

(2013) 01 GAU CK 0007

In the Gauhati High Court

Case No : Writ Petition (C) 3821 of 2011 and W.A. No. 305 of 2009

Kishoor Kumar Das

APPELLANT

Vs

State of Assam and Others

RESPONDENT

Date of Decision : 07-01-2013

Acts Referred:

Constitution of India, 1950 — Article 14, 226

Citation : (2013) 2 GLT 907

Hon'ble Judges : Adarsh Kumar Goel, C.J;Ujjal Bhuyan, J

Bench : Division Bench

Advocate : R.C. Saikia and Mr. D.C. Borah, for the Appellant; H. Sarma, SC, GMC, Mr. H. Buragohain, R. Goswami and Mr. S. Bora, for the Respondent

Final Decision : Dismissed

Judgement

Ujjal Bhuyan, J.—Since issues in Writ Appeal No. 305/2009 and W.P.(C) No. 3821/2011 are related and parties being the same, both the cases were heard together and are being disposed of by this common judgment and order. We have heard learned Counsel for the parties and also perused the materials on record.

Writ Appeal No. 305/2009

2. Respondents 7 to 11 as the writ petitioners had filed W.P.(C) No. 1616/2009 before this Hon"ble Court wherein respondents 3 to 6 were arrayed as respondents of even number while appellant was arrayed as respondent No. 7. The challenge made in the writ petition was to the legality and validity of order dated 25.03.2009 passed by the Commissioner, Gauhati Municipal Corporation (GMC) as well as the final gradation list of Assistant Engineers serving in GMC of even date. During the pendency of the writ petition, respondent No. 7 (appellant herein) was promoted as Assistant Executive Engineer (Mechanical) vide order dated 26.05.2009 issued by the Commissioner, GMC based on a separate gradation list of Assistant Engineers (Mechanical). The above promotion as well

as the separate gradation list were also put to challenge by the writ petitioners by filing an interim application.

3. By the order dated 25.03.2009, Commissioner, GMC directed that services of all Assistant Engineers serving in GMC stood regularized w.e.f. the dates of their initial appointment/promotion to the said post and that their seniority would be counted from the dates of their initial appointment/promotion to the post of Assistant Engineer. Accordingly, final gradation list of Assistant Engineers of GMC was prepared and published. However, a separate gradation list was prepared for the Mechanical Wing as per Government direction dated 10.08.2004.

4. Government direction dated 10.8.2004 was to take immediate necessary action in the matter of preparation of a separate gradation list of Mechanical Wing. It was issued on the basis of a petition dated 30.07.2004 submitted by the appellant.

5. As per the seniority list of Assistant Engineers (Mechanical), appellant was placed at serial No. 1 above one Md. Abdul Karim Choudhury, who was placed at serial No. 2. Date of initial appointment/joining of appellant in the post of Assistant Engineer was shown as 04.12.1992, which is also the date of regularization of his service in the post of Assistant Engineer. In the remarks column, it was mentioned that appellant was regularized on the basis of aforesaid order dated 25.03.2009.

6. By the order dated 26.05.2009 issued by the Commissioner, GMC, appellant was promoted to the post of Assistant Executive Engineer (Mechanical).

7. The writ petition was contested by the respondents by filing counter affidavits.

8. Learned Single Judge, on due consideration, held that the respective parties were appointed in the GMC before the Guwahati Municipal Corporation Engineering Service Rules, 2004 came into effect from 27.1.2004. The Rules do not contain any provision dealing with regularization of service of the existing employees. Learned Single Judge found from the record that respondents 3 to 6 in the writ petition were assigned higher positions than that of the writ petitioners though their services had been regularized from dates after the induction of the writ petitioners as Assistant Engineers. Respondent No. 7 (appellant herein) was consistently allotted a slot below the writ petitioners and respondents 3 to 6. Though the writ petitioners were promoted as Assistant Engineers on 26.11.1991, which is prior to regularization of service of respondents 3 to 6 as Assistant Engineer, in view of the fact that such promotion was without recommendation of the Assam Public Service Commission (APSC) as is the requirement u/s 72(1) of the Gauhati Municipal Corporation Act, 1971, their claim of higher seniority was negatived by the learned Single Judge. Tracing the background facts, learned Single Judge upheld the validity of the order dated 25.03.2009 and the gradation list based thereon. Since this part of the order is not under challenge in appeal, we do not propose to dilate on this aspect as the same is considered not necessary.

