(2007) 05 GAU CK 0038

In the Gauhati High Court

Case No : Writ Petition (Civil) No. 4678 of 2000

Dipti Bhuyan Das — APPELLANT

Vs

Monoranjan Choudhury and Ors. — RESPONDENT

Date of Decision : 24-05-2007

Acts Referred:
Assam Taxation Service Rules, 1995 — Rule 12(1), 12(1)

Citation : (2008) 1 GLR 832

Hon'ble Judges : Ranjan Gogoi, J

Bench : Single Bench

Advocate : A.K.Bhattacharyya, A.Kalita, B.K.Singh, D.K.Sarma, K.K.Bhattacharjee, U.K.Nair, Advocates appearing for Parties

Judgement

1. An order dated 10.8.2000 passed by the learned Assam Administrative Tribunal (''the Tribunal'') has been put to challenge in the present writ petition. By the aforesaid order the learned Tribunal, on the grounds assigned, has set aside the order dated 7.4.1998 promoting the petitioner to the post of Inspector of Taxes on ad hoc basis as well as the order dated 27.5.1999 regularising the said promotion with effect from 7.4.1998. The learned Tribunal, by its aforesaid impugned order, had further directed for the reversion of the petitioner to the post of Upper Division Assistant. It may be noticed, at this stage that by order dated 30.8.2000 while entertaining this writ petition, a restraint was put on the operation of the order passed by the learned Tribunal. By virtue of the aforesaid interim order passed by the court the petitioner continues to hold the post of Inspector of Taxes till date.

2. As the issues involved in the writ petition pertain to the validity of the promotion of the writ petitioner to the post of Inspector of Taxes made under the provisions of the Assam Taxation Service Rules, 1995, particularly those pertaining to promotion from the ministerial staff, it may be convenient to notice, at this stage, the relevant provisions of the Rules in force.

Under rule 5(vi) of the Rules recruitment against onefourth of the cadre strength of Inspector of Taxes is required to be made by promotion from the ministerial staff working under the Commissioner of Taxes. The eligibility criteria for such promotion is prescribed by rule 11 of the Rules. Subclause (f) of rule 11 has prescribed that for promotion from the ministerial staff to the cadre of Inspector, an incumbent must have meritorious service for a minimum period of 10 years out of which at least one year should be in the post of Upper Division Assistant. The incumbent is not required to exceed 45 years of age on the 1st day of January of the year in which promotion is considered.

Under rule 12(1) of the Rules before the end of each calendar year the appointing authority is required to make an assessment of the likely number of vacancies that are required to be filled up by promotion in the next year. Thereafter, the records of the eligible candidates are required to be sent to the duly appointed selection committee. The said committee is require to make the necessary selection by following the principle of merit with due regard to seniority. After the select list is n finalized by the committee, the appointing authority, after according its approval, is required to forward the same to the Public Service Commission and once approval is granted by the Public Service Commission the select list is to become final by publication in the Gazette and remain in force for a period of 12 months from the date of approval by the Commission.

3. Both the writ petitioner as well as the respondent No. 1 at the relevant point of time, were holding the post of Upper Division Assistant under the Commissioner of Taxes. There is no dispute that in the cadre of Upper Division Assistant the writ petitioner is senior to the respondent No. 1. A selection committee meeting was convened and held on 19.12.1997 for the purpose of recommending candidates for promotion to the post of Inspector from the quota earmarked for the ministerial staff. The selection committee, in its deliberations held on 19.12.1997, took into account two vacancies against the ministerial quota that was likely to occur on 30.9.1997 and 3.10.1997 on the superannuation of the serving incumbents. The committee also took into account one anticipated vacancy in the cadre of Inspector falling to the quota of the ministerial staff. The said anticipated vacancy was in respect of one Chunilal Das who was recommended for promotion to the higher post of Superintendent of Taxes by the selection committee which held its meeting on 27.3.1997. From the proceedings of the selection committee meeting dated 19.12.1997, as available on record, it is also clear that, out of the three vacancies including the anticipated vacancy for which deliberations were held, one post was required to be filled up against the ministerial quota of the year 1995.

