

(2005) 04 GAU CK 0025

In the Gauhati High Court

Case No : Writ Petition No's. 128, 158, 162, 168, and 170 (K) of 2004

Cheniram Borah and Others

APPELLANT

Vs

State of Nagaland and Others

RESPONDENT

Date of Decision : 04-04-2005

Acts Referred:

Constitution of India, 1950 — Article 14, 16, 309

Nagaland Engineering Services Rules, 1997 — Rule 17, 17(2), 17(3), 8

Citation : (2005) 3 GLT 348

Hon'ble Judges : B.K. Sharma, J

Bench : Single Bench

Advocate : N.K. Luikham, R. Iralu, Y. Yepthomi, V. Theyo, K. Yeptho, Taka Masa, E.Y. Renthingo, Z.N. Ngullie, N.C. Ngullie and C. Ungol, for the Appellant; T. Koza, Lucy and L.S. Jamir, for the Respondent

Judgement

B.K. Sharma, J.—All the above writ petitions are based on same set of facts and are linked to one Anr. . Thus they were heard analogously and are being disposed of by this common judgment and order.

2. The facts leading to filing of the writ petitions are in very narrow campus. When one set of writ Petitioners have assailed the legality and validity of the officiating promotion granted in favour of the private Respondents who are writ Petitioners in Anr. batch of writ petitions, the later batch of writ Petitioners have assailed the legality and validity of the orders by which their officiating promotions have been cancelled. Claim for officiating or regular promotion on the basis of DPC held about three years back have also been made. Some seniority disputes have also been raised. As to whether the quota for promotion for two different groups was correctly assessed or not has also been made an issue. However, the real issue involved is as to whether the officiating promotion was correctly made or not. The brief facts leading to filing of the writ petitions are narrated below.

WP(C) No. 128(K)/2004

3. This writ petition has been filed by the Petitioner who is working as Junior Engineer (Housing) under the Respondents making a grievance against the officiating promotions to the posts of SDO, PWD (Class-I gazetted) granted in favour of the Respondents No. 5 to 12 by the impugned notifications dated 21.6.2004, 25.6.2004, 28.6.2004, 29.6.2004, 4.7.2004 and 11.7.2004. A further prayer has been made to promote the Petitioner as SDO from the date his juniors were so promoted. Placing reliance on the Annexure-4 seniority list of Diploma Holders Junior Engineers (Civil) published by Annexure-4 Notification dated 31.5.2004 in which the name of the Petitioner appears at serial No. 27, it is the case of the Petitioner that he is senior to the Respondents No. 6 to 12 whose seniority positions are at serial No. 110, 47, 67, 72, 115, 34 and 82 respectively. The name of the Respondent No. 5 does not figure in the said seniority list.

4. The aforesaid Respondents have been granted officiating promotions by the aforesaid notifications on purely temporary basis subject to regularization by the DPC. It has also been stated in the orders of promotion that such promotion will not confer on the promotees any right to claim seniority over their seniors in the cadre. It is the grievance of the Petitioner that he being senior to the private Respondents which is apparent on the face of the aforesaid seniority list, he could not have been ignored for such officiating promotion.

WP(C) No. 162 (K)/2004

5. This writ petition has been filed by the Petitioners, some of whom are the private Respondents in the above writ petition i.e. WP(C) No. 128(K)/2004. They have raised a grievance in respect of orders dated 25.8.2004 (Annexure-5 series) by which their officiating promotions have been cancelled. In the impugned orders of cancellation of their promotions apart from assigning the ground of overwhelming imbalance created in the ratio of 40:60 for direct recruits and promotees as per the recruitment rules, another ground assigned towards issuance of the impugned orders is that the due procedure prescribed in the rules for promotion was not followed while promoting the Petitioners, some of whom are the private Respondents in the aforesaid writ petition.

WP(C) No. 168 (K)/2004

6. In this petition, the Petitioners like that of the Petitioners in the second writ petition, i.e. WP(C) No. 162(K)/2004 have made a challenge to the impugned orders dated 25.8.2004 cancelling their officiating promotions on the ground about which a mention has been made above.