9. However, the challenge to the order dated 26.05.2009 and the gradation list of Assistant Engineers (Mechanical) was upheld by the learned Single Judge. Accordingly, the seniority list of Assistant Engineers (Mechanical) and the promotion of respondent No. 7 (appellant herein) to the post of Assistant Executive Engineer (Mechanical) were set aside. Learned Single Judge held as under:-

20. A scrutiny of the Rules, per se does not demonstrate categorization of the encadred posts on the basis of disciplines, i.e. Civil, Electrical and Mechanical. Schedule-II thereto, which sets out the categories of posts, and other particulars related thereto, also do not admit of any such sectional bifurcation. To be specific, there is no post designated as Asstt. Engineer (Mechanical) and for that matter, Asstt. Executive Engineer (Mechanical). Though the respondent-Corporation has endeavoured to justify this compartmentalization on the basis of a letter dated 10.08.2004 of the Deputy Secretary, to the Govt. of Assam, Guwahati Development Department, in absence of any provision in the Rules authorizing such segregation on the basis of disciplines, the consequential steps taken by it (Corporation) being not approved by the Rules cannot be sustained. The minutes of the meeting of the Council of Administrators of the Corporation taken on 19.12.2003 records, in resolution No. 6, the decision to promote the Respondent No. 7 to the next higher post being considered to be the only Mechanical Engineer. Incidentally, a seniority list of Asstt. Engineer (Mechanical) was published after the impugned order was passed reflecting the names of the respondent No. 7 and one Md. Abdul Karim Chaudhury at Sl. No. 1 and 2. Noticeably, though the above resolution was taken far back as on 17.12.2003 it is only on 26.05.2009 that the same was implemented and the Respondent No. 7 was promoted to the post of Asstt. Executive Engineer (Mechanical) thereby. In view of the above determination against the permissibility and/or the validity of branching the posts on the basis of disciplines, the seniority list of Asstt. Engineers (Mechanical) cannot be approved. This list being manifestly against the framework of the Rules is therefore, to be construed as non-est in law. In the result, while the impugned order dated 25.03.2009 and the final Gradation List based thereon are upheld, the seniority list of Asstt. Engineer (Mechanical), as well as the promotion of the Respondent No. 7 to the post of Asstt. Executive Engineer (Mechanical) are hereby set aside.

21. In passing this order, this Court is not oblivious of the fact that the challenge to the promotion of Respondent No. 7 has been made in an interim application in the above proceeding. However, considering the fact that this development had occurred during the pendency of the writ petition in hand, this Court to avoid multiplicity of litigations has entertained the assaillment in the form presented. The petition, therefore, is partly allowed in the above terms. No costs.

10. We are in agreement with the views expressed by the learned Single Judge.

11. The Guwahati Municipal Corporation Engineering Service Rules, 2004 (2004 Rules) have been framed in exercise of powers conferred u/s 67(3) and 415 of

the Gauhati Municipal Corporation Act, 1971. Rule 3 of the 2004 Rules provides for various cadres comprising the service called GMC Engineering Service. The posts equivalent to and included in the various cadres comprising the service are as under:-

- (1) Chief Engineer,
- (2) Superintending Engineer,
- (3) Executive Engineer,
- (4) Assistant Executive Engineer,
- (5) Assistant Engineer,
- (6) Junior Engineer.

