

(2005) 04 GAU CK 0066
In the Gauhati High Court

Hrangthanmawii

APPELLANT

Vs

Lai Autonomous District Council and Others

RESPONDENT

Date of Decision : 26-04-2005

Acts Referred:

Constitution of India, 1950 — Article 14, 16

Citation : (2007) 1 GLR 377 : (2005) 2 GLT 588

Hon'ble Judges : T. Vaiphei, J

Bench : Single Bench

Final Decision : Allowed

Judgement

T. Vaiphei, J.—In this writ petition, the petitioner prays for quashing the orders promoting the respondent Nos. 4 and 5 to the posts of Assistant Education Officer in the Office of the Lai Autonomous District Council, Mizoram and for directing the respondents-Council to "remote her to the said post w.e.f 10.4.2002.

2. To appreciate the controversy involved in the writ petition, the material facts of the case may be noticed at the very outset. The petitioner was appointed as Circle Education Officer (CEO) (Middle Section) in the Education Department of the Lai Autonomous District council (LADC), which is one of the Autonomous District Council in the State of Mizoram vide the office order dated 10.5.1994. The respondent No. 4 was appointed to the same post in the same year in terms of the office order dated 8.8.1994. Both the petitioner and the said respondent were confirmed to their respective posts w.e.f 12.5.1996 and 2.8.1996 respectively.

3. On learning that one post of Assistant Education Officer (AEO) was vacant in the District Council, the petitioner is stated to have written the letter dated 20.6.2001 addressed to the respondent No. 1 requesting the latter to promote her to the said post as she had been in service since 10.5.1994. Thereafter, the respondent-Council constituted a DPC for selecting candidate for promotion to

the said post. According to the petitioner, the DPC after considering the case of eligible candidates recommended her for promotion to the said post. Subsequently, she was shocked to learn that the respondent No. 4 came to be deployed as District Project Officer by referring him as Assistant Education Officer vide the order dated 18.3.2002.

4. It is the further case of the petitioner that the respondent-Council subsequently issued the office order dated 10.4.2002 promoting the respondent No. 4 to the post of AEO. It is also stated by the petitioner that the DPC, which held its sitting on 28.6.2001 was constituted not only to consider the case of candidates for promotion to the post of AEO, but also other posts such as I & PO and FAO. It is, thus, the case of the petitioner that while the other candidates recommended by the DPC for the posts in other Departments were duly promoted by the respondent -Council, the recommendation of the DPC for her promotion to the post of AEO was not given effect to. On the contrary, according to the petitioner the respondent-Council promoted the respondent No. 4 to that post even though he was not recommended by the DPC.

5. Aggrieved thereby, the petitioner is stated to have filed an appeal before the respondent No. 2 on 17.6.2002 ventilating her grievances and urging him to rectify the mistake committed by the respondent-Council in promoting the respondent No. 4 and in not promoting her as recommended by the DPC. Apparently acting upon the appeal of the petitioner the matter was remitted in the DPC for reconsideration. The DPC reviewed the matter and again recommended the petitioner for promotion to the said post in place of the respondent No. 4. When no action was taken by the respondent-Council for promotion of the petitioner, she again made a representation to the Council-respondents on 29.1.2003 pleading that the recommendation of the DPC be acted upon.

6. It is the further case of the petitioner that in the meantime, another development had taken place wherein another post of AEO in the Education Department was created, for which the Council-respondent constituted a DPC to consider the promotion of eligible candidates. The DPC held its meeting in the month of May 2003 to undertake such exercise and again recommended the petitioner for promotion to this post. The recommendation was returned by the Council-respondents for reconsideration as, according to the petitioner, they wanted to promote a person other than her. It is the contention of the petitioner that though the academic qualification for the post of AEO is a graduate of a recognized University, the DPC recommended the respondent No. 5, who is merely a Matriculate, for the said post. The Council-respondents accepted the recommendation and thereupon promoted the respondent No. 5 to the post of AEO. Another representation made by the petitioner to the Council-respondents on 4.8.2004 did not prove fruitful. This drove her to file the instant writ petition.

