
(2009) 02 GAU CK 0065

In the Gauhati High Court

Case No : Writ Petition (C) No's. 6388 of 2006 and 2079 of 2007

Inamul Islam

APPELLANT

Vs

North Eastern Electric Power Corporation Ltd. and Others

RESPONDENT

Date of Decision : 26-02-2009

Acts Referred:

Citation : (2009) 2 GLT 392

Hon'ble Judges : Hrishikesh Roy, J

Bench : Single Bench

Advocate : U.K. Nair, J. Huda and M. Bharali, for the Appellant; K.P. Sarma, H. Das and H. Rahman, for the Respondent

Judgement

Hrishikesh Roy, J.—Heard Mr. U.K. Nair, learned Counsel appearing for the Petitioner. Also heard Mr. K.P. Sarma, learned senior Counsel representing the Respondent North Eastern Electric Power Corporation Ltd., (hereinafter referred to as "the NEEPCO") and its officials. The private Respondents have chosen not to contest the proceeding.

2. The Petitioner, who was serving as Manager (Civil) in the NEEPCO but was on deputation to another Central Government Organization namely the Brahmaputra Board at the relevant time, is before this Court to challenge the promotion given to private Respondent Nos. 5 and 6 to the post of Senior Manager (Civil) (E-6 category post) and denial of his promotion ahead of the Respondent Nos. 5 and 6, on the basis of the promotion criteria and the Rules laid down by NEEPCO, with effect from 2.4.1997 (Annexure-1) (hereinafter referred to as "the Rules, 1997").

From the gradation list circulated on 7.8.2002 of Manager (Civil), it is seen that the Respondents No. 5 and 6 at serial Nos. 1 and 2 respectively, are senior to the Petitioner at serial No. 3, in the feeder grade.

3. Mr. U.K. Nair, learned Counsel appearing for the Petitioner contends that when the promotion exercise for making promotion to the post Senior Manager (E-6)

was undertaken on 23.8.2002 by the DPC constituted on 18.6.2002, the consideration of the Petitioner's candidature and that of Respondents No. 5 and 6 were not made as per the Rules, 1997.

According to the Rules 1997, the promotions were to be considered by granting of appropriate marks under Rule 6.4.1 for qualification; under Rule 6.4.2 for experience/ length of service and under Rule 6.4.3 for appraisal reports/ACRs. It is submitted on behalf of the Petitioner that the Petitioner had "outstanding" in his ACR for the preceding 3 years of his service, before the DPC sat on 23.8.2002 and the Respondent Nos. 5 and 6 had lower grading in their respective ACRs for those years.

Under such circumstances, the Petitioner claims that he should have been graded higher vis-a-vis the private Respondents, while being considered for promotion to the post of Manager (Civil) and as appropriate marks were not awarded by considering the ACRs of relevant years, the recommendation made by the DPC held on 23.8.2002, stand vitiated and the same is liable to be interfered with by this Court.

4. Appearing for the NEEPCO, Mr. K.R. Sarma, learned senior Counsel at the outset raises a preliminary objection. He submits that the Petitioner is guilty of laches as he makes a delayed challenge to the promotions given to the Respondent Nos. 5 and 6 to the grade of Senior Manager (E-6) on 18.9.2002 and 19.12.2002 respectively and also the further promotions given to the said two Respondents, to the grade of Dy. General Manager (E-7) (on 19.7.2004 and 29.7.2005) and because of this delay, since writ petitions were filed before this Court only in the year 2006 and 2007, the present petitions ought not to be entertained by the Court.

In support of his preliminary objection, Mr. Sarma refers to the Supreme Court decisions in the case of P.S. Sadasivaswamy Vs. State of Tamil Nadu, where the Supreme Court was considering the merit of a writ petition filed in the year 1971, to challenge a promotion given in 1957 to the second Respondent. In such circumstances, the Supreme Court upheld the order of the High Court in dismissing the petition on the ground of laches. The Supreme Court in that case also indicated that a person aggrieved by a promotion order of others, must approach the Court, within 6 months or at the most within a year of such promotion.

5. It may be noted that the Writ Petition (C) No. 6388/2006 has been filed, inter alia, to include the Petitioner's name, when considerations are made on 22.12.2006 for promotion to E-7 Grade and to defer the promotion exercise, till the Petitioner is empanelled for selection.