Rule 20 provides for preparation and publication of a gradation list every year, containing the names of all members of the service, cadre-wise in order of seniority. The strength of each cadre is mentioned in Schedule-II alongwith the time scale of pay attached to each cadre. The total cadre strength of Assistant Engineer is thirty five, out of which thirty three are earmarked for the Civil Wing, one for the Mechanical Wing and another one for the Electrical Wing. However, for the posts of Assistant Executive Engineer and above, there is no such earmarking. Under Rule 11(a) of the 2004 Rules, fifty percent of the posts of Assistant Engineer are to be filled up by promotion and the remaining fifty percent by direct recruitment. As per Schedule-III, for direct recruitment to the post of Assistant Engineer, the qualification prescribed is B.E. degree from a recognized Engineering College. As per Schedule-IV, for promotion to the post of Assistant Engineer, the eligibility criteria is having worked as Junior Engineer for eight years in GMC.

12. Thus, it is evident that though certain number of posts in the cadre of Assistant Engineer are earmarked for various wings, such as, Civil, Mechanical and Electrical, there is no post as such which is designated as Assistant Engineer (Mechanical) or Assistant Executive Engineer (Mechanical). The Rules also provide for a single gradation list containing the names of all members of the service, cadre-wise in order of seniority. There is no provision for a gradation list of Assistant Engineers (Mechanical).

13. Viewed in the above context, we do not find any error or infirmity in the decision of the learned Single Judge. Writ Appeal is without merit and is, accordingly, dismissed.

W.P.(C) No. 3821/2011

14. By way of this writ petition under Article 226 of the Constitution of India, the petitioner (appellant in Writ Appeal No. 305/2009) has questioned the constitutional validity of the Gauhati Municipal Corporation Engineering Service Rules, 2004 (already referred to as the 2004 Rules), particularly Schedule-II

(Rule-4) and Rules-11(d) thereof. Petitioner also seeks a direction to the respondents to provide for separate cadres for Civil, Mechanical and Electrical Engineering Wings in the rank of Assistant Executive Engineer in GMC. Further prayer of the petitioner is to direct respondent No. 3 (Commissioner, GMC) to fix his initial date of appointment in the post of Assistant Engineer (Mechanical) as 24.09.1990 instead of 04.12.1992.

15. It may be mentioned that this writ petition was filed after filing of Writ Appeal No. 305/2009 against judgment and order dated 01.09.2009 passed in W.P.(C) No. 1616/2009 whereby promotion of petitioner to the post of Assistant Executive Engineer (Mechanical) made by order dated 26.05.2009 issued by respondent No. 3 and the separate gradation list of Assistant Engineers (Mechanical) were set aside.

16. Case of the petitioner as projected in the writ petition is that he is a B.E. degree holder from Gauhati University. He was appointed as Assistant Engineer (Mechanical) in GMC vide order dated 24.09.1990. The appointment was temporary for a period of three months and was made in anticipation of Government approval. Such appointment was extended from time to time, with a break of one day in between. Petitioner was ultimately appointed temporarily in GMC as Assistant Engineer (Mechanical) under Regulation 3(f) of APSC (Limitation of Functions) Regulations, 1951 vide order dated 04.12.1992 issued by respondent No. 3. In a previous round of litigation, this Court had held that the services of the Assistant Engineers should be deemed to be regularized from the dates of their initial appointment and further directed GMC to frame Rules.

17. Subsequently, GMC framed the 2004 Rules which was notified in the Assam Gazette on 27.01.2004.

18. By order dated 25.03.2009, respondent No. 3 directed that the services of all the Assistant Engineers stood regularized w.e.f. the dates of their initial appointment/promotion to the post and that their seniority shall be counted from the dates of their initial appointment/promotion to the post of Assistant Engineer. A separate gradation list was prepared for the Mechanical Wing as per Government direction. In the said gradation list, petitioner was placed at Serial No. 1 with his date of initial appointment/joining in the post of Assistant Engineer shown as 04.12.1992. According to the petitioner, the seniority list of Assistant Engineers (Civil and Electrical) prepared by respondent No. 3 would indicate that the services of such engineers have been regularized from the dates of their initial appointment/promotion to that post.