4. The proceedings of the selection committee meeting held on 19.12.1997, as available, does not very clearly indicate when and which Committee had made the recommendation against the post required to be filed up from the 1995 quota. However, the aforesaid aspect of the matter need not detain the court, save and except that one Ramkrishna Medhi appears to have been selected

against the said post. Insofar as the two other remaining posts including the anticipated vacancy is concerned, the selection committee considered the cases of 8 Upper Division Assistants in order of seniority. While the name of the petitioner was included for such consideration the name of the respondent No. 1 did not come within the zone of consideration. Thereafter, the selection committee prepared a select list consisting of four names for the two posts. In the said select list one Aditi Changmai was placed at serial No. 1 whereas the petitioner was placed at serial No. 2 The petitioner, it may be noticed at this stage, is a scheduled caste candidate.

5. Thereafter no promotion on the basis of the recommendations of the selection committee meeting dated 19.12.1997 took place within the calendar year 1997. While the reasons for the same are not available, explanations have been offered at the Bar that the consequential promotions could not be made on account of certain litigations as well as on account of the fact that the case of Chunilal Das had remained in a sealed cover on account of pendency of a departmental proceeding. However, one significant fact that must be noticed in this regard is the much delayed approval of the Public Service Commission to the select list in question, i.e., on 12.4.1999. The reasons for the delay in granting approval are not before the court nor is the Public Service Commission a party to the present proceeding.

6. Whatever may be the reason for the absence of the consequential action of promotion pursuant to the selections made, eventually on 7.4.1998, by separate orders passed, Aditi Changmai (Serial No. 1 of the select list) and the petitioner (Serial No. 2 of the select list) were promoted to the post of Inspector of Taxes on ad hoc basis. On 15.5.1999 Chunilal Das was promoted to the post of Superintendent of Taxes. Subsequently on 27.5.1999 the ad hoc promotions of Aditi Changmai and the petitioner were regularized with effect from the date of ad hoc promotion, i.e., 7.4.1998.

7. In the above facts, the respondent No. 1, Shri Monoranjan Choudhury. filed an appeal before the learned Tribunal below challenging the promotions, both ad hoc and regular, conferred to the present writ petitioner who was arrayed as the respondent No. 4 in the said proceedings. The aforesaid appeal was registered and numbered as Case No. 8 ATA of 1999.

The basis on which the present respondent No. 1, as the appellant, had moved the learned Tribunal may now be noticed. According to the appellant, the selection committee meeting held on 19.12.1997 could not have taken into account three vacancies as being available for its consideration. In this regard it was contended by the present respondent No. 1 that on 19.12.1997 out of a total 51 post of Inspectors falling to the share of the ministerial staff there'' were 49 incumbents already in office including Chunilal Das. The number of posts of Inspector available to the ministerial staff on the said date, therefore, was two in number. Out of the two vacancies one was to be filled up from the 1995 batch of ministerial staff. Therefore, there was only one available vacancy to be filled up on the basis of the recommendation of the selection committee meeting dated 19.12.1997. Aditi Changmai was placed at Serial No. 1 and, therefore, had to be granted promotion. In that event, according to the present respondent No. 1 (appellant before the Tribunal), there was no vacancy or post against which the name of the petitioner could be recommended for promotion.

Before the learned Tribunal, the present respondent No. 1 had further urged that the post of Inspector held by Chunilal Das having become available only on 15.5.1999, a fresh selection had to be held against the said post. In such fresh selection the petitioner could not have been considered as she would have crossed 45 years of age on 31.12.1997. In that event, the respondent No. 1 would have been the only remaining scheduled caste candidate in the fray. That is how, according to the respondent No. 1, his prospects of promotion and his right of consideration for promotion was infringed by the impugned actions of the respondents. Accordingly, it was contended that the promotion of the writ petitioner, on ad hoc basis, by order dated 7.4.1998 and its regularization with effect from the said date by order dated 27,5.1999 are not legally sustainable.