The second Writ Petition (C) No. 2079/2007 has been filed to challenge the promotions to E-6 and to E-7 grades given to the private Respondents 5 and 6, and for holding Review DPC meeting to consider afresh, the cases of eligible officers in the zone of consideration in the year 2002 and 2004 for promotion to

Senior Manager (E-6) and Dy. General Manager (E-7) respectively, and to conduct the said selections, strictly in accordance with the Rules of 1997.

6. Before proceeding with consideration of the cases on merit, it may be appropriate to dispose of the preliminary objection raised by Mr. K.P. Sarma, learned senior Counsel representing the NEEPCO.

7. It is pointed out on behalf of the Petitioner that the Petitioner has been on deputation from 2001 to 5.12.2005 with the Brahmaputra Board and therefore, he was not aware that persons with inferior ACR records were considered for promotion by the DPC, ahead of the Petitioner. It is submitted by Mr. Nair that the Petitioner being away on deputation was not aware of the sitting of the DPC and therefore, could not have known that ACRs of the relevant years were not considered at the time of promotion. Therefore he submits that although there has been some delay in approaching the Court by the Petitioner, it should not lead to dismissal of the writ without examining the merit of his contentions.

Learned Counsel for the Petitioner also refers to the letter written by the Petitioner on 30.11.2004 (Annexure P in Writ Petition (C) No. 6388/2006), where the Petitioner agreed to serve in the deputed assignment, only if his seniority and promotion benefits in his parent organization (NEEPCO) are protected. The communication of the Ministry of Water Resources made on 1.12.2004 to the NEEPCO Authorities, requesting for ensuring protection of Petitioners seniority and promotional benefits, as his service on deputation is needed in public interest, have also been referred to by Mr. Nair. He also reads the communication dated 3.12.2004 of the Manager (P and A) of the NEEPCO on the subject of his deputation.

By referring to the above communications, it is submitted that the Petitioner remained on deputation solely in public interest, as is indicated by the above correspondence, only on being assured that his right of seniority and promotional benefits would be protected in his parent organization. Therefore, the objection raised on behalf of the Respondents on the delayed challenge made in the present petition, should not be entertained.

8. Mr. Sarma, learned senior Counsel for the NEEPCO on the other hand submits that no decision was formally taken by the NEEPCO, to protect the service seniority and promotional benefits of the Petitioner, while he remained on deputation.

9. The Petitioner herein has alleged denial of fair consideration for promotion to E-6 Grade and non-consideration for promotion to the next grade. If the contentions of the Petitioner are correct, his Fundamental Rights have been infringed. Present is not a case of exceptional delay, as was in the case in P.S. Sadasivaswamy (supra), before the Supreme Court. There are also some explanations, for not being able to approach the Court, at an earlier point of time. Accordingly I hold that the cases filed by the Petitioners should not be dismissed and should be considered on merit, as otherwise his plea for justice

will go unheard.

10. The Rules of 1997 prescribes that during promotion, while considering the ACRs, points are to be awarded on a 30 points rating scale with "outstanding" (O) grade to receive the highest 30 points and "average" grade to receive the lowest 5 points.

For better appreciation of the criteria required to be considered for promotion, the relevant portion of the 1997 Rules are extracted herein below for ready reference:

6.4.1. Qualifications

...

6.4.2. Experience/Length of Service

...

6.4.3. Appraisal Reports /ACRs

For Appraisal Reports/ ACRs, the points will be allocated as per rating scale on 30 points scale i.e. "Outstanding", "Very Good", "Good" and "Average". Allocation of points against above mentioned ratings will be as follows:

Outstanding 30 points Very good 20 points Good 10 points Average 05 points
The appraisal year will be the Financial year from 1st April to 31st March and Appraisal Report/ACR of latest 3 years except the circumstances enumerated under these rules will be taken into account for the purpose of evaluation. Where more than six months of the Appraisal year have elapsed at the time of consideration of an employee for promotion, a special Performance Report for the part year will be obtained and taken into consideration alongwith the reports of the previous years. Once the special report is followed and replaced by the usual Annual Report, the special report will no longer be taken into consideration.

