
(1995) 03 GAU CK 0022
In the Gauhati High Court
Case No : Civil Rule No. 71 of 1994

Lalrinkima Hnamte

APPELLANT

Vs

State of Mizoram and Ors.

RESPONDENT

Date of Decision : 21-03-1995

Acts Referred:

Constitution of India, 1950 — Article 226, 226

Citation : (1995) 1 GLJ 470

Hon'ble Judges : W.A.Shishak, J

Bench : Single Bench

Advocate : K.N.Madhusudhanan, Mickael, H.Lalrinthanga, Advocates appearing for Parties

Judgement

1. The petitioner assails order of promotion of 7th respondent Shri N. Ranjit Singh to the post of Executive Engineer (Civil) under Power and Electricity Department in the scale of Rs.30004500 PM plus all other allowances admissible under the rules from the date of appointment, dated 18 October, 1994 issued by the Secretary, Power and Electricity Department, on the grounds, inter alia, that the said order of promotion has been in violation of statutory rules made under Article 309 of the Constitution of India as regards promotion of Assistant Engineer/SubDivisional Officer to the post of Executive Engineer inasmuch as the 7th respondent had not put in requisite number of years in the grade of AE/SDO at the time the order of promotion was issued and that the said 7th respondent had not passed the departmental examination as required under the rules.

2. The post of Executive Engineer is Selection Post. In terms of rules framed in this behalf vide Gazette Notification dated 28.2.1979, vacancies in the post of Executive Engineer are to be filled up 100% by promotion failing which by transfer on deputation. Necessary qualification for promotion to the post of Executive Engineer in terms of Column 11 of the Schedule is as under :

"Assistant Engineers/SDO/with 7 years experience in the grade for graduates in

Civil/Elect./Mech. Engineering and 10 years for diploma holders. In case of Public Health Department the Officer should possess Diploma in Public Health Engineering. 75% & 25% for graduates and Diploma holders respectively after passing Departmental Examination in Engineering."

Admittedly the petitioner and the 7th respondent are both Graduates in Civil Engineering.

3. The petitioner and the 7th respondent are both serving in Power and Electricity Department and their service are utilised in Civil Works of the Department. However, it may be stated that their appointments were made under Public Works Department.

4. It is averred that since the petitioner and the 7th respondent were both appointed under Public Works Department, as required under the relevant rules quoted above they were required to sit for the departmental examination in Engineering subjects conducted by the Department, However the 7th respondent failed in the said departmental examination. In this view of the matter the petitioner contends that the promotion of the 7th respondent to the post of Executive Engineer is in clear violation of provision laid down in this regard under the rules. Mr. Mickael, learned counsel appearing on behalf of the Government submits that since the 7th respondent is serving under Power and Electricity Department as of now, he will be required to pass the departmental examination when such is conducted separately by the Electricity Department in due course. It is stated on behalf of the parties at the Bar today that no departmental examination as such has been conducted by Power and Electricity Department till date. It is contended by learned counsel for the Government and also by Mr. Madhusoodhanan, learned counsel who appears on behalf of the 7th respondent that the Engineering subjects under PWD and Power and Electricity Department are different and as such the fact that the 7th respondent had not passed the departmental examination held earlier by the Public Works Department is not relevant for his promotion to the post of Executive Engineer. As against this Mr. Lalrinthanga, learned counsel for the petitioner submits that although the petitioner and the 7th respondent are serving in Power and Electricity Department, Engineering subjects for which departmental examinations are to be held are the same inasmuch as they both continue to serve the Power and Electricity Department as Civil Engineers. Government Memo No.A.34011/1/89CE(P)/124 Dated 16 August, 1991 states that: "The Engineers under Power and Electricity Department will have to sit in the Engineering subjects which will be conducted separately by this Department in due course." On perusal of this circular it is not very clear as to whether such examination is meant for Electrical Engineers who are employed under the Power and Electricity Department or such examination is also meant for Civil Engineers who were earlier recruited under Public Works. Department. Be that as it may, as per letter received by the petitioner from the office of the Chief Engineer dated 11 October, 1994, it is clear that the 7th respondent has not passed the departmental examination in

Engineering subject till date. As stated above the petitioner contends that the 7th respondent failed in the departmental examination, where as the petitioner passed the said examination. Learned counsel for the petitioner therefore contends that the impugned order of promotion was issued in respect of the 7th respondent in clear violation of the provision of the rules laid down in this regard.

5. The petitioner was appointed as AE/SDO against the vacant post of AE/SDO retained vide Department letter No. A. 11011/1/85PWE219 dated 30.3.87 and P&E Department letter No. A.I 1011/1/87P&E/64 dated 26.3.87. The said order of appointment was issued on 12 October, 1987 in respect of four persons and the name of the petitioner appears at serial 2 and the petitioner is shown as SDO (TC) HE Investigation Division, Lunglei P&E Department. The appointment order stated : " The Governor of Mizoram is pleased to appoint the following Gpduate Engineers as AE/SDO under Public Works Department in the scale of pay of Rs.20003500 plus other allowances as admissible under the rules from time to time with effect from the date of joining the post in the following order of merit." The 7th respondent was appointed on 29 October, 1987 as AE/SDO under PWD in the scale of pay of Rs.20003500 PM plus all other allowances as admissible under rules from time to time with immediate effect. Para 3 of the appointment order states as under:

"The appointment is purely on ad hoc basis subject to regularisation in accordance with the Recruitment Rules in due course. The appointment will not bestow on the person a claim for regular appointment and that services rendered on ad hoc basis will not count for the purpose of seniority in the grade."