WP(c) No. 170 (K)/2004

7. In this writ petition also, similar grievance has been raised as in the first writ petition i.e. WP(C) No. 128(K)/2004 against the officiating promotions granted in favour of the private Respondents in the first writ petition, who are the Petitioners in the second writ petition. However, in addition, this Petitioner has referred to the DPC recommendation made in 15.2.2002 by which 35 Junior

Engineers were recommended for future vacancies of Assistant Engineer/SDO, PWD. The name of the Petitioner appeared at serial No. 10 of such recommendation. According to the Petitioner, based on such recommendation many Junior Engineers including his juniors were promoted by notification dated 24.4.2003. Being aggrieved, he made a representation dated 5.3.2004. In the seniority list dated 31.5.2004 the Petitioner is the seniormost Junior Engineer and on that basis, according to him he has been superseded by 18 of his juniors. He was further superseded by his 13 juniors two of whom figured in the aforesaid DPC recommendation. Such suppression was made by the impugned notifications which have already been referred to in the first writ petition. Thus the Petitioner has prayed for quashing the impugned notifications with a further prayer to promote him to the post of SDO in accordance with the recommendations made by the DPC on 15.2.2002. The Petitioner has also referred to the proceedings in WP(C) No. 162(K)/2004 and WP(C) No. 168(K)/2004 and the orders passed therein by this Court.

WP(C)No. 158(K)/2004

8. In this writ petition also, the Petitioner, a Junior Engineer in 7th NAP Battalion has assailed the legality and validity of the order dated 11.6.2004 by which the Respondent No. 5 has been promoted as SDO (Class-I) gazetted under NPWD with same terms of officiating and temporary promotion. According to the Petitioner he is senior to the said Respondent. In this connection he has placed reliance on Annexure-I final seniority list as on 31.5.2001 in which his name appears at serial No. 4 as against the position of the Respondent No. 5 at serial No. 5.

9. From the above narration of facts, it will be seen that while the Petitioners in WP(C) No. 128(K)/2004; WP(C) No. 158(K)/2004 and WP(C) No. 170(K)/2004 have made challenge to the orders of officiating promotions granted in favour of the Petitioners in WP(C) No. 162(K)/2004 and WP(C) No. 168(K)/2004. They have also made prayer for their promotions as such. The Petitioner in WP(C) No. 170(K)/2004 has also claimed that he has been superseded by his juniors ignoring the recommendation made by the DPC held on 15.2.2002.

10. The official Respondents have filed counter affidavits in WP(C) No. 128(K)/2004, WP(C) No. 162(K)/2004 and WP(C) No. 168(K)/2004. In the counter affidavit filed in WP(C) No. 128(K)/2004, the official Respondents have admitted the case of the writ Petitioner by not denying the averments made in the writ petition. In paragraph 13 of the affidavit they have taken the stand that the impugned orders of promotions have already been cancelled by orders dated 25.8.2004 for violation of quota rules and the laid down procedure for promotion. They have also admitted that while making such officiating promotions, seniority was ignored. In paragraph 14 of the affidavit, it is the stand of the official Respondents that the aforesaid recommendation of DPC dated 15.2.2002 and/or the recommendation of the DPC that may be held in near future to consider the cases of eligible candidates would be followed.

11. The stand in the counter affidavit filed by the official Respondents in WP(C) No. 162(K)/2004, the plea of not following the quota earmarked for direct recruits and promotees has been taken. According to them also the DPC held on 15.2.2002 made recommendations for promotions against future vacancies and while granting the officiating promotions, many juniors superseded the seniors. It is also their stand that some of the beneficiaries of such officiating promotion did not even figure in the DPC recommendations.

12. Further stand in the said affidavit is that the officiating promotions were resorted to on pick and choose basis and on extraneous considerations. The Government, realizing the mistakes committed, has already issued the orders of cancellation of such promotions. In this affidavit also the Respondents have taken the plea that if any promotion are required to be made, same will have to be made on the basis of the DPC recommendations dated 15.2.2002 or on the basis of subsequent DPC to be held in near future.

13. Same is the stand of the official Respondents in their counter affidavit filed in WP(C) No. 168(K)/2004. Reply affidavits have been filed to the said counter affidavits even by questioning the very recommendations made by the DPC. They have also questioned the recommendations made for future vacancies, which according to them is in violation of Rule 17 of the Nagaland Engineering Service Rules, 1997. According to them there could not have any recommendation for future vacancies. The promotees have also questioned the bonafideness on the part of the Petitioner in WP(C) No. 170(K)/2004, inasmuch as according to them it was only at the time of their officiating promotion, the Petitioner made grievance against the same without raising any grievance in respect of his supersession by his juniors who have even been further promoted to the post of Executive Engineer.

