
(2017) 01 GAU CK 0029
In the Gauhati High Court
Case No : W.A. No. 235 of 2016

Jayanta Dev Sarma

APPELLANT

Vs

Manoj Kumar Baruah

RESPONDENT

Date of Decision : 27-01-2017

Acts Referred:

Assam Handloom Textiles (Recruitment and Promotion) Service Orders, 1988 — Clause 6, Clause 8(b)

Citation : (2017) 1 GauLT 585

Hon'ble Judges : Shri Ajit Singh, CJ. and Mr. Suman Shyam, J.

Bench : Division Bench

Advocate : Mr. S.S. Dey, Sr. Advocate and Mr. H.K. Das, Advocates, for the Petitioner; Mr. K.H. Choudhury, Sr. Advocate with Mr. B.D. Goswami, Ms. B. Choudhury and Mr. B.N. Sarma, Advocates, for the Respondent

Final Decision : Disposed Off

Judgement

Suman Shyam, J.(Oral)—Heard Mr. S.S. Dey, learned Sr. counsel assisted by Mr. H.K. Das, learned counsel for the appellant. Also heard Mr. K.H. Choudhury, learned Sr. counsel assisted by Mr. B.D. Goswami and Ms. B. Choudhury, learned counsel representing respondent No. 1. Mr. B.N. Sarma, learned Sr. Govt. Advocate, Assam appears on behalf of the respondent Nos. 2 and 3.

2. This intra-court appeal is directed against the common judgment and order dated 24-07-2015 passed by the learned Single Judge disposing of the two writ petitions, viz. W.P.(C) No. 4312/2011 and W.P.(C) No. 5380/2012 filed by the respondent No. 1.

3. The core controversy in this proceeding relates to the competing claims made by the writ appellant and the respondent No. 1 seeking promotion to the post of Officer-in-Charge, Handloom Research and Designing Centre (HRDC) under the Handloom, Textile and Sericulture, Department, Government of Assam. The appellant was working as Textile Chemist where as the respondent No. 1 was

working as Research Officer under the department of Handloom and Textile, Assam and both of them were eligible for being considered for promotion to the next higher post of Officer-in-Charge, HRDC. The department has not framed any service rules under of Article 309 of the Constitution of India and the conditions of service of the employees of the department is governed by the Assam Handloom Textiles (Recruitment and Promotion) Service Orders, 1988 (herein after referred to as "Orders of 1988") which came to be notified on 04-09-1988. Clause 8 of the Orders of 1988 lays down the procedure of promotion to the higher posts in the department. As per the requirement of the Service Order, the department had constituted a Selection Committee which had met on 30-07-2011 and after considering the candidature of both the candidates, made a recommendation in favour of the appellant for promotion to the next higher post of Officer-in-Charge HRDC and the consequential order of promotion was issued by the Principal Secretary of the department on 12-08-2011. The recommendation of the Selection Committee dated 30-07-2011 had been put to challenge in W.P.(C) No. 4312/2011 filed by the respondent No. 1 whereas the consequential order of promotion dated 12-08-2011 was challenged by him by filing the subsequent writ petition being W.P.(C) No. 5380/2012. By the impugned judgment and order dated 24-07-2015, the learned Single Judge had disposed of both the writ petitions with a direction upon the department to reconsider the candidature of both the candidates for promotion in the light of observation made there-in. Being aggrieved by the judgment and order dated 24-07-2015, the selected candidate has preferred the present appeal.

4. The learned Single Judge was of the view that the selection committee did not correctly follow the criteria laid down in Rule 8(b) of the service order while making the recommendation for promotion in favour of the writ appellant (respondent No. 3 in the writ petition). Moreover, the Annual Confidential Rolls (ACR) grading and entries relied upon by the department for assessing the merits of the candidates were also not communicated to the concerned Govt. servant., although such non-communicated ACR had been taken into account while considering their cases for promotion. Accordingly, the writ petitions were disposed of by the learned Single Judge with the following observations :

"26. From the above discussion, Court is of the unhesitant view that the Selection Committee did not follow the criteria laid down in Rule 8 (b) of the service orders. The matter therefore has to go back to the Selection Committee for a fresh consideration of the rival claims. However, before doing that, it would be obligatory on the part of the Department to communicate the gradings/entries of the relevant ACRs to both petitioner and respondent No. 3 so that they can make their respective representations for due consideration of the authority. Once this exercise is done, the Selection Committee may consider laying down proper norms by award of marks or percentage of marks for the various criteria laid down in Rule 8 (b) to ensure objectivity and to eliminate subjectivity in the selection.