8. The learned Tribunal, on due consideration of the facts of the case, as already noticed in the present order, and after an elaborate hearing recorded its final verdict in the matter by the order dated 10.8.2000. The conclusion reached by the learned Tribunal, in short, as would be evident from a reading of its order, appears to be that in an affidavit filed by the Commissioner of Taxes before the learned Tribunal it had been clearly stated that the post in the cadre of Inspector held by Chunilal Das was not vacant on 19.12.1997, i.e., the date of meeting of the selection committee. On the said date out of the ministerial quota of 51 posts of Inspector, 49 persons were already holding office. Therefore, according to the learned Tribunal, on 19.12.1997 only two posts of Inspector, falling to the share of ministerial staff, were available. Out of the said two posts, one post was a backlog vacancy of the year 1995. That left only one post of Inspector available for consideration of the selection committee. Consequently, the consideration of 8 names and the select list of four persons for two posts was unauthorized. According to the learned Tribunal, the selection for the first post as made by the selection committee alone could be valid; the recommendation for the second post was wholly uncalled for. It is on the aforesaid primary basis that the learned Tribunal had thought it fit to set aside the selection of the writ petitioner and the consequential promotions made on 7.4.1998 and 27.5.1999.

9. I have heard Sri A.K. Bhattacharyya, learned senior counsel appearing for the petitioner and Mr. U.K. Nair, learned counsel appearing for the respondent No. 1.1 have also looked into the pleadings of the parties including the records which were considered by the learned Tribunal.

10. The provisions of the Service Rules in force as would be relevant to the present case have already been noticed. Of particular significance, insofar as the issues arising in the present writ petition are concerned, would be the provisions contained in rule 12 of the Rules. Under rule 12(1) the appointing authority,

before the end of a calendar year, is required to make an assessment of the likely number of vacancies that are to arise in the course of the coming calendar year and take steps for filling up the said vacancies. The emphasis in rule 12(1) is on the word ''likely number of vacancies'' which expression would take within its sweep, apart from existing vacancies, not only vacancies which are certain to occur on account of superannuation but also vacancies which are likely to occur on account of anticipated promotions. The reason why the Service Rules contemplate selections in respect of existing as well as reasonably anticipated vacancies are not far to seek. A selection committee deliberating on existing as well as anticipated vacancies and makings its recommendations against all such vacancies dispenses with the need of repeated selections within a calendar year thereby introducing efficiency in the service by ensuring that vacant posts are filled up without any delay. If Chunilal Das who was holding the post of Inspector was selected for promotion to the post of Superintendent of Taxes on 29.3.1997, surely, the post of Inspector held by Chunilal Das was likely to fall vacant on his promotion to the higher post. If the promotion of the aforesaid person was in the offing in the month of March 1997, the selection committee was well within the ambit of its rights to treat the said post as a likely or anticipated vacancy and include it within its deliberations held on 19.12.1997.

11. In the present case the vacancy/post which was required to be filled up from the 1995 batch/quota is not an issue before the court. The court, therefore, will now have to proceed on the basis that there were two other posts available for being considered by the selection committee in its meeting held on 19.12.1997. Viewed from the aforesaid perspective, the consideration made by the selection committee and its recommendations in so far as the petitioner and Aditi Changmai in concerned would appear to be in consonance with the provisions of the Rules, disclosing no infirmity.

12. However, what has to be further noticed by the Court is that though the selections were completed within the calendar year 1997, promotions in terms of the recommendations of the selection committee were not made till 7.4.1998 on ad hoc basis and 27.5.1999 on regular basis. An argument has been advanced before the court that even assuming that the selections and recommendations, insofar as the petitioner is concerned are valid, the same could have been acted upon within the calendar year 1997 but once the said calendar year gets over, the second vacancy against which the petitioner was recommended must be taken to be a vacancy which could again be anticipated for the calendar year 1998. The said argument is sought to be fortified by the further contention that against the said anticipated vacancy, which has to be in respect of the calendar year 1998, a further selection should have been made in which event the petitioner would not have been eligible and the respondent No. 1 would have come into the fray being the next eligible scheduled caste candidate.