14. The promotees in their reply affidavit have referred to the notification dated 6.12.88 by which all the Engineering Wings attached to various Government departments in the State were amalgamated into one department namely the Works and Housing Department with the exception of Nagaland State Transport, Geology and Mining and Agriculture inclusive of Irrigation. According to the promotees after such amalgamation there will have to be a combined seniority list and the seniority list on which, assailing their promotions have placed reliance are of no consequence. Referring to the past practice in the departments, it is the stand of the promotees that at the first instance officiating promotions are made and thereafter such promotions are regularized through DPC and thus no exception can be made only in case of the present promotees. Countering the stand of the official Respondents that an imbalance has been created in the ratio of 60:40 while granting promotions, it is the stand of the promotees that no such imbalance has been created and such a ground assigned by the official Respondents is only a mere eye wash.

15. In WP(C) No. 158(K)/2004 the Respondent No. 5 has filed a counter affidavit taking the same very plea as that of the other Respondents who are the

beneficiaries of the officiating promotions. According to him the Annexure-1 final seniority list has no application towards determination of seniority.

16. Respective counsel for the Petitioners extensively argued their cases. The counsel for the beneficiaries of the officiating promotions submitted that when such officiating promotions are subject to regularization by DPC, no interference is called for to the same. According to them the seniority between the rival parties on the basis of combined seniority list is yet to be decided and in that view of the matter the claim of seniority over the officiating promotees is not tenable. As regards the recommendations made by the DPC against future vacancies, learned Counsel for the said promotees submitted that no such recommendations could have been made and thus there is no question of providing promotion on that basis. The plea of violation of the principles of natural justice has also been raised. According to the learned Counsel, before cancelling their officiating promotions, the promotees ought to have been put to notice giving them an opportunity to have their say in the matter.

17. Countering the above arguments, learned Counsel for the Petitioners who claimed to be senior to the said promotees defended the action of the Government in cancelling the orders of officiating promotions. According to the learned Counsel, the Petitioners being senior to the officiating promotees, their cases could not have been ignored for such promotions. Learned Counsel for the Petitioner in WP(C) No. 170(K)/2004 made additional submissions by way of referring to the recommendations made by the DPC on 15.2.2002. According to him, the Petitioner is entitled to be promoted to the rank of SDO on the basis of such recommendation, more particularly when his juniors have been so promoted. In any case, he submitted, that the Petitioner could not have been ignored even for officiating promotion while promoting his juniors by the impugned orders.

18. Mr. Koza, learned State Counsel, referring to the averments made in the counter affidavit submitted that the Government had no option that to cancel the officiating promotions in view of the illegalities committed towards granting such promotions. He submitted that the process for holding DPC for regular promotion as per the recruitment rules having been initiated, there is no question of granting the officiating promotions and that too in violation of the rules and ignoring the claims of the seniors.

19. I have considered the submissions made by the respective counsel and the materials available on records. There is no dispute that the promotion orders are all by way of granting officiating promotions purely on temporary basis subject to regularization by the DPC. In the orders of promotion it has been clearly stipulated that such officiating promotions will not confer any right of seniority over the seniors in the cadre. The official Respondents in their counter affidavit have taken the plea that while granting the officiating promotions the recommendations made by the DPC in February, 2002 as well as the seniority of different incumbents were not taken into account. According to them such

officiating promotions were granted on pick and choose basis. Their plea is that the promotions will either be effected as per the recommendations made by the DPC in February, 2002 or on the basis of the recommendations to be made by the DPC in future. In fact, Mr. Koza, learned State Counsel during the course of arguments submitted that the process for holding DPC for regular promotions has already been initiated.

20. A detail procedure for promotion has been laid down in Rule 8(b) of the Nagaland Engineering Service Rules, 1997. It is now well settled that appointment/promotion must be in accordance with the Rules. However, exigencies of administration may sometimes call for an adhoc or temporary arrangement to be made. In such a situation, efforts would always be to replace such an adhoc/temporary employee by a regularly selected employees as early as possible. The appointment of the regularly selected candidate cannot be withheld or kept in abeyance for the sake of such an adhoc/temporary employee.