19. Petitioner was promoted to the post of Assistant Executive Engineer (Mechanical) vide the order dated 26.05.2009 issued by respondent No. 3.

20. Petitioner's above promotion was challenged before this Court in W.P.(C) No. 1616/2009. This Court by judgment and order dated 01.09.2009 set aside the promotion of the petitioner on the ground that there is no such post designated as Assistant Executive Engineer (Mechanical) under the 2004 Rules. The said

decision is the subject matter of Writ Appeal No. 305/2009, decided in the earlier part of this judgment.

21. As already indicated above, after filing of the writ appeal, petitioner has filed the present writ petition challenging the constitutional validity of the 2004 Rules and for a direction to the respondents to provide separate cadres for various disciplines such as Civil, Mechanical and Electrical. As noticed earlier, petitioner has further sought for a direction to fix his initial date of appointment in the post of Assistant Engineer as 24.9.1990 instead of 04.12.1992.

22. The relevant portions of the 2004 Rules, which have been impugned, are as under:-

4. Strength of Service:-

The strength of each cadre in the Service shall be such as determined by Corporation with prior approval of Government from time to time. The strength of the cadres on the date of commencement of these rules shall be as shown in the Schedule-II to the rules.

II. Appointment by promotion:-

(a).....

(b).....

(c).....

(d) The promotion shall be on seniority-cum-merit basis and experience.

(e).....

23. The vires of the 2004 Rules, particularly the aforesaid provisions, have been assailed on the following grounds:-

(a) The 2004 Rules are not comparable to the Rules of other Departments of the Government of Assam, such as, Public Works Department, Irrigation Department, Water Resources Department etc;

(b) In the cadre of Assistant Engineer, Junior Engineers (diploma holders) on promotion are treated at par with graduate Engineers as they are enlisted in the common gradation list and are equally eligible for promotion to the next higher post of Assistant Executive Engineer, which is not the case in the other Departments;

(c) In the other Departments, there are separate cadres for the different disciplines of Civil, Mechanical and Electrical Engineering unlike GMC where the above three Engineering disciplines are clubbed together;

(d) Not having separate cadres for the different disciplines would affect the administration as a Civil Engineer may not have the knowledge and technical expertise to look after works of Mechanical Engineering and vice-versa;

(e) Rule 11(a) of the 2004 Rules provides that recruitment to the post of Assistant Engineer would be by promotion as well as by direct recruitment. Fifty percent of the posts are to be filled up by promotion from amongst the Junior Engineers (diploma holders) whereas the remaining fifty percent are to be filled up by direct recruitment from amongst graduate Engineers. This is not the position in the other Departments where lesser percentage is earmarked for such promotion;

(f) Though in Serial No. 5 of Schedule-II of the 2004 Rules, there are thirty three posts of Assistant Engineer to be manned by Civil Engineers, one by Mechanical Engineer and one by Electrical Engineer but in the next higher cadre of Assistant Executive Engineer and above, there is no specific promotional post earmarked for the three disciplines, which is there in the other Departments;

(g) Rule 11(d) of the 2004 Rules provides that promotion shall be on the basis of seniority-cum-merit and experience but in other Departments, promotion is based on merit-cum-seniority. By virtue of this Rule, a Junior Engineer may be promoted to the highest post of Chief Engineer on account of his seniority. In such a case, the interest of the institution will suffer;

(h) There is violation of Article 14 of the Constitution of India by treating unequals as equals in-as-much as diploma holders cannot be treated at par with degree holders considering the disparity in their educational qualifications;

24. GMC has filed its counter affidavit. It has contended that petitioner was appointed as Assistant Engineer (Mechanical) under Regulation 3(f) of APSC (Limitation of Functions) Regulations, 1951 w.e.f. 4.12.1992 and, therefore, his service was regularized w.e.f. 04.12.1992. It has also contended that the 2004 Rules are valid and constitutional.

