

(1999) 06 GAU CK 0007
In the Gauhati High Court
Case No : Writ Petition (C) No. 104 of 1998

Gopendra Kr. Malakar

APPELLANT

Vs

State of Tripura and Another

RESPONDENT

Date of Decision : 11-06-1999

Acts Referred:

Constitution of India, 1950 — Article 309
Tripura Public Service Commission (Exemption from Consultation) Regulations, 1973 — Regulation 5(1)

Citation : (1999) 3 GLT 141

Hon'ble Judges : H.K.K. Singh, J; D.N. Chowdhury, J

Bench : Division Bench

Advocate : A.K. Bhowmik and S. Ghosh, for the Appellant; S. Chakraborty, S. Deb, A. Dey and S. Roy, for the Respondent

Final Decision : Allowed

Judgement

1. The bone of contention in the writ application pertains to the computation of the period of service rendered by the Petitioner, Shri Gopendra Kumar Malakar, as Superintending Engineer with effect from 15.3.88 till he was regularised as such on and from 10.9.93, which as per the pleadings has arisen in the following circumstances.

2. The Petitioner first entered into Government service under the Public Works Department (PWD in short) as Overseer on 3.3.70. The Petitioner was thereafter promoted and appointed as Asstt. Engineer under the Respondent No. 1, the State of Tripura, with effect from 24.10.72, thereafter, he was promoted to the post of Executive Engineer on 31.5.78 and was regularised as such with effect from 24.3.81. The Petitioner was then promoted as Superintending Engineer (Civil) on ad hoc basis with effect from 15.3.88 and finally was appointed as Superintending Engineer (SE in short) on promotion in the Tripura Engineering Service (TES) Grade III on regular basis with effect from 10.9.93. Then the Petitioner knocked the door of this Court seeking for an appropriate direction for

regularisation of the aforesaid period of his service and to issue a direction regularising his service as SE (Civil) with effect from 15.10.88 with all the attending service benefits from that date as such officer. According to the Petitioner, since his initial appointment was made by the authority upon considering all aspects of the matter taking into account the claim of other eligible persons and was appointed to the aforesaid permanent post allowing him to work as such SE (Civil) uninterruptedly, the period mentioned above is required to be considered for all practical purpose as a regularly appointed incumbent in the post of SE. The Petitioner also cited instances of some officers of the Department who were initially appointed on ad hoc basis like him, but when such appointees/promotees were regularised, they were conferred with the benefits of a regularly appointed person from the date of their initial appointment to the post. The Petitioner mentioned the names of Shri Bimal Chakraborty, Shri Kanailal Das, Shri Ranjit Lodh, Shri A.K. Gupta and Shri A.K. Debnath, who were given similar benefits. The Petitioner accordingly moved the authority for such a direction and failing to get the relief, has moved this Court by way of this writ petition seeking appropriate reliefs.

3. The Respondent No. 1, State of Tripura as well as Respondent No. 2, Tripura Public Service Commission (TPSC) in short), both contested the claim of the Petitioner and filed their respective affidavits. According to the State/Respondent No. 1, till the Petitioner was regularly appointed to the post of SE vide order dated 10th September, 1993 on a regular basis, the Petitioner was only holding the post as an ad hoc measure on ad hoc basis and that the Petitioner became a full-fledged SE only after regularisation of his service as such. In the affidavit, the Respondent stated that the case of the Petitioner could not be taken-up for consideration for regularisation in view of the fact that Shri K.N. Das, an Executive Engineer who was the immediate senior to the Petitioner in the category of Scheduled Caste candidates could not be promoted due to the pendency of a vigilance case and accordingly, the Petitioner was appointed on ad hoc basis on 15.10.88 as the SE (Civil) on administrative exigency to overcome the situation. The Respondent No. 1 stated that in its affidavit in paragraph 3 (three) that "At the time of filling up the post of Superintending Engineer on ad-hoc basis on 15.10.1988, the matter was so urgent that the matter could not be placed before the Departmental Promotion Committee for filling up the post on regular basis as some statutory formalities were required to be placed before the Departmental Promotion Committee for consideration with regard to the filling up of the post of Superintending Engineer on regular basis".