In the case of A.K. Bhatnagar and Others Vs. Union of India (UOI) and Others, the Apex Court while deprecating the practice of the Government giving a go-by to the statutory rules or regulations framed under proviso to Article 309 of the Constitution making large sale departure, expressed thus:

On more than one occasion this Court has indicated to the Union and the State Governments that once they framed rules, their action in respect of matters covered by rules should be regulated by the rules. The rules frame in exercise of powers conferred under the proviso to Article 309 of the Constitution are solemn rules having binding effect. Acting in a manner contrary to the rules thus creates problem and dislocation. Very often Government themselves get trapped on account of their own mistakes or action in excess of what is providing in the rules. We take seriops view of these lapses hope and trust that the Government both at the Centre and in the State would take note of this position at refrained from acting in a manner not contemplated by their own rules. (Emphasis added).

22. In the case of J and K. Public Service Commission, etc. Vs. Dr. Narinder Mohan and others etc. etc., the Apex Court emphasized that appointments made in violation of the recruitment rules violate Article 14 and 16. In the case of R.N. Nanjundappa Vs. T. Thimmiah and Another, dealing with the contention that Article 309 speaks of rules for appointment and general conditions of service, the Apex Court held that regularization of appointment in exercise of executive power process notwithstanding any rule, cannot be a form or kind of appointment and if it is in infraction of the rules and if it has effect ofthe violation of the rules or the Constitution, illegality cannot be regularized.

23. In the instant case, the State Government has resorted to temporary officiating promotions. It is not the stand of the official Respondents that such temporary arrangements had to be made in the exigencies of service. Even it, it was so, the Government could not have done so on pick and choose basis ignoring the senior persons in the fray. In this connection, I may refer to the

claim of the officiating promotees that in absence of combined seniority list, there is no determination of seniority between the contesting parties. The seniority lists annexed to the writ petitions, maybe, pertaining to a single department clearly depicts that the senior persons have been ignored in the matter of such officiating promotion and their juniors have been preferred. Even in absence of a combined seniority list, if the same is at all required to be prepared, the seniority list forming part of the instant proceeding clearly show that some of the officiating promotees who are juniors have been allowed to supersede their seniors. Even in case of preparation of a combined seniority list, such seniority positions of the contesting parties will not lead to any alteration. The officiating promotees cannot take unsustainable pleas towards defending their officiating promotions. As to what should be the criteria and quota are all indicated in the recruitment rules and it will be within the exclusive domain and jurisdiction of the appointing authority and the DPC to determine such factors while making regular promotions.

24. It is the own stand of the State Government that the officiating promotions were resorted to on pick and choose basis in violation of the recruitment rules. They have also cancelled the officiating promotions. They have taken the stand in their counter affidavit that appropriate action would be taken either on the basis of the recommendations made by the DPC in February, 2002 or the recommendations to be made in future by the newly constituted DPC. As submitted by Mr. Koza, learned State Counsel the process for holding DPC for regular promotion has already been initiated.

25. Rule 17(1) of the aforesaid rules of 1997 deals with the composition of the committee for consideration of promotion. Rule 17(2) and (3) lay down the procedure to be followed towards consideration of cases for promotion. The selection shall be based on merit and suitability with due regard to seniority. Whenever a junior officer is selected in preference to a senior one, the committee shall record in writing the reasons(s) of such supersession. The select list shall be valid for one year from the date of its approval by the Commission under Sub-rule 5 of the Rule 17. All vacancies arising during the period and intended to be filled by promotion shall be filled from that list.

26. In WP(C) No. 170(K)/2004, it is the case of the Petitioner that although he was recommended by the DPC in February, 2002, he was not promoted, but on the other hand his juniors whose merit positions were also below him and even officers not included in the select list were promoted. In this connection a distinction will have to be made between regular promotion and officiating promotion. If the Petitioner, on the basis of the aforesaid recommendation, has been superseded by his juniors in the matter of regular promotion, the Petitioner has a right for such promotion from the date when his juniors were so promoted with consequential benefits of seniority and notional fixation of pay etc. Even in case of officiating promotion, as has been held above, the seniors cannot be ignored. Officiating promotions with the stipulation of subject to regularization by

DPC cannot be a mode of eventual regular promotions. Such officiating promotees cannot score a march over their seniors on the basis of their such officiating promotions. The DPC while considering the case of different incumbents for regular promotion will have to consider their cases at par without giving any waitage to the officiating promotees.