25. Respondents 5 to 9, who were the petitioners in W.P.(C) No. 1616/2009 giving rise to Writ Appeal No. 305/2009, have also filed a common counter affidavit. They have resisted the claim of the petitioner that the benefit of regularization should be given to him w.e.f. 24.09.1990 by contending that his appointments prior to 04.12.1992 were dehors any rules or procedure. Therefore, petitioner cannot claim seniority from 24.09.1990. They have also contended that petitioner had accepted his promotion to the post of Assistant Executive Engineer (Mechanical) on the strength of a separate gradation list of Assistant Engineers (Mechanical) where his initial date of appointment in the post of Assistant Engineer (Mechanical) was shown as 04.12.1992. Having accepted the same, it is not open for the petitioner to now turn around and contend that his date of appointment should be 24.09.1990 and not 04.12.1992. They have also urged that the 2004 Rules are constitutionally valid and do not suffer from any infirmity.

26. Petitioner in his reply affidavit has reiterated the contentions made in the writ petition. Additionally, he has contended that question of his initial appointment being not in-accordance with rules does not arise in-as-much as there was no

service rule at that time.

27. Respondents 5 to 9 in their brief rejoinder affidavit have contended that the claim of the petitioner that his seniority be counted from 24.09.1990 and not from 04.12.1992 is hit by delay and laches as the challenge has been made after more than two years, that too, after accepting the promotional order dated 26.05.2009 which mentioned his date of initial appointment as 04.12.1992.

28. Basic contention of the petitioner as highlighted by Mr. Saikia, learned Counsel for the petitioner in the course of his argument is that the 2004 Rules provides discipline wise posts in the cadre of Assistant Engineer i.e. thirty three for Civil, one each for Mechanical and Electrical but in the next higher post of Assistant Executive Engineer and above, no post is ear-marked for any of the disciplines. In other words, for promotion to such post, irrespective of the discipline, an Assistant Engineer would be eligible provided he fulfills the eligibility criteria and comes within the zone of consideration.

29. We do not find any force in the contention of the petitioner.

30. Whether there should be separate cadres for Civil, Mechanical and Electrical Wings in the rank of Assistant Executive Engineer is for the concerned authority to decide. Just because there is no separate cadre for the above disciplines, it would not render the 2004 Rules invalid or unconstitutional. It is within the domain of the administration and the Court would not ordinarily like to enter into such domain by invoking the power of judicial review. Moreover, the provision for considering promotion on the basis of seniority-cum-merit and experience instead of on merit-cum-seniority basis would not dent the constitutionality of a statute. It is for the administration to decide which criteria to adopt while considering promotion. It is not for the Court to substitute its views for that of the administrative authority.

31. The 2004 Rules also provide that recruitment to the post of Assistant Engineer shall be on 50:50 basis i.e. fifty percent by direct recruitment from amongst degree holders and fifty percent by promotion from amongst Junior Engineers (diploma holders) having eight years of service experience as such in GMC. Once inducted into the cadre of Assistant Engineer, diploma holders are treated at par with degree holders for the purpose of promotion to the next higher post of Assistant Executive Engineer, which is to be filled up hundred percent by way of promotion from the feeder cadre of Assistant Engineer, the eligibility criteria being having service experience of five years in the said post in GMC. To our mind, there is no arbitrariness or unreasonableness in the aforesaid provision as contained in the 2004 Rules. It only provides for opportunity of promotion to the Junior Engineers. The 2004 Rules requires service experience of eight years in the post in GMC for a Junior Engineer to be eligible for promotion to the post of Assistant Engineer. After promotion, they become part of the common cadre alongwith degree holders. By no stretch can it be said that thereby unequals are being treated alike, thus violating Article 14 of the

Constitution of India.