27. Let the whole exercise be carried out within a period of 4 (four) months from the date of receipt of a certified copy of this order.

28. Till then, promotion of respondent No. 3 shall be treated as tentative which shall abide by such fresh recommendation which may be made by the Selection Committee."

5. Mr. Dey, learned Sr. counsel appearing for the appellant submits that as per Rule 8(b) of the service Order of 1988, the criteria for promotion to the rank of Officer-in-Charge, HRDC is merit with due regard to seniority. Since the appellant is more qualified than the respondent No. 1 and also has better work experience, hence, taking note of his better merit, the Selection Committee had recommended the case of the appellant for promotion to the next higher rank. Assailing the findings recorded by the Learned Single Judge as regards non-compliance of the mandate of Rule 8(b) the learned Sr. counsel submits that insofar as the criteria laid down in Rule 8(b) pertaining to personality and character, tact, energy and general intelligence, integrity and previous record of service, the said aspects have already received due consideration of the departmental authorities while writing the ACR of the Govt. servant and therefore, there has been substantial compliance of all the criteria laid down under Rule 8 of the Order of 1988. The learned Senior Counsel however, fairly submits that the departmental authorities ought to have communicated the ACR grading before placing reliance upon the same for assessing the merit of the candidates.

6. Defending the judgment and order dated 24-07-2015 passed by the learned Single Judge, Mr. K.H. Choudhury, learned Sr. counsel submits that the Selection Committee had admittedly relied upon the ACR grading which are never communicated to his client. As such, assessment of merit of the candidates by the selection committee based on the non-communicated ACR grading, according to the learned Sr. counsel, would have a vitiating effect on the conclusion reached thereof warranting reconsideration of the matter. Inviting the attention of this Court to the provisions of Clause 6 of the Service Orders of 1988, the learned Sr. counsel further submits that the Order of 1988 envisages a Selection Committee constituted of only four Members named there-in and therefore, the inclusion of the fifth member in the form of Smti. M. Borthakur, ACS was in utter violation of clause 6 of the order of 1988. Mr. Choudhury submits that the defect in constitution of the selection committee would have a fatal bearing on the recommendation made by the Selection Committee rendering the same as nullity in the eye of law.

7. Mr. Choudhury, further contends that while assessing the comparative merit of both the candidates, the selection committee has arbitrarily ignored the experience gathered by the respondent No. 1 in view of the number of workshop attended by him inasmuch as there is no mention about the said fact in the minutes of the selection committee. The learned Sr. counsel submits that the mere fact that the appellant holds a Ph.D degree cannot place him at a higher

pedestal then the respondent No. 1 on the criteria on merit since the rules do not permit such a recourse. He further submits that the selection committee, although was under an obligation to prepare a panel of selected candidates, did not do so in the present case with the sole malafide intention of causing injury to the interest of the respondent No. 1.

8. The learned Govt. Advocate, Mr. B.N. Sarma submits that the department will carry out the directions that may be issued by the court.

9. We have taken note of the arguments advanced by the learned counsel for the parties and have also perused the material available on record. From an examination of the Order of 1988 we find that the post of Officer-in-Charge HRDC is a single post cadre which is required to be filled up by promotion from the eligible departmental candidates. The criteria for promotion is merit with due regard to seniority. The procedure for promotion is laid down in Clause 8 of the Order of 1988. The relevant provision of clause 8 (a), (b) and (c) of the Order of 1988 is quoted herein below for ready reference:

"8. Procedure for promotion :-

(a) The Appointing Authority shall refer to the Selection Committee, the approximate number of vacancies likely to occur during the year in each grade of posts and furnish to it the character Rolls and Service Records and other relevant documents of all eligible candidates. The Selection Committee shall examine the character Rolls, Personal Files and other relevant documents of the candidates, also taking into consideration the seniority and merit of the candidates.

(b) The Selection shall be made on the basis of "merit with due regard to seniority and

(I) Personality and Character.

(II) Tact, energy and general Intelligence.

(III) Integrity and

(IV) Previous record of Service.

(c) The Selection Committee shall prepare a list showing in order of preference names of the persons selected.

10. From a plain reading of the clauses 8(a) and (b) it is evident that while recommending any candidate for promotion by following the criteria of "merit with due regard to the seniority", the selection committee is also required to make an assessment of their candidature on the other criteria referred to in the said Clause, viz. personality and character, tact, energy and general intelligence, integrity as well as previous record of service. However, a perusal of the minutes of the meeting of the Selection Committee held on 30/07/2011 goes to show that no such exercise had been carried out before making the recommendation in favour of the appellant. Clause 8 of the Service Order categorically lays down the

criteria to be followed by the Selection Committee while making recommendations for promotion. Therefore, any recommendation made in contravention to the mandate of the Service Order would be un-sustainable in law and has been rightly held so by the Learned Single Judge.

