
(2005) 04 GAU CK 0009

In the Gauhati High Court

Case No : Writ Petition (C) No"s. 84 (K) , 156 (K) and 171 (K) of 2004

Direct Recruits Engineers Association, Works and Housing	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, 8

Citation : (2005) GLT 814 Supp

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

Bench : Single Bench

Advocate : A. Zhimoni, K. Yepthom, J. Zhimoni, A. Zho, Neku and Taka Masa, for the Appellant; T. Koza, Taka Masa, A. Zimoni, K. Yepthom and J. Zhimoni, for the Respondent

Final Decision : Dismissed

Judgement

B.K. Sharma, J.—Above three writ petitions are linked to, each other touching the same issue and hence were heard together and are being disposed of by this common judgment and Order. The facts as narrated in the writ petition are shortly stated below:

W.P. (C) No. 84 KV 2004

2. This Writ petition has been filed by the Direct Recruit Engineers Association of the Works and Housing Department, Nagaland, representing the directly recruited engineering graduates, making a prayer for a direction to the Respondents to constitute DPC for consideration of the cases of all eligible candidates for promotion to the post of Executive Engineer in terms of the rules ensuring strict compliance of Rule 8(b)(ii) of the Nagaland Engineering Service Rules, 1997. The said provisions of Rule 8(b)(ii) read as follows:

8.(b) Departmental Promotion:

(i)

(ii) 75% of the total strength of Executive Engineer shall be filled up by promotion from amongst the serving degree holders having 7(seven) years of continuous service in the next lower grade. 25% of the total strength of E.Es is will be filled by promotion from amongst the serving diploma holders with a minimum of 9(nine) years of continuous service in the lower grade.

3. It is the case of the Petitioner that in the department of Public Works there are 61 posts of Executive Engineers and 60 of the said posts have been filled up by regular employees and one post is lying vacant. According to them the recruitment prescribed by Rule 8(b)(ii) has been violated inasmuch as the 25% of the quota prescribed for diploma holders has been exceeded. The Petitioner has annexed the incumbency list to substantiate their claim. On an earlier occasion they approached this Court making a similar grievance by filling W.P. (C) No. 108(K)/2003 which was disposed of by order dated 11.09.2003 providing consideration of the representation of the Petitioner. The representation has not yet been disposed of. In the meantime two of the members of the Petitioners association have been promoted as Executive Engineer by Notification dated 20.11.2003.

4. After the aforesaid promotion of two of its members, by Notification dated 07.06.2004, two diploma holders have been promoted, one of whom, according to the Petitioner has superseded many of his seniors. In paragraph 9 of the Writ Petitioner, the Petitioner has stated that diploma holders have exceeded their quota by way of occupying three posts in excess of the quota prescribed and that there is shortfall in the quota of degree holders in respect of four posts. Further grievance raised in the writ petition is that the Respondents have failed to convene DPC in terms of the rules. They made a representation on 16.6.2004 which is still pending consideration before the Respondents. W.P. (C) No. 156(K)/2004

5. This Writ petition has been filed by the Petitioner making a grievance against the order dated 25.08.2004 issued by the Respondents cancelling his order of promotion promoting him as Executive Engineer by order dated 24.06.2004. The Petitioner was a diploma holder in Engineering at the time of entering the services of the Respondents in the year 1985 as Computer/Draftsman Grade-I. His service was regularized on 31.07.86 through the NPSC and was appointed as Overseer Grade-I (Civil). On being granted study leave in the year 1993, the Petitioner obtained his Engineering degree undergoing the course during 1993-96.

6. After the aforesaid degree in Engineering obtained by the Petitioner, he was given temporary officiating promotion as Assistant Engineer (Class-I gazetted) against a vacant post. On the recommendation of the DPC dated 15.01.2002, his such officiating promotion was regularized alongwith five other candidates who were also allowed temporary officiating promotion as Assistant Engineer/SDO under NPWD. The Petitioner's service was regularized with effect from 01.04.97.

7. By an order dated 14.06.2004, the Petitioner was given officiating promotion

to the post of Executive Engineer and was posted to the office of the Vigilance Commission, Nagaland on deputation against a vacant post. He joined the promotional post on 16.06.2004 and continued to serve in the promotional post. However, by the impugned order dated 25.08.2004, his such promotion has been cancelled on the ground that his such promotion has exceeded the quota of 25% earmarked for the diploma holders. The Petitioner has assailed the legality and validity of the order of cancellation of his promotion. The Petitioner asserts that when he was promoted to the post of Executive Engineer, there were three vacant posts as indicated in paragraph 4 of the writ petition.