32. It is a settled legal proposition that the constitutional validity of an enactment can be challenged only on two grounds, viz., (a) lack of legislative competence and (b) violation of any of the fundamental rights guaranteed in part-III of the Constitution or any other constitutional provision [See Greater Bombay Co-op. Bank Ltd. Vs. United Yarn Tex. Pvt. Ltd. and Others,]. In considering the validity of a statute, the presumption is always in favour of its constitutionality and the burden is upon the person who challenges it to show that there has been transgression of constitutional principles. Mere hardship is no ground to strike down a valid legislation. In the case of Prafulla Kumar Das and Others Vs. State of Orissa and Others, , the Hon"ble Supreme Court has held that it would not be permissible for the Court to declare a legislation ultra vires only because it may cause hardship to the petitioner. A mere hardship cannot be a ground for striking down a valid legislation unless it is held to be suffering from the vice of discrimination or unreasonableness.

33. The Apex Court in the case of Dilip Kumar Garg and Another Vs. State of U.P. and Others, has held that the administrative authorities are in the best position to decide the requisite qualification for promotion (in that case from Junior Engineer to Assistant Engineer) and it is not for the Court to sit over their decision like a Court of appeal. In the facts of that case, it was held that the decision to treat all the Junior Engineers, whether degree holders or diploma holders, as equals for the purpose of promotion is a policy decision and the Court should not ordinarily interfere in policy decision unless there is clear violation of constitutional provision or the statute.

34. It is also permissible to prescribe longer qualifying service for those not possessing the qualification. Mohammad Shujat Ali and Others Vs. Union of India (UOI) and Others, recognized the principle that difference in educational qualifications can be made up by longer experience. The Hon"ble Supreme Court in a number of decisions has upheld provisions prescribing higher experience on the basis of difference in educational qualifications for eligibility for promotion.

35. Therefore, in our view, the grounds urged by the petitioner assailing the constitutionality of the 2004 Rules are not good grounds to test the vires of the said enactment. Learned Counsel for the petitioner has also not been able to show any transgression of the parent statute by the impugned Rules. For the aforesaid reasons, the impugnement of the 2004 Rules has to fail and, accordingly, the challenge is rejected.

36. Coming to the claim of the petitioner that his service in the post of Assistant Engineer should be regularized w.e.f. 24.09.1990 by counting his date of initial appointment from such date instead of 04.12.1992, a perusal of the initial appointment order dated 24.09.1990 would indicate that it was a purely temporary appointment for three months and was issued in anticipation of Government approval. It is true that the 2004 Rules was not in existence then

but at the same time, petitioner has also not been able to show that such appointment was preceded by any advertisement or selection. Subsequently, petitioner was appointed as Assistant Engineer (Mechanical) on 04.12.1992 under Regulation 3(f) of APSC (Limitation of Functions) Regulations, 1951. By order dated 25.03.2009, respondent No. 3 has regularized the services of all the Assistant Engineers w.e.f. the dates of their initial appointment/promotion to the post of Assistant Engineer and decided to count their seniority from such date. Accordingly, petitioner's service in the post of Assistant Engineer was regularized w.e.f. 04.12.1992 i.e. his date of appointment under Regulation 3(f) and his seniority counted from such date. The Apex Court in the case of Masood Akhtar Khan and Others Vs. State of Madhya Pradesh and Others, has made it clear that if the initial appointment is not made according to the Rules, subsequent regularization of service does not entitle an employee to the benefit of intervening service for seniority.

37. In view of above, prayer of the petitioner to fix his initial date of appointment as 24.09.1990 instead of 04.12.1992 cannot be accepted.

38. Writ petition is devoid of merit and is accordingly dismissed. No cost.