7. The office note dated 24.11.2004 shows that notices have already been properly served upon the respondent Nos. 4 and 5. However, none appears on

behalf of the said respondents. Under the circumstances, this writ petition is heard against them ex parte. The Council-respondents resisted the writ petition and filed their counter affidavit. In their counter affidavit the fact that the petitioner was recommended by the first DPC on 28.6.2001 for promotion to the post of AEO has not been denied by the Council-respondents. It is, however, contended by them that the respondent No. 4, having been found to be the most suitable person for implementation of the SSA programme, was given the designation of AEO one month prior to his actual deployment as District Project Officer and the order of promotion was accordingly issued to him. The further stand taken by the Council-respondents is that they are not bound to accept each and every recommendation made by the DPC. According to the Council-respondents, promotion was given to the respondents after seeing his outstanding work in the field under the SSA programme. In so far as the second vacancy for the post of AEO is concerned, the respondents vide paragraph No. 9 of the counter affidavit do not deny that the petitioner was again recommended for this post by the DPC on 30.9.2003. However, it is the case of the Council-respondents that the recommendation was not approved by them. According to the Council-respondents, the respondent No. 5 was found to be more efficient in his service than the petitioner as evidenced from the certificate of proficiency in Teachers' Education (Annexure-1 to the counter affidavit); he had successfully completed Diploma Course way back in 1984 ; he was also appointed as CEO under the Council-respondents in 1987, i.e., much before the commencement of the Lai, Mara and Chakma District Councils (Groups A, B, C and D) Recruitment Rules, 1992. It is, thus, submitted by the Council-respondents that the writ petition being devoid of substance is liable to be dismissed with suitable cost.

8. From the pleading's of the parties, it becomes manifestly clear that the petitioner was recommended by the DPC on 28.6.2001, and, again, on 11.7.2002, even after reconsideration by the same DPC, for promotion to the post of AEO, but the Council-respondents refused to accept the recommendations on the said two occasions on the ground that "The Executive Committee has seen the outstanding work of the respondent No. 4 in the field under the SSA programme...". The question is whether the ground, thus, assigned by the Council-respondents for not acceding to the recommendations of the DPC dated 28.6.2001 and dated 11.7.2002 for promoting the petitioner to the post of AEO is sustainable in law. It may be noticed that the Council-respondents do not question the legality or otherwise of the DPC proceedings or the qualification or merits of the petitioner. It is also an admitted position of the parties that the post of AEO is a selection post, which means that the selection is based on merit-cum-seniority. Moreover, there is also no dispute that the petitioner is senior to the respondent No. 4.

9. Under Article 16 of the Constitution, the right to be considered for promotion is a fundamental right. It is not the mere "consideration" for promotion that is important but the "consideration" must be "fair" according to established principles governing service jurisprudence. Courts will not interfere with

assessment made by DPC unless the aggrieved officer establishes that the non-promotion was bad according to Wednesbury principles or mala fide. By "Wednesbury principles", it means irrationality or unreasonableness in that the decision is so outrageous in defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided would have arrived. In other words, the decision impugned is such that no authority properly directing itself on the relevant law and acting reasonably could have reached it.

10. I am not unmindful of the legal position that the appointing authority like the Council-respondents are not bound to accept the recommendation of a DPC. To this effect Mr. George Raju, the learned Counsel for the petitioner also submits that mere inclusion of the name of a candidate in a select list does not confer on such candidate any vested right to get an order of appointment. Strong reliance is placed by him in Punjab State Electricity Board v. Malkiat Singh (2004) 7 SCC 394, in support of his contention. But then it is an equally settled law that the appointing authority is obliged by law to disclose valid reason or reasons for not accepting the recommendation of the DPC which after all is an expert body constituted by itself the reason assigned by the Council-respondents, in my considered view, for not acting upon the recommendation of the DPC or for promotions the respondent No. 4 to the post of AEO without the recommendation of the DPC as noticed earlier cannot pass the test of the Wednesbury principle of reasonableness or rationality. The merit or performance of the candidates in the promotion of a selection post has to be assessed on the basis of the ACRs and certainly not on the basis of the personal observation of a particular official or officials of the Council-respondents on the working of candidates in the field. Under the circumstances, I have no hesitation to hold that the Council-respondents in not accepting the recommendation of the DPC for the promotion of the petitioner or for promoting the respondent No. 4, who was not recommended by the DPC, to the post of AEO has acted irrationally and without valid justification. In that view of the matter, the promotion of the respondent No. 4 to the post of AEO cannot be sustained in law. On the contrary, the petitioner is the one who should have been promoted to the said post soon after the recommendation of the DPC or w.e.f 10.4.2002 when the respondent No. 4 was promoted to the post of AEO.