W.P. (C) No. 171 (K)/2004

8. A similar grievance has been raised in this writ petition by the four Petitioners. The Petitioner No. 4 has already retired from service on attaining the age of superannuation. As in the aforesaid case i.e. W.P. (C) No. 156(K)/2004, the Petitioners in this case also were granted officiating promotions as Executive Engineer by orders dated 29.06.2004, 25.06.2004, 05.07.2004 and 24.06.2004 respectively. As against the stand of the Petitioner in the first writ petition i.e. W.P. (C) No. 84(K)/2004, it is the stand of the Petitioner in paragraph 9 of the writ petition that the degree holders have exceeded their quota of 75% to the deprivation of diploma holders. The percentage has been indicated as 82.45% and 12.28% respectively. According to the Petitioners, who are diploma holders, they were promoted within the 25% quota reserved for diploma holders. Before they could assume charge of the promotional posts, their orders of officiating promotions were cancelled by the impugned order dated 25.08.2004 making a grievance against which they have approached this Court.

9. For convenience sake all the aforesaid three writ petitions are described in this judgment as the first, second and third writ petition respectively. In the first writ petition the official Respondents have filed counter affidavit more or less admitting the stand of the writ Petitioner. In paragraph 7 of the counter affidavit, they have stated that the Government has taken action to enforce the aforesaid Rules of 1997. The Respondent No. 6 i.e. the All Nagaland Diploma Engineers Service Association has also filed its counter affidavit con-troverting the claim of the Petitioner. According to them, it is the degree holders who have eaten up the quota earmarked for the diploma holders. The Petitioner by way of their reply affidavit has reiterated the stand in the writ petition.

10. In the second writ petition also, the official Respondents have filed counter affidavit. It is the stand in the affidavit that the case of the Petitioner would be considered against 25% quota earmarked for diploma holders inasmuch as, although the Petitioner has in the meantime obtained the Engineering degree, but he had entered the service of the Respondents as a diploma holder. In this connection they have placed reliance on a judgment of this Court passed on 20.02.1995 in the writ petition being Civil Rule No. 120(K)/1993. According to them the Petitioner was promoted in excess of the quota of 25% and accordingly, the impugned order had to be issued cancelling his promotion. It is their further

stand that the Petitioner has superseded many of his seniors in the matter of promotion and that the promotion was made in a selective and arbitrary manner.

11. The Respondent No. 5, the Petitioner in the first writ petition has also filed a counter affidavit controverting the claim of the Petitioner in tune with the stand of the official Respondents.

12. In the first writ petition also, the official Respondents have filed their counter affidavit reiterating the stand as has been taken in the second writ petition.

13. I have heard Mr. A. Zhimoni, learned Counsel for the Petitioner in W.P. (C) No. 84(K)/2004. I have also heard Mr. B.N. Sarma, learned Sr. Counsel, assisted by Mr. A. Zho, learned Counsel appearing for the Petitioner in W.P. (C) No. 156(K)/2004. Mr. Taka Masa, learned Counsel argued on behalf of the Petitioner in W.P. (C) No. 171(K)/2004. Mr. T. Koza, and Mr. L.S. Jamir, represented the State Respondents and made their submissions.

14. Mr. B.N. Sarma, learned Sr. Counsel appearing for the Petitioner in the second Writ petition submitted that the impugned order being violative of the principles of natural justice is not sustainable. He submitted that prima facie the reasons assigned in the impugned order being contrary to the rules, the impugned order is not sustainable. He submitted that the Petitioner having obtained the degree in Engineering during the course of his employment for which he was granted study leave, he can no longer be branded as a diploma holder and consequently his case is required to be considered against the 75 % quota earmarked for the degree holders.

15. Mr. Taka Masa, learned Counsel appearing for the Petitioners in the third writ petition also submitted that the grounds assigned in the impugned order towards cancellation of the orders of their officiating promotion are not sustainable. He submitted that in fact, it is the degree holders who have transgressed the quota earmarked for the diploma holders. He submitted that the promotions having been made only on officiating basis subject to holding of regular DPC, the Petitioners are required to be allowed to continue in their promotional posts of Executive Engineer till their cases are considered by the DPC.

