The petitioner alleges that due to illegal intervention of the then Chief Engineer (R4) he was denied promotions in the days, when respondent No. 4 was heading the department.

5. Mr. B.N. Dutta, learned senior Counsel submits that declaration has been given by the then Executive Engineer (R.17) on 17.8.1998 (Annexure-2) that as the Reporting Officer he recorded negative entries in the petitioner's ACRs of 1993 and 1994 at the dictate of the Chief Engineer and accordingly Mr. Dutta contends that the said adverse entries were wrongfully made the basis for denying promotion to the writ petitioner.

5.1 The learned Counsel further submits that the reply given by the petitioner on 2.8.1995 against the communicated adverse entries for the year 1993 and 1994, was never considered by the respondent authorities and even on this ground, the said adverse entries could not have been made the basis to deny promotion to the writ petitioner, when his case was not recommended for promotion in the year 1995 and 1998.

5.2 Insofar as denial of promotion in the year 1996 is concerned, Mr. Dutta

submits that the case of the writ petitioner was never considered by the DPC when it met on 4.9.1996.

6. Mr. A.S. Siddique, learned Departmental counsel, submits that this petition should not be entertained by this Court as the petitioner by filing a writ petition in the year 2004 seeks to re-open promotions given as far back as in the year 1995 to 1998 and the learned Counsel submits that the petition be dismissed on the ground of laches.

6.1 Mr. Siddique further submits that the post retirement declaration given on 17.8.1998 (Annexure-2) by the Reporting Officer to the effect that, he recorded the adverse entries in the ACRs of the years 1993-94 at the behest of the then Chief Engineer (R4), cannot be considered by the court inasmuch as the said officer might have been persuaded to give such a statement to favour the petitioner.

7. Before we proceed any further in the matter it may be appropriate to extract herein the declaration given by respondent No. 17 on 17.8.1998 with regard to the adverse entries recorded in the ACRs of the petitioner for the year 1993 and 1994:

The 17th August, 1998.

TO WHOM IT MAY CONCERN

When I was working as the Executive Engineer (PHE), Investigation and Planning Cell, in the office of the Chief Engineer (PHE), Meghalaya, Shillong - I received a letter one day from the Chief Engineer (PHE), asking me to record the Annual Confidential Record of Shri B. Paul Choudhury, Assistant Engineer (PHE), I wrote back to him officially that I am not empowered to write his Annual Confidential Report, as both of us were working in the establishment of the Chief Engineer (PHE), Meghalaya, Shillong. Again, the Chief Engineer (PHE), returned back the same to me with a direction to write his Annual Confidential Report. I wrote a good Annual Confidential Report but he objected to that and returned back to me, thereafter, I was called by him to his chamber and verbally asked me to write a bad Annual Confidential Report against him and threatened me as well that he would see that I shall not get any pension at that point of time I was on the verge of retirement.

Being afraid of not getting pension, I succumbed to his illegal pressure and was compelled to write a bad Annual Confidential Report although I did not intend to do so since I did not find any thing against him. Instead I found him to be an intelligent and outstanding officer.

However, I feel extremely sorry for my action which I had to do under the pressure of Shri A.K. Mukherjee, the then Chief Engineer (PHE), Meghalaya, Shillong.

I wish him all success in his life.

Sd/- Shri W.S. Shabong Retired Executive Engineer (PHE), Meghalaya, Shillong.

7.1 On reading of the above declaration of the Reporting Officer, it appears that the adverse entries for the writ petitioner were not recorded on objective consideration as per the norms in force but were recorded by the Reporting Officer at the dictate of the Chief Engineer, being unable to resist the threat meted out by the said superior (R4).

7.2 The writ petitioner made detailed allegations on the unjustified interference of the Chief Engineer, and notice of this proceeding have also been served on him. But the said respondent No. 17 has stayed away from the present proceeding. Thus the allegations made in the writ petition has gone un-rebutted by those who had personal knowledge of the matter.

8. However, even if the declaration given by the respondent No. 17 cannot be acted upon to examine the legality of the adverse entries recorded in the years 1993 and 1994, what is seen further in the instant case is that the reply given by the petitioner on 2.8.1995, to the communications of the adverse remarks, were never considered by the authorities.

8.1 Even otherwise, the ACR for the year 1993 was recorded in general fashion in the following terms:

Unimpressive officer, needs to improve his personal habits and regularity in attendance.

Similarly for the year 1994 the adverse entry was recorded as:

need persuasion, performance not up to the mark.

9. On the basis of the general adverse remarks noted as above, the writ petitioner was not found suitable for promotion by the DPC which sat in the year 1995 and 1997. Whereas, the DPC which sat in the year 1996, did not even consider the case of the writ petitioner.

10. From the above narrations, it thus appears that the petitioner was wrongfully denied consideration of promotion at the appropriate time. But before any order is passed on that basis, the objection raised on behalf of the respondents that this petition should be thrown out on the ground of laches, has also to be considered by the court.

