

(1994) 01 GAU CK 0001

In the Gauhati High Court

Case No : Civil Rule No's. 77, 78 and 79 of 1992

Jitendra Nath Patowary and Others

APPELLANT

Vs

State of Assam and Others

RESPONDENT

Date of Decision : 24-01-1994

Acts Referred:

Assam Engineering (Irrigation Department) Service Rules, 1978 — Rule 13, 13(2), 13(4), 13(5)
Constitution of India, 1950 — Article 14, 226, 309

Citation : (1994) 2 GLR 263

Hon'ble Judges : D.N. Baruah, J

Bench : Single Bench

Advocate : B.K. Das, N. Dutta, U.C. Bhattacharyya, P.K. Roy, D. Mazumdar, N. Dutta and S. Das, for the Appellant; B.K. Goswami, R.L. Yadav, A. Hazarika, B.L. Singh, B.K. Goswami, D.N. Choudhury, H.N. Sarma, R.L. Yadav, A. Hazarika and B.L. Singh, for the Respondent

Judgement

D.N. Baruah, J.—These civil rules involve common questions of law and facts therefore, I propose to dispose of these cases by a common judgment.

2. Petitioners in these civil rules have challenged Annexure-A notification fixing inter-se-seniority of the officers in Irrigation Department of Assam and Annexure-B notification dated 10.1.92 issued by the third Respondent promoting the Respondents 6, 7 and 8 to the rank of Additional Chief Engineers superseding the Petitioners and also the select list dated 30.12.91. The Petitioners state that at the time of filing of these civil rules, they had been working in various posts in the rank of Superintending Engineers.

3. By Annexure-A notification dated 2.1.90 inter-se-seniority of the officers in the rank of Superintending Engineers was published. In the said list names of the Respondent Nos. 8 to 11 did not appear. As per the Assam Engineering (Irrigation Department) Service Rules, 1978 (for short "the Rules"), the Superintending Engineers are eligible for promotion to the post of Additional

Chief Engineers in accordance with the provisions laid down under the said Rules.

4. In 1992 there were three vacancies in the rank of Additional Chief Engineers and also two more vacancies were likely to occur. Accordingly a Selection Board was constituted. The said Board consisted of Respondent No. 2 as Chairman, Respondent Nos. 3, 4 and 5 as members. The Board held its meeting on 30.12.91 for consideration of promotion of 12 officers to the post of Additional Chief Engineer who were within the zone of consideration. The Board prepared a list of the names of six officers, i.e. Respondent Nos. 6 to 11. However, Petitioners name did not appear in the said list even though they were seniors in the rank of Superintending Engineer. The Board also did not record the reason for not recommending the names of the Petitioners. It is mandatory to record the reason in writing under Rule 13(5) of the Rules in case of not recommending a senior officer. On the basis of the list, the Appointing Authority promoted Respondent Nos. 6, 7 and 8 to the rank of Additional Chief Engineers by Annexure-B notified dated 10.1.92.

5. According to the Petitioners the Selection Board prepared the list in violation of the mandatory provisions of the Rule 13 of the Rules. They further state that the selection to the rank of Additional Chief Engineer must be made on the basis of the merit with due regard to seniority as required under Rule 13(4) of the Rules. However, the Selection Board took its decision on evaluation of Annual Confidential Reports only and did not give weightage to the seniority factor. Classification of officers had been made in all previous selections to the rank of Additional Chief Engineer (Irrigation) on the basis of the grading, such as "Average", "Good", "Very good and "Outstanding" "However, this time the Board made a departure from the existing norms without recording any reason. According to the Petitioners, this was arbitrary, contrary to the established norms and accepted principles of law. Moreover, this arbitrary departure of the procedure was in gross violation of principles of natural justice.