16. Mr. A. Zhimoni, learned Counsel appearing for the Petitioner in the first writ petition made submissions in tune with the averments made in the writ petition. He submitted that the Petitioner in the second writ petition cannot be considered against the quota earmarked for degree holders, he having entered the service as a diploma holder. According to him the acquiring of degree qualification by the Petitioner is inconsequential. In this connection he also placed reliance on the aforesaid judgment of this Court in Civil Rule No. 120(K)/1993.

17. Mr. T. Koza and Mr. L.S. Jamir, learned State Counsel defended the action of the Respondents in cancelling the orders of officiating promotions. They submitted that instead of resorting to such officiating promotions leading to heartburning, it will be in the fitness of the things to go for regular promotion by

constituting DPC for which process has already been initiated. As regards the claim of the Petitioner in the second writ petition, they argued that his case will have to be considered against the quota earmarked for diploma holders irrespective of his acquiring the degree qualification. During the course of argument, Mr. Koza, learned State Counsel produced a copy of the disposition list of Executive Engineers in the department as on May, 2004.

18. I have considered the submissions made by the learned Counsel for the parties and the materials available on records. There is no dispute that the promotions made in favour of the Petitioners in the second and third writ petitions are on temporary and officiating basis. learned Counsel for the parties all agreed that such officiating and temporary arrangements cannot continue indefinitely and that the DPC will have to be convened to consider the case of all the incumbents who come within the zone of consideration for regular promotion as Executive Engineer. learned Counsel for the Petitioners in the second and third writ petition argued that till such regular selection is held, they should be allowed to continue in their promotional posts of Executive Engineer to which they have been promoted on temporary and officiating basis. Both the learned State Counsel more or less agreed for such continuation of officiating promotions till holding of DPC for regular promotions.

19. Once the aforesaid consensus is arrived at, there may not be any difficulty towards continuation of the officiating promotions made in favour of the Petitioners in the second and third writ petitions. However, the whole difficulty has arisen in view of the reasons assigned in the impugned orders cancelling the officiating promotions made in favour of the Petitioners. In the second writ petition it is the stand of the Respondents in the order cancelling the officiating promotion that the promotion of the Petitioner has been made in excess of the prescribed quota of 25% for diploma holders. In the impugned order it has also been emphasized that regular promotions are required to be made following the procedure laid down in Rule 17 of the aforesaid rules of 1997.

20. In the third writ petition, same is the stand of the Respondents. However, the basic difference between the two writ petitions is that in the third writ petition the Petitioners are admittedly diploma holders, whereas the Petitioner in the second writ petition although had entered the services of the Respondents as a diploma holder but has since obtained his degree in Engineering for which the Respondents themselves granted him study leave. Although, the Respondents have taken the common ground in both the impugned orders that the Petitioners have been given officiating promotions in excess of the quota of 25% for diploma holders, but no particulars have been indicated.

21. As stated above, during the course of argument, Mr. Koza, learned State Counsel produced the disposition list of the Executive Engineer as on May, 2004. The total cadre strength of Executive Engineer is stated to be 57. As per the disposition list altogether 43 degree holders and 15 diploma holders are there in the cadre of Executive Engineer. However, out of the 15 diploma holders, 4 are

on current duty charge. Thus really speaking there are 11 diploma holders in the cadre of Executive Engineer with the cadre strength of 57. Thus if we go by this disposition list, then there is shortfall of three vacancies in the quota of 25% for diploma holders. The numbers of writ Petitioners in the third writ petition presently in the fray are also three. In such a situation the ground assigned in the impugned orders that the Petitioners were promoted in excess of the quota earmarked for diploma holders is not tenable. As regards the plea of requirement to follow the due procedure for promotion to fill up the promotional post of Executive Engineer, there cannot be any quarrel on the same. In fact, learned Counsel for the parties also emphasized on the need to fill up the posts on regular basis.

22. There is no consensus in respect of the aforementioned disposition list amongst the parties. Even otherwise also the said disposition list finished by Mr. Koza, is of as on May, 2004 and the same has not been authenticated by any authorized officer of the Respondents. Thus, it cannot be said to be an authentic document. The real state of affair as regards the positions of the incumbents falling in the quota of 75% and 25% is not discernible from the available materials on record. Both degree holders and diploma holders have claimed that their quota has been transgressed. However, this aspect of the matter need not detain us inasmuch as in the process of regular selection, the appointing authority and the DPC are bound to take into account the real state of affair and to act in accordance with the rules as has been emphasized by this Court in the earlier writ proceeding. It has been brought on record that by order dated 24.11.2004 passed in W.P. (C) No. 142(K)/2004, this Court has already issued direction to the Respondents to hold DPC in accordance with Rules recording the submission of Mr. T. Koza, learned State Counsel that the Government is taking steps to hold DPC to consider the cases of the eligible candidates.