11. It is also the admitted position of fact that the ACR entries relied upon by the Selection Committee were never communicated either to the appellant or the respondent No. 1. In the wake of the decision of the Hon"ble Supreme Court in the case of Dev Dutt v. Union of India & Ors. reported in (2008) 8 SCC 725 it is no more res-integra that every entry and not merely a poor or adverse entry relating to an employee of the State or its instrumentality must be communicated to him within a reasonable period. In the said decision, the Supreme Court has also observed that even if there is no bench mark, non-communication of an entry may adversely affect the employees chances of promotion because when comparative merit is being considered for promotion a person having a "good" or "average" or "fair" entry would have less chances of being selected than a person having "very good" or " outstanding" entry. Taking note of the law laid down by the Supreme Court on the above issue, the learned Single Judge has found fault with the department on account of its failure to communicate the ACR entries to the candidates before placing reliance on the same for assessing their merit. We find ourselves in agreement with the view expressed by the learned Single Judge on the above issues.

12. Coming to the next question of validity of the constitution of the Selection Committee, we have noted that Clause 6 of the Order of 1988 clearly lays down the composition of the committee which is as follows:

"6. There shall be a Selection Committee consisting of the following members :-

(I) Secretary, Handloom Textile and Sericulture Dept.Chairman

(II) Director of Handloom and TextileMember

(III) A nominee of the personnel Deptt. And not below the rank of Deputy Secy.Member

(IV) Under Secretary, Handloom Textiles and Sericulture Deptt.Member Secy."

13. From the above, it is clear that the Service Order envisages a Selection Committee consisting of only four members indicated therein and there is no provision of co-opting any fifth member in the committee. However, record reveals that the selection committee which had met on 30-07-2011 consisted of a fifth (co-opted) member in the form of Joint Secretary to the Govt. of Assam, Handloom Textiles and Sericulture Department. Taking note of the provision of Clause 6 of the Service Order, we are of the prima facie view that the inclusion of the fifth member was not correct since the Service Order does not approve of any additional member being part of the Selection Committee. However, since the said issue had not been agitated by the respondent No. 1 before the learned

Single Judge, hence, we are not inclined to make any further observation on this issue in the present appeal.

14. Mr. Dey has raised strong objection regarding the observations made in paragraph 23 of the impugned Judgment contending that by asking the Selection Committee to assign varying degree of marks and percentage for each of the criterion included in Clause 8(b) the learned Single Judge has practically re-written the Service Order. But from a careful reading of the observation made in paragraph 23 we find that the learned Single Judge had merely laid down certain guiding principles to be adopted by the Selection Committee for assessing the performance of the candidates on the additional criteria mentioned in Clause 8(b) of the Service Order. As would be evident from paragraph 26 of the judgment, the purpose behind issuance of such guidelines was not to denude the Selection Committee of its authority to device proper criteria of selection but to ensure objectivity and to eliminate subjectivity in the selection process. Once it is held that the Selection Committee would be required to make relative assessment of the candidates in respect all the criteria mentioned in Clause 8 of the Service Order, it is obvious that the committee would now have to come up with proper assessment criteria for such purpose. What would be the proper criteria for assessment of the personality trait and other parameters mentioned in Rule 8(b) is a matter for the selection committee to decide in the light of the observations made by the learned Single Judge but such criteria shall have to be reasonable and transparent in nature.

15. For the reasons mentioned herein above, we do not find any good ground to interfere with the judgment and order passed by the learned Single Judge. However, since, the time line of 4(four) months as fixed by the learned Single Judge for compliance of the directions contained there-in has already lapsed, hence, while affirming the judgment and order under appeal, we grant 6(six) month time to the Department from today to comply with the directions passed by the Single Judge.

16. Before parting with the record, we deem it appropriate to refer to the submission of Mr. Dey to allow his client to continue as Officer-in-Charge HRDC until such time a fresh decision is taken in the matter as per the order of this court. We have noticed that in paragraph 28 of the impugned judgment, the learned Single Judge had granted interim protection to the appellant but no appeal has been preferred by the respondent No. 1 assailing the said order. It is also not in dispute that by virtue of an interim order passed by this court, the appellant is continuing in the post of Officer-in-Charge HRDC. In view of the above, as an interim measure, it is hereby provided that until such time a final decision is taken in the matter, the appellant shall be allowed to continue as Officer-in-Charge, HRDC.

With the above observation, this writ appeal stands disposed of.

There would be no order as to cost.