6. Being aggrieved, the Petitioners submitted representations before the Chief Minister pointing out the irregularities committed by the Selection Board as well the Department in forwarding the Annual Confidential Reports to the Board. These representations were forwarded to Respondent No. 3 by the Chief Minister's Secretariat with a direction to review the matter making an endorsement on the application filed by J.N. Patowary, Petitioner in Civil Rule No. 77/92. The Petitioners further state that in spite of the direction by the Chief Minister, the Appointing Authority refused to review the matter and accorded its approval to the list and rejected the representations. Thereafter, the authority appointed Respondent Nos. 6, 7 and 8 in the rank of Addl. Chief Engineer. As there was no possibility of getting justice from Respondents 1 to 5 the Petitioners have approached this Court by filing writ applications under Article 226 of the Constitution, i.e. Civil Rules 31/92, 29/92 and 30/92 respectively. However, all these Civil Rules had been withdrawn by the Petitioners with liberty to approach the Court, if necessary.

7. According to the Petitioners, the selection list prepared by the Selection Board was not made available to the Petitioners inspite of their demand, The Petitioners further state that under Rule 13(2)(c) of the Rules, it was incumbent on the Authority to furnish to the Selection Board amongst other materials, the Character Rolls and Personal files of the officers for objective consideration. Therefore, it was a legal obligation on the part of the authority to ensure that the ACRs forwarded to the Selection Board were true and genuine and had been prepared in accordance with the instruction laid down for preparation of the same. The Petitioners further allege that the ACRs of the private Respondents had been seriously tempered with in violation of the standing instructions in force. Manipulated ACRs were placed before the Selection Board and those were reconstructed on the false plea that ACRs submitted earlier had been lost. faking advantage of such reconstruction of ACRs the Reporting Authority changed and rewrote the remarks of private Respondents for several years at a time, though for the years in question, the present Chief Engineer had no occasion to observe the performance of the Private Respondents, As per instructions in force, the ACRs of an officer in the rank of Deputy Secretary is to be accepted by the Chief Secretary, but in the instant case, one ACR was accepted by the Minister of the Department. This was without any authority of law, as the Minister had no authority to accept the ACR. The Petitioners allege that the authorities acted in gross violation of the mandatory provision and the select list for the year 1992 as well as the order dated 10.1.92 had been passed arbitrarily, unreasonably and in violation of principles of natural justice. As such the select list is not sustainable in law. The representations were also disposed of in tin arbitrary manner without proper application of mind.

8. The 8th Respondent, Hiralal Nayak has filed an affidavit-in-opposition. He has tried to justify the Annexure-B notification passed by the 3rd Respondent. According to him the selections were made in accordance with the provisions of law and there was no violation of provision of Rule 13(5) of the Rules as alleged.

9. I have heard learned Counsel for the parties. The counsel for the Petitioners submitted that the selections were made in total violation of the Rules. Besides, the appointing Authority did not place all the materials before the Selection Board and the ACRs were seriously manipulated and reconstructed and had been prepared by the present Chief Engineer, who had no occasion to observe the performance of the officers. On the basis of such reconstructed and manipulated ACRs, the Selection Board recommended the names of private Respondents for promotion to the post of Addl. Chief Engineer. On the basis of such recommendation, the Appointing Authority by Annexure-B notification appointed Respondent Nos. 6, 7 and 8. By annexure-A notification dated 2.1.90, the inter-se-seniority of the officers in the rank of Superintending Engineers were prepared. Altogether 16 officers names were mentioned therein, out of these, two officers (Serial No. 1 and 5) had already retired in 1989. Serial No. 4 was holding the post of Chief Engineer from the last part of 1990. If 8 eligible persons were required to be chosen in the selection held on 30.12.91, it should confine to

8 senior persons only, excluding the above three promotion, to the post of Addl. Chief Engineer. Therefore, Respondents 6, 7 and 8 could not have been considered for promotion as they were far below the eligibility zone of consideration. The names of Respondents 9, 10 and 11 were not even in the select list and no further list of inter-se-seniority had been published or notified.