4. The Respondent No. 2, TPSC, in its affidavit stated that the eligibility conditions for consideration for promotion to the post of Superintending Engineer are to be regulated by the provisions of the Tripura Engineering Services Rules, 1987, hereinafter referred to as the Rules, 1987. According to the Respondent No. 2, the matter of ad-hoc appointment of the Petitioner to the post of was neither reported to the TPSC in the manner required under Regulation 5(1) of the Tripura Public Service Commission (Exemption from Consultation) Regulations,

1973, nor was the TPSC consulted with regard to filling-up of the post immediately after a period of one year from the date of ad-hoc appointment in terms of Clause (iii) of the Regulations, 1973. According to the Public Service Commission, the matter came to its notice after elapse of four years when the Government referred the proposal for filling-up the post of SE (Civil) under the PW Department on regular basis through the constitution of Selection Committee. On receipt of the proposal of the Respondent No. 1 for arranging to convene the meeting of the constituted Selection Committee for filling up two vacancies in the post of SE (Civil) (Grade II), the TPSC took the matter in right earnest, constituted the Selection Committee and convened the meeting of the constituted Selection Committee and the Selection Committee on considering the service records and the overall ACRs belonging to the SC candidates, viz., Shri K.N. Das, Shri G.K. Malakar and Shri Gopal Chandra Das, recommended the names of (1) Shri G.K. Malakar and (2) Shri K.N. Das, Executive Engineer (Civil) for promotion against the two backlog vacancies for SC candidates in the post of SE (Civil) (Grade II of TES) from the prospective date in the given order of merit:

(1) Shri G.K. Malakar (SC)

(2) Shri K.N. Das (SC)

5. The proceeding of the meeting of the Selection Committee was sent to the State/Respondent for necessary action and the State/Respondent on acceptance of the recommendation of the Selection Committee initiated necessary proposal to the TPSC for concurrence of the above-named officers to the post of SE (Civil) with prospective effect as recommended by the Selection Committee and the TPSC concurred to the proposal of the State Government for promotion of the Petitioner along with the other officer to the posts of SE (Civil) from the prospective date. The Respondent No. 2 in its affidavit averred that the matter relating to the constitution of the Departmental Promotion Committee (DPC in short) was beyond the purview of the TPSC and as per the procedure, it was the State Government who was to constitute the DPC for promotion to a particular post. That in the case in hand also, the Government constituted the Selection Committee in pursuance of the Rules, 1987 and, therefore, the Respondent No. 2 was not responsible for non-constitution of the DPC. As regards the numerous instances about the officers in whose cases seniority was computed from the date of their initial appointment on ad hoc basis, the Respondent No. 2 made the following statements in its affidavit:

...SO far the case of Shri Bimal Chakraborty and Shri G.K. Das are concerned, their services were regularised w.e.f. from 30.8.79 and 15.12.88, respectively, i.e. the dates of ad-hoc appointment of each on their recommendation of the D.P.C. It is true that their appointment was regularised in the years 1993 and 1991 respectively because the recommendation in respect of those two officers were kept in sealed covers on account of pendency of Vigilance case/ Departmental proceedings against them at the relevant point of time. The effect to the recommendation of the DPC was given on later dates on the Officers being

exonerated on completion of the case proceeding.

So far the case of Shri Kanailal Das or that of Shri Ranjit Lodh, Shri A.K. Gupta and Shri A.K. Debnath are concerned it is to state that effect of regularisation of ad hoc appointment with effect from their respective dates of appointment on ad hoc basis was given on the recommendation of the DPC and in matters of promotion of Officers DPC is the sole recommending authority. The recommendation of the DPC on acceptance by the Govt. is referred to the Commission for concurrence in the appointment of the Officers with effect from the dates recommended by the DPC.

It may be pertinent to state that in the case of Shri G.K. Malakar, the Petitioner, the DPC recommended for his appointment to the post of Superintending Engineer on regular basis only with prospective effect. The Government in the Public Works Department accepted the recommendation and referred the case to the Commission for necessary concurrence which were duly accorded. There was, therefore, no case of discrimination as alleged by the Petitioner.

6. Mr. A.K. Bhowmik, the learned senior Counsel appearing on behalf of the Petitioner submitted that the initial appointment of the Petitioner for all practical purposes was a regular appointment since the Petitioner fulfilled the eligibility criteria and other norms and he continued to hold the post without any interruption till he was regularised in service in accordance with the Rules and that the Respondents acted arbitrarily and discriminatorily in not computing the above period towards the seniority of the Petitioner.

7. Mr. S. Chakraborty, the learned Counsel appearing on behalf of the State Government submitted that the Petitioner remain as an ad-hoc appointee/promotee till he was regularised in the post as a member of the Tripura Engineering Service, Grade II. That the earlier period of his service prior to his regularisation was purely ad-hoc service in which the Petitioner was merely officiating. Mr. Chakraborty has also produced the connected records of the case.