23. I now proceed to deal with the issue raised in the second writ petition. According to the learned Counsel for the Petitioner in the first petition and the learned State Counsel, the Petitioner does not come within the quota of degree holders inasmuch as although he has obtained his degree in Engineering, he having entered the services on the basis of his diploma, he is entitled to be considered only against the quota of 25% earmarked for the diploma holders. As noticed above, the Petitioner was granted study leave to undergo the course leading to his degree in Engineering. Immediately after obtaining the degree, he was promoted as Assistant Engineer/SDO on the basis of the recommendations made by the DPC. Thereafter, he was given officiating promotion to the rank of Executive Engineer in June, 2004. However, by the impugned order his such promotion has been cancelled on the aforementioned assigned reasons in the impugned order.

24. The basic question involved in his case is as to whether he should be considered against the quota of degree holders or against the quota of diploma holders. According to the Petitioner in the first petition and the learned State

Counsel, he is entitled to be considered only against 25% quota of diploma holders, he having entered his services as a diploma holder. In this connection they have placed reliance on the aforementioned judgment of the Court i.e. the judgment and Order dated 20.02.1995 passed in Civil Rule No. 123(K)/1993. In the said case the Court was concerned with the Nagaland Engineering Service Rules, 1984 unlike the present set of rule of 1997. However, a submission was made by the learned Counsel for the Petitioner in the first petition that the provisions of both the Rules touching the issue are in perimateria. I have gone through the judgment. In that case, the third Respondent was first appointed as Draftsman Grade-I without any process of selection through the NPSC. After putting in about 8 months of service, he was given officiating promotion as Assistant Engineer subject to regularization by the DPC. Till the date of delivering the judgment his such promotions was not regularized and yet he was granted further officiating promotion as Executive Engineer. It was held that his initial appointment of Draftsman Grade-I was illegal. However, the Court was of the opinion that it would be harsh to set aside his initial appointment.

25. It was noticed in the aforesaid judgment that within 8 months of his appointment as Draftsman Grade-I, the said Respondent No. 3 could not have been given officiating promotion to the post of Assistant Engineer inasmuch as per rules he was to complete 7 years of regular service in the substantive grade. In that case, unlike the present case, the Court was concerned with the amalgamation of different departments etc. The Respondent No. 3 was given officiating promotion to the post of Executive Engineer on 4.5.1993 and at that time he had put in about 6 years of service as Assistant Engineer. On that occasion also he was given promotion without completing the required length of service of 10 years in the substantive grade. The Court noticed that neither the promotion of the Respondent No. 3 as Assistant Engineer nor as Executive Engineer was regularized by DPC.

26. It was in the aforesaid back ground the Court posed the question as to whether the Respondent No. 3 who obtained his Engineering degree should be considered as a promotee or as a direct recruits to the post of Assistant Engineer. The Court noticing the state of affairs relating the amalgamation held that the said Respondent should be deemed to be a promotee.

27. From the aforesaid discussion in respect of the judgment which has been pressed into service to emphasize that the Petitioner in the second writ petition should be considered as a diploma holder, I am of the considered opinion that the said judgment has no application to the case of the Petitioner. Unlike the case of the third Respondent involved in the said judgment, the Petitioner in the second writ petition was appointed as Draftsman Grade-I and his such appointment was regularized through the NPSC. He was granted leave to undergo the course of study leading to his Engineering degree. After the obtaining such degree, he was given temporary officiating promotion by order dated 1.4.97 and his such promotion was regularized through DPC. Thereafter,

he has been granted officiating promotion as Executive Engineer by order dated 14.6.2004. Thus, on the face of it, the facts of his case are quite different with the facts of the third Respondents in the said proceeding. Needless to say, that the ratio of a decision will have to be understood in the fact situation of that case. In fact, no ratio as such has been laid down in the aforesaid judgment. It was only in respect of the factual state of affair involved with the service of the third Respondent in the said proceeding.