10. The learned Counsel further stated that the consideration of these persons if excluded, the Petitioners' case ought to have been considered for promotion. The working system introduced was not in the rule and it was introduced by an office memorandum. As the categorisation and working system are so inter linked and fixation of the lower limit at mark 11 are arbitrary, unreasonable, unfair and violative of provisions of the Constitution. If no rule is introduced in such categorisation and/or marking system, the reason has to be recorded in case of supersession of a senior. Respondents 6, 7 and 8 were promoted on 10.1.92 on the basis of selection held on 30.12.91 however, no reason was recorded. The other Respondents (9 and 10) whose names did not appear in the select list were also promoted superseding the claim of the Petitioners, when two vacancies occurred in the year 1992. No further D.P.C. was held for consideration of further vacancies and they had been appointed from the anticipated vacancy mentioned in the D.P.C. meeting held on 30.12.91.

11. The learned Counsel in Civil Rule No. 77/92 further submitted that the Petitioner was selected in the meetings held on 4.1.90 and 6.1.90 and his name was recommended for promotion when merit alone was considered getting the same 10 marks when he was graded as "Good". But this time the norm had been suddenly and arbitrarily changed and cut off mark was made 11. The basis of making 11 as cut off mark has not been mentioned. This itself is sufficient to indicate that the Authority fixed it arbitrarily. Further, the Petitioner's position was wrongly fixed due to incorrect date of his promotion as Superintending Engineer w.e.f. 2.1.81, which was later corrected by notification dated 31.3.93 (Annexure S. to the affidavit-in-reply) showing him promoted w.e.f. 8.9.77. His seniority position was, therefore, in between B.N. Sarma and A.K. Choudhury.

12. The Government neither filed any affidavit-on-opposition nor produced any record. The learned Government Advocate also did not put forward any argument.

13. The counsel for private Respondents supported the selection. According to the private Respondents, there was no violation of provisions of law. The Counsel further submitted that the terms and conditions of the services of the Petitioners as well as the Respondents are regulated by the Rules. Rule 13(4) has been amended by notification No. IGN (E) 136/80/Pt. 137 dated 7.11.90. After the amendment, the promotion to the rank of Superintending Engineer and above shall be on the basis of merit with due regard to seniority to all cadre posts. As per the amended Rule, if an officer junior in the Gradation List is found to be meritorious then he would be selected and in such as it cannot be said to be a supersession. In the present Civil Rules, the private Respondents had been found more meritorious as they obtained more marks than the Petitioners. Therefore,

the selection cannot be held to be illegal, contrary to the provisions of Rules. Respondents 7 and 8 obtained higher marks than the Petitioners, hence, there was no necessity of recording of reasons as submitted by the Petitioner, Besides, these posts are selection posts, therefore, there is no question of supersession of the Petitioners by the private Respondents. The learned Counsel further submitted that the writ Petitioners have no right for promotion and they have only right to be considered for promotion and if the Selection Board considered the cases of the Petitioners, then there cannot be any complaint about violation of Article 14 of the Constitution:

14. On the rival contentions of the parties it is to be seen whether promotion of Respondents 6, 7 and 8 to the rank of Addl. Chief Engineer can sustain in law. The Governor in exercise of power conferred by the proviso to Article 309 of the Constitution of India was pleased to frame Rules regulating the recruitment and the conditions of service of the persons appointed to the Assam Engineering (Irrigation Department) Service Rule 13 of the said Rules prescribes the procedure for promotion. As per the said Rule, before the end of each year the Government shall make an assessment of the likely number of vacancies to be filled up by promotion in the next year in each cadre and thereafter the Appointing Authority shall furnish to the Selection Board relevant informations and documents, namely; information about the number of vacancies, list of officers in order of seniority, character rolls and personal files of the officers listed, details about reservation in case of promotion to Class-II of the service etc, and any other documents and information as may be considered necessary by the Appointing Authority or required by the Board. Besides, the Appointing Authority also shall simultaneously request the Board to recommend within one month a list of officers found suitable for promotion. in order of preference. The board after examination of the documents and information furnished by the Appointing Authority shall recommend to the Appointing Authority a list of officers about double the probable number of vacancies in order of preference, found suitable for promotion. In case the Board docs not consider an officer suitable for promotion according to seniority, it shall record reasons thereof in writing and forward these reasons to the Appointing Authority together with the list. The contention of the Petitioners is that in the minutes of the Selection Board held on 30.12.91 it was stated that there were three vacant posts of Additional Chief Engineer in the calender year 1991, though there wore only two vacant posts. The other two posts filled up, i.e. Addl Chief Engineer, Inspection & Quality Control and Addl. Chief Engineer Monitoring & Investigation were from the calender year 1992. As there were only two posts in the calender year 1991, the Government was required to promote only two persons, i, e. Respondent Nos. 6 and 7, instead, Respondent Nos. 6, 7 and 8 had been promoted. From the above, according to the Petitioner, it is evident mat Government had promoted two officers to the rank of Additional Chief Engineer for the calender year 1992 from the select list of 1991.

15. As per Rule 13(5) if the Selection Board does not consider an officer suitable

for promotion according to seniority it shall record the reasons thereof in writing with the list. But in the instant case, no reason was recorded.

16. The law is well established in this regard the Rule prescribes that the case of the officers for promotion to be considered in accordance with merit cum seniority. If, however, any officer is not found suitable for promotion by the Board, it shall record the reason in writing and forward it to the Appointing Authority. In the instant case, as submitted by the learned Counsel for the Petitioner, no such reason has been recorded. The Petitioners further alleged that certain documents were not forwarded, i.e. ACRs and personal files. According to the counsel for the Petitioners, those were necessary and relevant for the Board to consider the case of the Officers. Further it was alleged that the ACRs had been tempered with and were prepared in favour of the Respondents just to help them. Moreover, the present Chief Engineer had no occasion to assess the performance of the Officers in question to enable him to make his comment in the ACRs. But in the present case it had been done so. Besides, the ACRs of Respondent No. 8 was accepted by the Minister and he had written his remarks in the ACRs without any authority. As per the Government instruction, the Secretary of the Department is the Accepting Authority in case of officers in the rank of Deputy Secretary and not the Minister. These are the irregularities which had been pointed out by the Petitioners.

17. This Court in exercise of power under Article 226 of the Constitution of India cannot embark upon to make detail enquiry regarding these allegations. All these, however, in my view, require further scrutiny. The Respondents have challenged the maintainability of the Petitioners, in view of the existence of alternative remedy. It is true that if there is alternative and efficacious remedy the party should exhaust it before approaching this Court, which the Petitioners have not done. Court has imposed a restraint in its own wisdom on its exercise of jurisdiction under Article 226 where the party invoking the jurisdiction has an effective, adequate alternative remedy. This is a rule of convenience and discretion, rather than a rule of law. But it does not oust the jurisdiction of the Court. Where the order complained of is alleged to be illegal or invalid as being contrary to law, a petition at the instance of person adversely affected by it would lie under Article 226 of the Constitution. Therefore, I feel, on this count, the petitions should not be thrown out. Besides, a detail and proper scrutiny regarding the allegations and grievances if the Petitioners are required to be made.

18. In view of the above, I dispose of these writ petitions with a direction to the 3rd Respondent, i.e. the Secretary to the Government of Assam, Irrigation Department, to scrutinize the entire case in detail in accordance with the provisions of law and in the light of various judgments of the apex Court and also the observation made above by this Court and pass reasoned order, as expeditiously as possible and at any rate, within a period of four months from today. The 3rd Respondent shall also consider whether any senior officer is

overlooked and superseded and if so, record the reasons thereof. If any Officer is overlooked without any reason, proper relief should be given.

With the above direction the petitions are disposed of. No costs.