Performance Appraisal Reports/ ACRs for any period of less than 3 months in an appraisal year will not be taken into consideration for the purpose of promotion. However, where two or more reports are written in any appraisal year by reason of an Employee being posted under different Reporting/Reviewing/Accepting Officer, a single rating for the year will be determined by the Departmental Promotion Committee.

11. From reading of the above Rules, it is clear that merit of the candidates are to be determined by considering the ACRs of the latest 3 years and even part ACRs of the year in which the DPC sits are also to be taken into consideration, by requisitioning a special performance report, if more than 6 months of the appraisal year have elapsed, at the time of consideration of an employee for promotion.

12. It is further seen that under Rule 7 of the 1997 Rules that, methodology for preparation of panel is also prescribed. Since the provision of Rule 7 has a

bearing in the present case, the relevant portions are extracted herein below for ready reference:

7. Methodology for preparation of panel, in respect of promotion from one Group/Cadre to another Group/Cadre....

Finally the DPC will prepare the panel indicating the comparative merit of the eligible employees graded on four point scale i.e.. A, B, C and D based on aggregate points obtained on various factors i.e., qualification, length of service in present post, Appraisal Reports/ACRs, Interview/Test (wherever prescribed). The aggregate marks obtained will be graded as under:

...

Where aggregate mark is 70 excluding

Test/Interview

Within Executive And Sr. Executive Within Super-Visory and From E1 to E2A Grade

60 and above 54 and above A

50-59 44-53 B

40-49 34-43 C

39 and below 33 and below D

Since under the above methodology merit has to be recognized and rewarded... The employees obtaining Grade- "D" will not be included in the merit panel and will be dropped for promotion.

The employees obtaining Grade- "A" would rank enblock senior to those who are graded as "B", and employees who obtain grade "B" would rank enblock senior to those who are graded as Grade "C". The employees placed within same grade would maintain the same seniority as per the lower grade of post from which being considered for promotion.

A final panel of successful candidates in order of merit observing above procedures will be drawn up by the Committee...

13. Under Rule 7, an employee obtaining Grade "A" with a 60+ score would rank enblock senior to those who are graded as "B", scoring less than 59 marks. Therefore, the better merit of an officer would enable him to get priority promotion, if his performance appraisal gets him 60+ marks and if his competing colleagues get 59 or lesser marks.

The proceeding of the DPC held on 23.08.2002 for promotion E-6 grade have been produced for perusal of the Court and it is pointed out by Mr. K.P. Sarma, that all three (Respondent Nos. 5 and 6 and the Petitioner) were graded and were categorized for Grade "B" and none deserved priority promotion. The

learned Counsel submits that since all 3 were graded in "B" points scale, NEEPCO rightly promoted the Respondents who were senior to the Petitioner in the feeder grade, ahead of the Petitioner.

14. On examination of the proceedings of the DPC dated 23.08.2002,¹ I find that the ACRs of the candidates only for the 3 years from 1998-2001 (from 1st of April to 31st of March) were considered for grading the candidates. But surprisingly, ACRs for the latest relevant year i.e. from 1.4.2001 to 31.03.2002, were not taken into account by the DPC which deliberated on 23.08.2002. Rule 6.4.3 as is already noted, prescribes that the latest ACRs are to be considered for the purpose of evaluation of the candidates, whereas in the instant case, the ACR of the latest year i.e. 2001-2002 were not at all considered, while the DPC sat on 23.8.2002 to consider promotion to E-6 grade.

15. As there is no dispute at the Bar that promotions are to be considered on the basis of the 1997 Service Rules, I find that the DPC, in violation of the requirement of Clause 6.4.3, had ignored the latest ACR of the candidates for the year i.e. 1.4.2001 to 31.3.2002 and on this ground, I find that the proceedings of the DPC held on 23.8.2002 and the consequent recommendations made by them, for promotion to the post of Senior Manager (E-6) stands vitiated. The DPC in my view, could not have ignored the latest ACR up to 31.3.2002 of the candidates when they sat on 23.8.2002 for considering promotions.

16. As the DPC ignored the ACR of a relevant year, that too of the latest year, the DPC erred in making assessment of the merit of the candidates, when they sat on 23.8.2002. This is unreasonable as it is provided in the Rules, to give priority promotion to the more meritorious candidates, by including those with higher merit, enblock in group "A" and those with lesser merit enblock in group "B" and so on.