11. In the view that I have taken that the Council-respondents have acted illegally and arbitrarily in not promoting, the petitioner to the said post, I do not find it necessary to examine the validity of the promotion of the respondent No. 5, for court does not decide what is more than necessary, it is for the Council-respondents to rectify their mistake, if there be any, and do justice as warranted by the facts and circumstances of the case. It is, however, contended by Mr. George Raju, the learned Counsel for the answering respondents that the writ petition, in so far as it challenges the promotion of the respondent No. 4 is concerned is not maintainable on the wound of laches. He draws my attention to the decision of the Apex Court in Asha Kaul (Mrs) and Another Vs. State of

Jammu and Kashmir and Others, to buttress his submission. I have carefully gone through this decision but the facts therein are clearly distinguishable. In the case at hand, what is stakingly evident is that the petitioner was given from time to time assurance or of to that effect, that her case would be reconsidered. To recapitulate the facts, on the appeal filed by the petitioner on 17.6.2002 against the promotion of the respondent No. 4. the Council-respondents asked the DPC to reconsider the matter (even though the question of reconsideration does not arise). The DPC reconsidered the matter and again recommended the promotion of the petitioner vide the proceeding dated 11.7.2002. The recommendation was not again not acted upon. Thereupon, the petitioner filed another representation to the Council-respondents on 29.1.2003, when no action was taken, this writ petition was filed by her on 23.9.2004, i.e., about one and half year. The Apex Court in *K. Thimmappa v. Chairman, Central Board of Direct Taxes* AIR 2001 SC 467, has observed that a petition cannot be rejected solely on the ground of laches when question of violation of fundamental right (article 14) is involved in it and that where there is no infraction of Article 14 of the Constitution, the question of delay in filing the petition cannot be ignored. In the instant case, the arbitrary action of the Council-respondents in promoting the respondent No. 4 in place of the petitioner, who has been duly recommended by the DPC, has certainly violated the fundamental right of the petitioner guaranteed under Article 14 of the Constitution. Therefore, the delay involved in filing the writ petition cannot non-suit her.

12. It is lastly contended by Mr. George Raju, the learned Counsel for the petitioner that since the post of AEOs have already been filled up, there is no vacancy to promote the petitioner. A submission somewhat similar to this was advanced by on behalf of the respondents in *Purushottam Vs. Chairman, M.S.E.B. and Another*, The Apex Court held that the right of the appellant to be appointed against the post to which he has been selected cannot be taken away on the pretext that the said penal has in the meantime expired and the post has already been filled up by somebody else. It further held therein that usurpation of the post by somebody else is not on account of any defect on the part of the appellant but on the erroneous decision of the employer himself. In the instant case, it is not obviously the case of the respondents that the panel life has expired but their case is that there is no more vacancy. As already held by earlier that the non-promotion of the petitioner is arbitrary and untenable in law, his right to be promoted to the post of AEO cannot be taken away by the respondents on the ground that somebody also has already filled the post. In my considered view, the ratio of *Purushottam* case (*supra*) is clearly applicable to this case. Consequently, there is no merit in the contention of the learned Counsel of the respondents.

13. In the result, this writ petition allowed. The order dated 10.4.2002 promoting the respondent No. 4 to the post of AEO is hereby set aside. The Council-respondents are directed to promote the petitioner to the post of AREO in the Education Department w.e.f 10.4.2002 with the consequential benefit of seniority

and increment but without actual monetary benefit. The exercise shall be completed within a period of two months from the date of receipt of judgment. No order as to costs.