
(2015) 02 MAD CK 0104

In the Madras High Court

Case No : Writ Petition No. 18532 of 2013, M.P. Nos. 1, 3, 5 of 2013 and 1 of 2014

Engineering Diploma Association

APPELLANT

Vs

State of Tamil Nadu and Others

RESPONDENT

Date of Decision : 04-02-2015

Acts Referred:

Citation : (2015) 02 MAD CK 0104

Hon'ble Judges : M.M. Sundresh, J.

Bench : Single Bench

Advocate : R. Muthukumaraswamy for G. Sankaran, for the Appellant; R. Ravichandran, Addl. Government Pleader, Advocates for the Respondent

Final Decision : Dismissed

Judgement

M.M. Sundresh, J.

This Litigation is an extension of the previous litigations initiated either by the Assistant Engineers or Junior Engineers qua to the post of Assistant Engineer. To decide the issues raised, it is appropriate to understand the background facts.

1. Background Facts:-

The post of Assistant Engineer in the Agricultural Engineering Department is governed by the Special Rules for the Tamil Nadu Agricultural Engineering Services. The post of Junior Engineer in the said Department is governed by the Special Rules for the Tamil Nadu Agricultural Subordinate Services. The post of Assistant Engineer is filled up by the direct recruitment with the prescribed qualification of Engineering Degree. The post of Executive Engineer is filled up from the Diploma holders on promotion from the feeder categories. As both these posts are feeder categories to the post of Assistant Executive Engineer, a ratio of 1:3:2 has been prescribed by the Special Rules for the Tamil Nadu Agricultural Engineering Services under Rule 2(b) and the following is the order of rotation:

- "(a) By direct recruitment;
- (b) By promotion from the post of Assistant Engineer(AE);
- (c) By recruitment by transfer from the post of Junior Engineer(AE);
- (d) By promotion from the post of Assistant Engineer (AE);
- (e) By recruitment by transfer from the post of Junior Engineer(AE);
- (f) By promotion from the post of Assistant Engineer(AE)."

2.1. The ratio fixed was unsuccessfully challenged by both the Junior Engineers and Assistant Engineers. Suffice it is to state that as on today, the ratio as fixed between them stands.

2.2. Taking into consideration of the stagnation of the Assistant Engineers for more than 20 years without any possibility of promotion, the second respondent sent its proposal to the first respondent on 28.12.2011. In the said proposal, the following reasons were assigned by the second respondent.

"The Superintending Engineers(AE) and the Executive Engineers (AE) of this department are touring officers. The Executive Engineers(AE) have to attend Collector's meetings often and have to co-ordinate with the district administration. At present the Executive Engineers (AE) are assisted by Technical Assistants in the cadre of Assistant Engineer/Junior Engineer (AE). Hence, induction of a post of Assistant Executive Engineer (AE) in the offices of Executive Engineer(AE) and Superintending Engineer(AE) will be very useful in this regard.

The Assistant Executive Engineer (AE) could be entrusted with the scrutiny of the estimate and other reports so that the respective Superintending Engineers(AE) and Executive Engineers (AE) are relieved of the work directly to the Technical Assistants who are in the cadre of Assistant Engineer/Junior Engineer (AE).

The Assistant Executive Engineer (AE) can scrutiny the technical documents thoroughly and also can look after pay bills and other bills. This will allow the Superintending Engineers (AE) and Executive Engineers (AE) effectively monitor the vastly expanding progressive schemes like Agricultural Mechanization, Rainwater Harvesting Programmes and IAMWARM by touring extensively as the load of office work is taken care by the Assistant Executive Engineers(AE).

The Executive Engineers (AE) rapport with the district administration will be improved if they have frequent contact with the District Collector. Moreover more farmers meetings can be conducted to improve relationship with farmers."

2.3. Accordingly, it was suggested that the present form of posting of Assistant Engineers/Junior Engineers in the post of the Executive Engineer and Superintending Engineer may be dispensed with and the posts may be filled up with the Assistant Engineers, who are stagnated without promotions by relaxing ratio stipulated as in the Rule 2(b) of Special Rules for Tamil Nadu Agricultural

Engineering Service.

2.4. After coming to know the said development, the petitioner made a request to the first respondent by the letter dated 03.01.2012 claiming the ratio of 3:2 under Rule 2(b) of Special Rules for Tamil Nadu Agricultural Engineering Service to be followed for the proposed upgraded posts as well. The operative portion of the request made is reproduced hereunder:

"We therefore submit to state the Chief Engineer (AE) that, even for upgrading the post of Assistant Engineer (AE)/Junior Engineer (AE) as Assistant Executive Engineer (AE) and for filling up the post of ratio rule of 3:2 have to be followed. Any alteration of the present ratio of 3:2 will lead to a position of that No junior Engineer gets promotion as Assistant Executive Engineer (AE) before their retirement. Furthermore the ratio of 3:2 was upheld by the Hon"ble Supreme Court of India on 13.09.1994. Hence any alteration of ratio will drastically affect the judgment of the Hon"ble Supreme Court of India and we request to adopt the ratio of 3:2 in filling up the post of Assistant Executive Engineer (AE) by upgrading the post of Assistant Engineer/Junior Engineer (AE)."