17. Therefore, the contention raised by Mr. Nair appears to have substance as it is argued that by ignoring the latest 3 ACRs, where the Petitioner is claimed to have higher rating than the 2 private Respondents, the DPC acted unfairly and caused injustice to the Petitioner. Therefore, this appears to be an eminently fit case, where a writ of Mandamus should issue, directing the Respondents to make a fresh consideration as on 23.8.2002, by constituting a Review DPC, which should re-examine the relative merits of the candidates, by taking note of the latest 3 ACRs and then make fresh recommendation for promotion to the Grade-6 cadre.

18. In the meantime, the Petitioner was promoted to the post of Senior Manager (E-6), with effect from 28.7.2003 and was to be considered for promotion to E-7 Cadre. But the Respondent authorities considering the Petitioner to be lacking in relevant field experience, ignored him while considering promotion to the posts of Dy. General Manager (E-7).

It is contended that although the Petitioner satisfies the 2 years field experience criteria prescribed by Rule 9.1.2, he has wrongly been ignored for such

promotion by NEEPCO.

It is submitted by Mr. Nair, that the Petitioner was involved with installation of the Tipaimukh Multi Purpose Hydro-Electric Project in Manipur between 1998-2001 and also served as the Chief Engineer Level-II (Investigation and Works) in the Brahmaputra Board from 5.12.2001 to 4.12.2005 and in both these assignments, he discharged field responsibilities and the same should be considered as field experience, to make the Petitioner eligible for being considered for promotion.

19. Mr. K.P. Sarma, learned senior Counsel representing the NEEPCO on the other hand submitted that, the above service cannot be construed as field experience, to make the Petitioner eligible for being considered for promotion under Rule 9.1.2.

Mr. Sarma specifically submits that the Petitioner was never posted to work in the field and was actually serving in the Head Quarter of the concerned organizations. According to him additionally looking after project works and also some of the works pertaining to the Brahmaputra river, while posted at the headquarter, would not constitute field experiences, to make the Petitioner eligible, for being considered for promotion under the Clause 9.1.2.

20. The Petitioner has been denied promotion to the cadre of Dy. General Manager (E-7) purportedly considering him to be not qualified for such promotion, as the Respondents feel that he does not have the requisite field experience. There is nothing on record to show as to whether, the Respondents took note of the works done by the Petitioner in the installation of the Tipaimukh Multi Purpose Hydro-Electric Project and the service rendered by him as the Chief Engineer, Level-II (Investigation and Works) in the Brahmaputra Board, and whether a decision was taken by the employer as to whether those works qualify the Petitioner to be considered for promotion to E-7 grade.

21. Although right to promotion cannot be claimed as a Fundamental Right but the right to be considered for promotion has been held to be a fundamental right by the Supreme Court in S.B. Bhattacharjee Vs. S.D. Majumdar and Others, Here since the Petitioner has not been considered for promotion to the higher post of Dy. General Manager (E-7), it is deemed appropriate to direct the Respondents that, once they reconsider the promotion of the eligible candidates as on 23.8.02, by convening Review D.P.C., and promotion to the post of Senior Manager (E-6) is made afresh, a consequential exercise for considering promotion to the higher grade of Dy. General Manager (E-7), has also to be taken up by the authorities.

22. It is accordingly considered appropriate to direct the NEEPCO authorities to take into account the works done by the Petitioner in the Tipaimukh Power Project and also in the Brahmaputra Board to decide whether those works, can be considered as field experience, for the purpose of considering his eligibility under Rule 9.1.2 of the Rules. It would be right and necessary to take a specific

decision in this regard, before NEEPCO undertakes the Review DPC, for re-considering promotion to the higher post of Senior Manager (E-6) and thereafter to the post of Dy. General Manager (E-7), in terras of the orders passed by this Court.

23. As the proceeding of the DPC held on 23.8.2002 has been held to be violative of the Service Rules, I am of the opinion that interest of justice would be served if Review DPCs are constituted expeditiously and preferably within a period of 3 months from today. It is ordered accordingly.

24. It is made clear that promotions made to the cadre of Senior Manager (E-6) in pursuant to the DPC dated 23.8.2002 and the further promotions given thereafter to E-7 grade in favour of the private Respondents, are made subject to the out come of the fresh considerations ordered by this Court.

25. With the aforesaid direction, this writ petition stands disposed of.