8. Mr. S. Deb, the learned senior Counsel appearing on behalf of the Respondent No. 2, submitted that the TPSC is not directly involved in the matter. The TPSC came into picture only when the State Government referred the matter to it for regularisation and it promptly performed its duty in accordance with law. Mr. Deb, the learned senior Counsel, submitted that the TPSC performed its Constitutional duty justly and fairly.

9. For appreciating the controversy, it will be necessary to look to the relevant Statutory provisions involved in the matter. For regulation of recruitment and the conditions of service of the Engineers under the PWD of the Govt. of Tripura, a set of rules has been made in exercise of the powers conferred by the provision of Article 309 of the Constitution of India, which is known as the Tripura Engineering Services Rules, 1987 hereinafter referred to as the Rules, 1987. The relevant provisions of the Rules, 1987 are set out below:

Part-IV: Method of Recruitment.

6. Recruitment to posts of different grade (s) of the service shall be regulated by the following provisions.

A) Chief Engineer. Recruitment....

B) Add. Chief Engineer & Arbitrator. Recruitment....

C) Superintending Engineer

Recruitment to the posts of Superintending Engineer shall be made by promotion of Executive Engineer on the basis of "Selection" failing which by transfer on deputation.

An Executive Engineer possessing a degree in the appropriate branch of Engineering and having seven years regular service in the grade will be able for promotion as Superintending Engineer.

Note: For eligibility for promotion the Executive Engineers should have passed the Departmental Test Examination prescribed for the post of Executive Engineer.

D) Executive Engineer. Recruitment....

Departmental Examination & Training

8. All persons appointed in the service, except Chief Engineer/Addl. Chief Engineer & Arbitrator/Superintending Engineer shall undergo such training and pass during the probation period of such departmental examination as prescribed by the Govt. and as may be modified from time to time and are in force on the date of publication of these rules in the Tripura Gazette within such period as prescribed in the relevant rules/orders.

Part-XVIII: Appointment of Selection Grade.

23. Appointment of members of the service to the selection Grade shall be made consultation with the Commission the basis of merit with due regard to seniority.

28. Part XXI: Selection by Direct Recruitment....

A candidate for appointment for direct recruitment shall apply before such date in such form and in such manner as may from time to time be prescribed by the Commission.

B) Eligibility, age limit, educational qualification and experience for direct recruitment to the service shall be as laid down in Part. IV under the caption of method of recruitment.

C) A candidate must satisfy the appointing authority the characters and antecedents are such as to make his/or suitable for appointment to the service.

D) The decision of the Commission on the question whether a candidate does or does not satisfy any of the requirements for recruitment shall be final.

E) A candidate must be in good mental and bodily health and free from any physical defect likely to interfere with the discharge of his duties as an officer of the service. A candidate who (after such Physical examination as the Govt. may prescribe) is found not to satisfy these conditions will not be appointed.

10. As indicated earlier, the Petitioner was appointed on 15.10.88 as SE on ad hoc basis vide order dated 10th November, 1988 under No. F. 1(32)-PWD(E)/72 in the following circumstances. One post in the Grade of SE was lying vacant in the Department (PWD) since 17.7.88, the charge of which post was held by Mr. H. Bhattacharjee. The authority thought over the matter and for filling up the post and the concerned authority processed the matter vide its note dated 26.9.88 in the following manner:

Consequent on proceeding on one Year's training course on 17th International Post Graduate diploma course in Hydrology, University of Roorkee, by Sri D.K. Chowdhury Superintending Engineer, one post in the grade has been lying vacant since 17.7.88. Shri H. Bhattacharjee, S.E. is now holding additional charge of Circle which was under Sri Chowdhury. It is necessary to relieve Sri H. Bhattacharjee of the additional charge.

According to TES Rules, an Executive Engineer having degree in Civil Engineering with 7 (seven) years regular service in the grade become eligible for consideration for promotion to the grade of Superintending Engineer. The TES Rules also provide that for eligibility for promotion, the Executive Engineer should have passed the Departmental examination prescribed for the Executive Engineers. This vacancy is now to be filled by an SC candidate according to 100 point roster.