11. It appears that the appeal filed by the petitioner on denial of promotion and against his supercession by his juniors was belatedly considered by the Government and only on 6.3.2003, the Government indicated to the petitioner about the rejection of the petitioner's representation. The subsequent appeal to the Governor was also rejected by the order passed on 16.1.2004. Soon thereafter, the instant writ petition came to be filed.

12. To resolve the issue of laches, this Court may usefully refer to the decision of the Apex Court in the case of Sualal Yadav Vs. The State of Rajasthan and

Others, where the court has recorded as follows:

2. A preliminary objection was taken by the State in the High Court that the application merited dismissal because of undue laches and delay on the part of the appellant. The High Court found that the review application was made to the Governor after a lapse of about two years which was unreasonable delay according to the High Court. That is the main reason why the High Court accepted the preliminary objection and dismissed the writ application. We are unable to hold that the High Court's approach in this matter was correct. Since the Governor had not dismissed the review application on the ground of delay and having entertained the same held it to be a case not fit for review, we take the view that the Governor dismissed the review application on merits. That being the position, it was not open to the High Court to resurrect the ground of delay in the review application at a remote stage and make it a ground for dismissing the writ application....

13. In this case, the Government while rejecting the appeals of the petitioner on 6.3.2003 and 16.1.2004 respectively did not reject them on the ground of delay but rejected them on merit. Therefore, the ratio of the decision of the Supreme Court in *Sualal Yadav (supra)*, in my view, would squarely apply to the facts in the instant case. Accordingly, preliminary objection raised by Mr. A.S. Siddique is hereby rejected.

14. It is seen that the denial of promotion to the petitioner was on the basis of adverse entries recorded by respondent No. 17 at the behest of the then Chief Engineer (R4). The petitioner's reply dated 2.8.1995 (Annexure-6) after the adverse remarks were communicated to him have not been considered and the impugned promotion exercise were carried out, without any appropriate order on the adverse entries, after due consideration of the explanation furnished by the petitioner. In the case of *Gurdial Singh Fijji Vs. State of Punjab and Others*, it has been held that:

...an adverse report in a confidential roll cannot be acted upon to deny promotional opportunities unless it is communicated to the person concerned so that he has an opportunity to improve his work and conduct or to explain the circumstances leading to the report. Such an opportunity is not an empty formality, its object, partially, being to enable the superior authorities to decide on a consideration of the explanation offered by the person concerned, whether the adverse report is justified. Unfortunately, for one reason or another, not arising out of any fault on the part of the appellant, though the adverse report was communicated to him, the Government has not been able to consider his explanation and decide whether the report was justified. In these circumstances, it is difficult to support the non-issuance of the integrity certificate to the appellant. The chain of reaction began with the adverse report and the infirmity in the link of causation is that no one has yet decided whether that report was justified....

15. Keeping in mind the law laid down by the Supreme Court Gurdial Singh Fijj (supra), it can be reasonably concluded that the adverse remarks recorded against the petitioner, could not have been made the basis for denying promotion, as the explanation of the petitioner that such adverse entries were unjustified, were not taken into account by the competent authority of the department.

16. It has been held by the Supreme Court that the right to be considered for promotion is a Fundamental Right and since the petitioner was not considered for promotion in the year 1996 and was not recommended for promotion in 1995 and 1998 on the basis of adverse entries which could not have been taken into account, the impugned exercises leading to denial of promotion to the writ petitioner and promotions of his juniors in the year 1995, 1996 and 1998 are found to be unjustified in law.

17. Having reached the above conclusion, the court has to now consider the appropriate order that should be passed in the instant case. Since the promotion to the juniors were given as far back as in the years 1995 to 1998, obviously it would not be right to disturb the said promotions at this stage since it is submitted that some of the promotees have been given further promotion to the higher cadre of Superintendent Engineer. But the injustice done to the petitioner himself has to be corrected.

18. Therefore, I consider it appropriate to direct the respondent authorities to first consider the reply dated 2.8.1995 given by the petitioner with regard to the adverse entries recorded in his ACRs for the year 1993 and 1994. The competent authority would thereafter pass an appropriate order with regard to the said adverse entries, taking note of the petitioner's explanation and also his contention that the said entries were recorded by the Reporting Officer without any objective consideration, at the behest of the then Chief Engineer of the Department.

19. Once the adverse entry issue is resolved by appropriate consideration, the respondents would constitute a review DPC as on June, 1995 to consider the petitioner for promotion. If the petitioner is not recommended for the year 1995, his case should again be considered as on 4.9.1996 and 16.6.1997, respectively, when the earlier DPC considered promotion given in the year 1996, 1998. In the event of positive recommendation of the DPC the State would take the requisite steps so that the petitioner is able to get consequential service benefits such as promotion from an earlier date. But having regard to the fact that the petitioner would not have served in the promoted post for the earlier years, the consequential promotion should be only on notional basis and there should not be any salary benefits for the petitioner, if he is recommended by the Review DPC for retrospective promotion.

20. The respondents would take necessary steps to comply with the above order expeditiously and preferably within six months from today.

21. The writ petition stands allowed to the extent indicated above.