2.5. As the request was not considered, a writ petition was filed before this Court in W.P.No. 11523 of 2013. In pursuant to the order passed therein, the first respondent passed the order impugned dated 24.05.2013 rejecting the request made by the petitioner on the ground that what is recommended is only a upgradation and hence, there is no requirement to follow the ratio. It was also observed that the proposal has been made by taking note of the stagnation in the same post for 20 years qua the Assistant Engineers. Challenging the said order, the present writ petition has been filed.

3. Submissions of the Petitioner:-

The learned Senior Counsel appearing for the petitioner as well as the other counsels, who support the stand taken, have made the following submissions:

The order impugned is an attempt to circumvent the prescription of Rule 2(b) of Special Rules for Tamil Nadu Agricultural Engineering Service. As the challenge made at the instance of the Assistant Engineers ended in a failure, what cannot be done directly is sought to be achieved indirectly. Though it has been stated that what has been proposed is only an upgradation, it is actually a promotion. If it is a case of promotion then, the Rule of reservation should apply strictly in accordance with law. There is no factual premise for considering the case of the Assistant Engineers alone. In support of the contentions, the following cases are relied upon.

"(1) B. Thirumal Vs. Ananda Sivakumar and Others, ; and

(2) Bharat Sanchar Nigam Ltd. Vs. R. Santhakumari Velusamy and Others, .

4. Submissions of the Respondents:-

The counsels appearing for the respondents submitted that the writ petition as

filed is premature. A mere proposal sent by the second respondent will not give a cause of action to seek a higher relief as the proposal is pending consideration with the first respondent. There is no cause of action for this writ petition. The said proposal is also not put under the challenge. The recommendations of the second respondent clearly states about the necessity to consider the proposal, based upon the factual situation. It is not right to contend that under the garb of upgradation, promotions are sought to be made. In support of their contentions, the counsels had relied upon the following judgment:

1. P. Sudhakar Rao and Others Vs. U. Govinda Rao and Others, .

5. DISCUSSION:-

5.1. The facts would reveal that the proposal sent by the second respondent is pending consideration with the first respondent. Though the proposal states about the Rule 2(b) of Special Rules for Tamil Nadu Agricultural Engineering Service, a perusal of the order impugned would show that it deals with upgradation alone. The power of upgradation is not under challenge. In fact, it is also accepted by the learned counsel appearing for the petitioner. It is the specific case of the petitioner that the ratio will have to be followed while considering the upgradation.

5.2. The principal question for consideration is as to whether the issue involved is upgradation or promotion. It is not as if the Assistant Engineers were sought to be promoted ahead of the Junior Engineers. The classification is qua the Assistant Engineers, who have put in service of 20 years more. The upgradation is sought to be made only for these persons. They do not become Assistant Executive Engineers per se except certain benefits concerned on them. In other words, the upgraded posts cannot be strictly equated on par with the post of Assistant Executive Engineer. It is also made applicable only to the office postings. In the recommendations, specific reasons have been assigned from the point of view of the stagnated Assistant Engineers as well as the public interest. The impugned order also states that it is an one time measure. As both the sides have made heavy reliance upon the judgment of the Supreme Court in B. Thirumal Vs. Ananda Sivakumar and Others, over the question as to whether what is sought to be made is upgradation or promotion, it is apposite to place the relevant paragraphs governing the same.

15. The cumulative effect of the above, in our opinion, is that there is no element of recruitment to the State Engineering Service by direct recruitment or by transfer. The contention that those re-designated stood appointed to the cadre of Assistant Engineers (Electrical) in State Service must, therefore, fail. Considerable support for that conclusion is available from the decision of this Court in Bharat Sanchar Nigam Ltd. Vs. R. Santhakumari Velusamy and Others, . That was a case where this Court was examining whether rules of reservation were applicable to promotions to Grade IV under the Biennial Cadre Review Scheme introduced by the Department of Telecommunications,

Government of India with a view to remove stagnation of certain categories of employees serving in the said department. The Government had formulated the procedure regarding promotion to Grade IV according to which such promotions were to be granted on the basis of seniority in the basic grade from amongst the officers in Grade III subject to fitness determined in the usual manner of One Time Bound Promotion Scheme ("OTBP Scheme" for short). By a clarificatory Circular issued subsequently the Government had directed that promotions would be subject to fulfilment of other conditions and that normal rules of reservation would apply to the same. The direction regarding application of rules of reservation to promotions to Grade IV was assailed by the All India Non Schedule Caste/Schedule Tribe Telecom Employees Association on the ground that principles of reservation had no application for upgradation on existing posts which did not carry any change in duties and responsibilities. The Central Administrative Tribunal, Ahmedabad upheld that contention and directed that reservation will have no application while upgrading posts under the BCR Scheme and directed that the department shall take appropriate action for effecting promotions to the upgraded posts without applying the reservation roster. The order passed by the Tribunal was upheld by the Gujarat High Court in a writ petition filed by the Government. The matter eventually reached this Court by special leave. One of the main issues considered by this Court was whether upgradation of the posts under the BCR Scheme was tantamount to promotion. This Court upon a comprehensive review of the decisions rendered earlier including those rendered in *Union of India (UOI) and Another Vs. S.S. Ranade*, *Union of India v. V.K. Sirothia* (2008) 9 SCC 283 and *Lalit Mohan Deb and Others Vs. Union of India (UOI) and Others*, formulated specific principles relating to promotion and upgradation in the following words:

"21. On a careful analysis of the principles relating to promotion and upgradation in the light of the aforesaid decisions, the following principles emerge:

(i) Promotion is an advancement in rank or grade or both and is a step towards advancement to higher position, grade or honour and dignity. Though in the traditional sense promotion refers to advancement to a higher post, in its wider sense, promotion may include an advancement to a higher pay scale without moving to a different post. But the mere fact that both that is advancement to a higher position and advancement to a higher pay scale - are described by the common term "promotion", does not mean that they are the same. The two types of promotion are distinct and have different connotations and consequences.

(ii) Upgradation merely confers a financial benefit by raising the scale of pay of the post without there being movement from a lower position to a higher position. In an upgradation, the candidate continues to hold the same post without any change in the duties and responsibilities but merely gets a higher pay scale.

(iii) Therefore, when there is an advancement to a higher pay scale without

change of post, it may be referred to as upgradation or promotion to a higher pay scale. But there is still difference between the two. Where the advancement to a higher pay-scale without change of post is available to everyone who satisfies the eligibility conditions, without undergoing any process of selection, it will be upgradation. But if the advancement to a higher pay-scale without change of post is as a result of some process which has elements of selection, then it will be a promotion to a higher pay scale. In other words, upgradation by application of a process of selection, as contrasted from an upgradation simplicitor can be said to be a promotion in its wider sense that is advancement to a higher pay scale.

(iv) Generally, upgradation relates to and applies to all positions in a category, who have completed a minimum period of service. Upgradation, can also be restricted to a percentage of posts in a cadre with reference to seniority (instead of being made available to all employees in the category) and it will still be an upgradation simplicitor. But if there is a process of selection or consideration of comparative merit or suitability for granting the upgradation or benefit of advancement to a higher pay scale, it will be a promotion. A mere screening to eliminate such employees whose service records may contain adverse entries or who might have suffered punishment, may not amount to a process of selection leading to promotion and the elimination may still be a part of the process of upgradation simplicitor. Where the upgradation involves a process of selection criteria similar to those applicable to promotion, then it will, in effect, be a promotion, though termed as upgradation. A

(v) Where the process is an upgradation simplicitor, there is No. need to apply rules of reservation. But where the upgradation involves selection process and is therefore a promotion, rules of reservation will apply.

(vi) Where there is a restructuring of some cadres resulting in creation of additional posts and filling of those vacancies by those who satisfy the conditions of eligibility which includes a minimum period of service, will attract the rules of reservation. On the other hand, where the restructuring of posts does not involve creation of additional posts but merely results in some of the existing posts being placed in a higher grade to provide relief against stagnation, the said process does not invite reservation."

5.3. In the light of the ratio referred to supra and applying it to the facts of the case, it is clear that no additional posts were sought to be created. What has been sought to be done is by way of a placement in a higher grade to provide relief against stagnation. It was also meant to be made as a one time measurement to be complied with only for those Assistant Engineers, who have put in 20 years of more service and that too, for the office posts. Therefore, though the recommendations made appears to indicate the necessity of relaxing the rules, if one sees from the reasons assigned in the order impugned, the position is rather clear that what is involved is only an upgradation. When once, a conclusion is arrived at that the proposal involves upgradation alone, then the

petitioner and others do not have any locus to question the same. It is not as if the sanctioned posts are tinkered with or the process involves creation of the additional posts of Assistant Executive Engineers. Therefore, this Court is of the considered view that the proposal governs only upgradation alone.

5.4. In view of the conclusion arrived at above, this Court is not inclined to go into the incidental issues as the question of upgradation is yet to be decided by the first respondent since it continues to be at the proposal stage. Therefore, mainly because it has been stated that upgradation is for the posts of Assistant Executive Engineers, it cannot be said that new posts are created or the upgradation of persons working in the posts would encompass the sanctioned posts, which require appropriate rules being adhered to.

5.5. Hence, this Court is of the view that it would be just and appropriate for the first respondent to take a decision on the proposal dated 28.12.2011 made by the second respondent one way or other within a period of eight weeks from the date of receipt of a copy of this order.

6. In the result, the writ petition is dismissed with a direction to the first respondent to pass appropriate final orders on merits and in accordance with law on the proposal of the second respondent within a period of eight weeks from the date of receipt of a copy of this order. No costs. In view of the orders passed in the writ petition, all the miscellaneous petitions are closed.