The names & particulars of eligible Executive Engineers (SC) are given below:

From the above, it would be seen that both Sri Das & Sri Malakar have already attained the eligibility for promotion to the post of SE. But the case of Sri K.N. Das not been cleared by the AR Deptt. though requested by this Deptt. In the interest of works, it is necessary to post an SE to fill up the vacant position.

The selection of the candidate by the DPC/TPSC for promotion on a regular basis will take considerable time. Pending finalisation of the promotion cases by the DPS/TPSC, it is proposed that Sri G.K. Malakar, EE for whom AR Deptt. has given vigilance clearance may be appointed as Superintending Engineer (Civil) on ad-hoc basis for a period of 6 (six) months initially against the vacancy reserved for SC. The A.P. Deptt. vide their letter No. F.6(11)-ARD/88 dt. 19.7.88 has furnished the vigilance clearance in respect of Sri G.K. Malakar, EE.

Sri Malakar, on promotion, may be posted to 3rd Circle or to the River Project Circle, if approved.

Sd/-illegible, 26.9.88 Secretary: PWD

11. The above proposal was accepted by the concerned authority and the same

was duly approved/accepted by the concerned Minister of the Respondent No. 1 and finally approved by the Chief Minister and thereafter, the Petitioner was appointed and posted as such SE (Civil). From the above note, it thus transpires that there was a vacant post of SE which had to be filled up by an SC candidate according to 100 point roster and there was two SC persons holding the posts of Executive Engineers who were eligible for promotion to that post. According to the Respondent No. 1, both Shri K.N. Das as well as the Petitioner had the eligibility for promotion to the post of SE, but since the case of Mr. K.N. Das was not cleared by the AR Department, the case of the Petitioner was considered for promotion. According to the Respondent No. 1 since selection of a candidate by the DPC/TPSC for promotion on a regular basis would be time consuming, therefore, the Department thought it fit to promote the Petitioner as stop-gap arrangement pending finalisation of the promotion. From the above facts, it thus transpires that the appointment of the Petitioner was initially made against an existing vacancy. The vacancy was not limited to a fixed period of time and promotion was made pending finalisation of the promotion by the DPC/TPSC. The Petitioner was found to be eligible and qualified in every manner for regular appointment to the post on the date of appointment. Under the Rules, 1987, as mentioned above, appointment to selection Grade posts are to be made in consultation with the Public Service Commission with due regard to the merit and seniority. The duty of constitution of the Selection Committee and that of consultation with the Public Service Commission rested on the Respondent No. 1. Save and except the bad statements made in the affidavit on behalf of the Respondent No. 1 to the effect that the matter could not be placed before DPC for filling up the post on regular basis as some statutory provisions were to be fulfilled before placing the matter before such Committee, no other explanation was put forward by the Respondent No. 1 as to what were the compelling formalities/provisions that prevented it from constituting the Selection Committee. The records those were produced before us, also do not indicate as to why the process of regularisation could not be completed prior to the order of regularisation dated 10.9.93. The Petitioner was allowed to continue in the post of SE (Civil) without any interruption till his regularisation in service in accordance with rules without any default. The Petitioner is not to be blamed for the deficiency in meeting the procedural requirements under the Rules.

12. From the facts and circumstances narrated above, it cannot be held that the initial appointment of the Petitioner was made as a stop-gap arrangement. As alluded earlier, the initial appointment of the Petitioner was made against an existing vacancy subject to the holding of selection through DPC. The Petitioner was eligible and qualified for regular appointment on the date of the initial appointment. For the deficiency in meeting the procedural requirements and for not completing the selection process, the Petitioner cannot be blamed. The responsibility was that of the Respondent to meet the procedural requirement of the Rules with utmost despatch. The Respondents did not point out any default on the part of the Petitioner which prevented the Respondents in completing the

process of regularisation. The materials on record clearly point out to the deliberate inaction on part of the Respondents in not completing the process of regularisation thereby adversely affecting the service career of an officer. Under all these circumstances, we are of the opinion that the seniority of the Petitioner in the cadre of Superintending Engineer ought to have been counted from the date of initial appointment in the cadre and not according to the date of his regularisation/confirmation. We accordingly hold that the Respondents were not justified in not computing the seniority of the Petitioner, Gopendra Kumar Malakar, and denying the Petitioner from the service benefits from 15.10.88 till 10.9.93.

13. Accordingly, the Respondents are directed to take-up the matter at the earliest and pass necessary cadres for regularising the service of the Petitioner for the aforesaid in the light of the observations made above.

14. With this the writ application stands allowed. However, there shall be no order as to costs.