13. The argument advanced overlooks certain basic facts. If the vacancy against which the petitioner was selected and recommended was an anticipated/likely

vacancy of the calendar year 1997, a view that the court is inclined to hold for the reasons already alluded to, and the selection for the said vacancy took place within the same calendar year i.e. 1997, the vacancy being already embraced by one selection will not be a vacancy which can be carried forward to the next year. The further act of making promotions on the basis of a selection already held is a consequential act. Merely because promotions have not been forthcoming, notwithstanding a valid selection and recommendation made by the duly constituted selection committee, the selected candidate cannot be understood to have forfeited his/her rights for being considered for promotion. In any event, if such a view is taken for the second post against which the petitioner was selected, a similar view has to be taken in respect of the first vacancy for which Smt. Aditi Changmai was selected, as both the petitioner and Aditi Changmai were promoted in a similar manner and on the same dates, i.e., 7.4.1998 on ad hoc basis and 27.5.1999 on regular basis with effect from 7.4.1S98. That apart, the argument advanced by Sri Nair, learned counsel for the Respondent, on its own reasoning, will not permit the vacancy to be treated as of the year 1998 as it did not factually occur till the promotion of Chunilal Das on 15.5.1999.

14. In the present case the Public Service Commission had not approved the select list as required under rule 12(11). The reasons for ''withholding'' of such approval are not before the court; neither is the Public Service Commission a party to the present proceedings. Grant of approval by the Public Service Commission is a matter over which the petitioner had no control. In these circumstances, can the petitioner be understood to have forfeited his rights to be considered for appointment on the basis of the recommendations made by a valid selection committee against a vacancy which the Rules permit taking cognizance of ? This is why, perhaps, the Government decided to promote the petitioner on ad hoc basis by the order dated 7.4.1998. Eventually, the Public Service Commission having accorded its approval to the selections in question on 12.4.1999 and Chunilal Das having been promoted on 15.5.1999, the promotion of the petitioner to the post of Inspector was regularized with effect from 7.4.1998 by order dated 27.5.1999. In the above facts, what can be said at the highest is that the date of regularization of the petitioner with effect from 7.4.1998 is not correct as on the said date the promotion of Chunilal Das had not occurred so as to create the vacancy in the cadre of Inspector for the petitioner to step in. That would, however, make the order of regularization passed on 27.5.1999 irregular to the extent of the date from which the regularization is to take effect. Such irregularity in the order cannot be equated with an incurable or inherent flaw or illegality requiring the court''s interference with the promotion order itself.

15. For the aforesaid reasons, the court is inclined to take the view that the vacancy anticipated on the promotion of Chunilal Das to the cadre of Superintendent of Taxes being reasonably foreseeable was a likely vacancy which could have been taken into account by the selection committee which met on 19.12.1997. Once the said vacancy was embraced by the recommendation of the

committee and the consequential act of promotion alone was left to be done the said vacancy could not have fallen to the share of the anticipated vacancies of a subsequent calendar year so as to require a further selection for the said post. On the above view, subject to what has been observed with regard to the irregularity in the order dated 27.5.1999 regularising the ad hoc promotion of the petitioner with effect form 7.4.1998, it must be held by the court that there is no other infirmity in the consequential promotion made so as to enable this court to agree with what has been held by the learned Tribunal in its order dated 10.8.2000.

16. In view of the above, this writ petition is allowed. The order dated 10.8.2000 passed by the learned Tribunal in Case No, 8 ATA of 1999 is set aside and the selection and consequential promotion of the writ petitioner subject to such modification, as observed above, is hereby affirmed.