27. From the pleadings in WP(C) No. 170 (K)/2004 it is not discernible as to who are the juniors who have superseded the Petitioner in the matter of regular promotion pursuant to the recommendation made by the DPC in February, 2002. As per the provisions of the aforesaid Rule 17 of the rules of 1997, the vacancies arising during the validity period of the select list and intended to be filled up by promotion are required to be filled up from amongst the selected candidates in order of merit. It is not known as to whether the case of the Petitioner comes within the zone of consideration for regular promotion as per the provisions of Rule 17 on the basis of the recommendations made by the DPC in February, 2002.

28. The stand of the official Respondents in their counter affidavits is somewhat confusing. In one hand it is their stand that action for promotion will be taken on the basis of the recommendations made by the DPC in February, 2002, but on the other hand the same very Respondents have taken the stand that the promotions would be effected on the basis of the recommendations to be made by the DPC in future. Be that as it may, if the Petitioner in WP(C) No. 170(K)/2004 was within the zone of consideration as per the parameters laid down in Rule 17 of the aforesaid rules and was superseded by his juniors in the matter of regular promotion, then in that case he will be entitled to get his promotion at par with his juniors applying the principles of "next below rule". Otherwise, his case will also have to be considered at par with Ors. who are in the fray for promotion as SDO by a regularly constituted DPC as per the provisions of the recruitment rules. It is made clear that in materialization of the first course of action, the Petitioner will be entitled to all consequential benefits of seniority with notional fixation of pay without back wages.

29. The official Respondents have filed two miscellaneous applications i.e. Misc. Case No. 200(K)/2004 in WP(C) No. 168(K)/2004 and Misc. Case No. 199(K)/2004 in WP(C) No. 162(K)/2004 praying for vacation of the interim orders passed by this Court staying the orders of cancellation of officiating promotions. During the course of hearing, Mr. Koza, learned State Counsel submitted that since the officiating promotions were effected in violation of the recruitment rules, same were cancelled and accordingly the interim orders passed by this Court are liable to be vacated. On being asked as to whether there would be any difficulty in managing the affairs of the promotional posts in absence of the incumbents, Mr. Koza, submitted that there would be no difficulty.

30. In view of the above, more particularly in view of the fact that the officiating promotions were granted only on temporary basis dehors the recruitment rules which is explicit on the face of the orders and in view of the stand of the

Government that they would manage the affairs without such officiating promotions and that the process for holding DPC has already been initiated, I am inclined to allow the writ petitions being WP(C) No. 128(K)/2004, WP(C) 158(K)/2004 and WP(C) No. 170(K)/2004 and dismiss the writ petitions being WP(C) No. 162(K)/2004 and WP(C) No. 168(K)/2004. Consequently, the aforesaid two miscellaneous applications filed by the State Respondents stand allowed vacating the interim orders passed in WP(C) No. 162(K)/2004 and WP(C) No. 168(K)/ 2004.

31. In so far as the Petitioner in WP(C) No. 170(K)/2004 is concerned, his case shall be considered in the light of the discussions made above. However, if none of his juniors has been given regular promotion in terms of the February, 2002 DPC recommendation, his case shall also be considered along with other eligible candidates by the future DPC. The consideration of the case of the Petitioner pursuant to his recommendation by the aforesaid DPC of February, 2002 shall also be subject to his coming within the zone of consideration and being within the parameters laid down in Rule 17 of the aforesaid rules. The Respondents shall also consider as to whether the select list in question is still valid or has spent its force. Prima facie it appears that the select list is no longer valid, although it is not known as to when the select list was finally approved. The validity period of one year of the select list as specified in Rule 17 is from the date of approval by the Commission. It is known as to when the list was approved by the Commission.

32. Subject to the above observations in respect of the Petitioner in WP(C) No. 170(K)/2004, the Respondents shall now proceed with the matter for holding the DPC for regular promotions strictly in accordance with the rules. Entire process shall be carried out as expeditiously as possible. If for any reason the matter gets delayed and a necessity is felt for resorting to temporary arrangements, same shall be done strictly in accordance with seniority of the incumbents. However, such temporary arrangement shall not be made for an indefinite period and the DPC for regular promotion should be convened without any delay. It is expected that the process for regular promotion shall be completed within six(6) months from today.

33. The writ petitions are answered in the above manner leaving the parties to bear their own costs.