28. There is another aspect of the matter. In this proceeding, we are not concerned with any quota earmarked for direct recruits and promotees as has been sought to be projected in the first writ petition. In fact the members of the Petitioner in that case cannot have any distinct and separate entity as direct recruits raising the issue relating to Rule 8(b)(ii). On the face of it, the provisions of the said rule provide for respective quota for degree holders and diploma holders and it does not speak of direct recruits or promotees. On this count also, the said judgment has no application to the present case.

29. As per the provisions of Rule 8(b)(ii) quoted above, 75% of the total strength of Executive Engineer shall be filled up by promotion from amongst the serving degree holders having 7 years of continuous service in the next lower grade. There is no dispute that the Petitioner has completed 7 years of service from the date of his promotion as Assistant Engineer and thus eligible for promotion as Executive Engineer. learned Counsel for the Petitioner in the first Petitioner as well as the learned State Counsel referring to Rule 8(b)(v) of the Rules which provides that serving diploma holders in the rank of Junior Engineers who have improve their technical qualification i.e. acquiring degree or equivalent qualification will be given preference for further promotion with a minimum length of 5 years of continuous service as Junior Engineer, submitted that this is the only benefit which-the Petitioner can expect in his service career. According to them, after acquiring this benefit under Rule 8(b)(v), for consideration of the future promotion as Executive Engineer, he would again fall back in the category of diploma holders.

30. If the aforesaid argument is to be accepted, then in that case there is no point of acquiring the degree qualification only to get some preference only in the matter of promotion to the rank of Assistant Engineer. Even in Rule 8(b)(v), the expression used "will be given preference for further promotion" has a significance and the same cannot be said to be an one time exception. Once the Petitioner has obtained his degree in Engineering his case will have to be considered as per the provisions of Rule 8(b)(ii) which provides that 75% of the total strength of Executive Engineers shall be filled up by promotion from amongst the serving degree holders having 7 years of continuous service in the substantive grade. Remaining 25% of the vacancies are earmarked for the diploma holders. The Petitioner obtained his degree pursuant to study leave granted to him by the Government. Thus, he is a degree holder. The expression used in Clause 8(b)(ii) "the serving degree holders" will take the Petitioner into

its fold in absence of any reservation. The said expression is unqualified. There is no manner of doubt that the Petitioner is a degree holder and his case will have to be considered in that manner only. Otherwise, the degree obtained by the Petitioner would be meaningless. He cannot be regarded as diploma holder even after obtaining his degree in Engineering. Once he has obtained the degree and on that basis has entered the cadre of Assistant Engineer/SDO, he earns the status of a degree holder. Any other interpretation will lead to absurdity.

31. In view of the above factual and legal position, the basic ground in which the officiating promotion of the Petitioner has been cancelled falls through. If that be so the impugned order is not sustainable.

32. Consequent upon the aforesaid findings and conclusions, the second and third writ petitions deserve to be allowed by way of setting aside the impugned orders. The prayer made in the first writ petition also deserves to be allowed. The Petitioners in the second and third writ petition may be allowed to continue with their officiating promotions as Executive Engineers till such time the DPC for regular selection is held. This does not mean that they will continue with their officiating promotions indefinitely. this Court has already passed an order in W.P. (C) No. 142(K)/2004 directing the Respondents to hold DPC for regular promotions. Learned State Counsel also made submissions that the Government has already initiated the process for holding DPC to consider the cases of the all eligible officers within the zone of consideration for promotion as Executive Engineer.

33. 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 employee 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.

34. 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 mistake or action in excess of what is providing in the Rules. We take serious view of these lapses and 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).

35. 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 Articles 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 of the violation of the rules or the Constitution, illegality cannot be regularized.

36. 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. The time limit prescribed for such holding of DPC in the order dated 24.11.2004 passed in W.P. (C) No. 142(K)/2004 has already expired. However, in view of the submissions made by the learned State Counsel that the time limit stipulated in the said order could not be adhered to because of these pending writ petitions with interim order, it is hereby provided that the Respondents shall now proceed with the matter of regular selection by convening the DPC within four months from today. While considering the cases of the eligible officers for promotion to the rank of Executive Engineer, the provisions of the aforesaid Rules of 1997 shall be strictly followed. They will also work out the vacancies in the respective quota to maintain the equilibrium between the two groups of degree holders and diploma holders. Till such time the Petitioners in the second and third petitions shall be allowed to continue in the promotional posts of Executive Engineer to which they were promoted on temporary officiating basis. Consequently, the impugned orders in both the writ petitions stand set aside and quashed.

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