Thereafter the service of the 7th respondent was regularised by Government order dated 10th July, 1990. The order runs as under :

"On recommendation of Selection Committee, the Governor of Mizoram is pleased to regularise the ad hoc appointment of the following Assistant Engineer/ SubDivisional Officer (Civil)/(Mech), PWD in order as shown below in the scale pay of Rs.2200752800EB1004000 PM with immediate effect."

The name of the 7th respondent appears at serial 8. His technical qualification is shown as BE (Civil) and mode of recruitment is shown as direct recruitment. Last para Of the aforesaid order of regularisation states as under :

"The Governor of Mozoram is further pleased to order that the ad hoc service rendered by all the above officers in the grade of Assistant Engineer/ SubDivisional Officer.

6. Sometime in 1994 two vacancies in the post of Executive Engineer arose. Having come to know that the case of the 7th respondent was being considered for filling up one of the posts of Executive Engineer, the petitioner protested to the Government stating that the 7th respondent had no minimum qualification for consideration of promotion to the post of Executive Engineer in terms of the relevant Rules of 1975.

7. Although in terms of para 12 of the counter affidavit, the Government accepts that Recruitment Rules of 1975 is in force in Power and Electricity Department, it is further stated that "the promotion of respondent No.7 is because of his 11 years of uninterrupted continuous service in Power and Electricity Department since 1983. Respondent No.7 was promoted to fill the vacant Executive Engineer post and his continuous length of service in Power and Electricity Department was also taken into consideration." It is also the case of the 7th respondent that he was given contract employment in 1983. The period of contract employment was extended from time to time. As stated above, it was in 1987 that the 7th respondent was given ad hoc appointment as AE/SDO under PWD by Government order dated 29th October, 1987. The said ad hoc appointment was regularised with effect from 10 July, 1990 as mentioned earlier. In the backdrop of this case, learned counsel for the petitioner submits that when the impugned order of promotion was issued on 18 October, 1994, the 7th respondent had put in just four years of regular service in the grade of AE/SDO and therefore the 7th respondent was not eligible for consideration of promotion to the post of Executive Engineer in 1994, whereas the petitioner had already put in seven years of regular service as AE/SDO. It is, therefore, contended that the case of the petitioner was illegally rejected. It is contended by Mr. Mickael, learned counsel for the Government as well as Mr. Madhusoodhanan, learned counsel for the 7th respondent that the period during which the 7th respondent served on ad hoc basis, was counted in terms of the Govt. Notification dated 10.7.90 which has already been quoted above, to the effect that the ad hoc service rendered in the grade of Assistant Engineer/SubDivisional Officer shall be counted for the purpose of future promotion. Further, as mentioned above Mr. Mickael and Mr. Madhusoodhanan both submit that the period during which the 7th respondent was given employment on contract basis should also be taken into consideration while computing the length of service rendered by the 7th respondent in the grade of AE/SDO for the purpose of consideration of promotion to the post of Executive Engineer. On careful perusal of the documents that have been filed on behalf of the parties in the present case, I do not find any order of the Government by which the period of contract service of the 7th respondent is sought to be given benefit for the purpose of consideration for promotion to the post of Executive Engineer. In my view such proposition would not have been permissible also inasmuch as contract service is entirely on, a different footing. On careful perusal of the order dated 10th July, 1990, there can be no doubt in the mind of anyone that regularisation of ad hoc appointment of the 7th respondent in the grade of Assistant Engineer/SubDivisional Officer (Civil) was made effective from 10th July, 1990. This clearly goes to show that the benefit of regular appointment in the post of AE/SDO was not given retrospective effect from the date of appointment of 7th respondent on ad hoc basis i.e. from 29 October, 1987. That being the position the date to be reckoned with for the purpose of seniority in the Grade of AE/SDO will be from 10th July, 1990 only. It is contended on behalf of the petitioner that even if the period of ad hoc appointment is taken into consideration, the 7th respondent had not put in seven

years regular service as AE/SDO when the impugned order of promotion was issued in 1994.

8. It is further submitted by learned counsel for the petitioner that for yet another reason the case of the 7th respondent could not have been considered in 1994 for promotion to the post of Executive Engineer inasmuch as at the relevant time the 7th respondent was under suspension and a departmental enquiry was pending against him. Mr. Mickael, learned counsel for the Government as well as Mr. Madhusoodhanan, learned counsel for the 7th respondent state that although it is correct that departmental proceeding was pending against the 7th respondent, the order of suspension had already been revoked when the order of promotion was issued in October, 1994. In the midst of hearing a copy of Government order issued on 14th March, 1995 has been made available for this Court. Among other things this order states that the 7th respondent is fully exonerated from all the charges levelled against him and "the period of suspension with effect from 20.8.1993 to 9.12.1994 will be treated as on duty for all purposes and he will be entitled to full pay and allowances for the said period." No doubt at the time of issuance of the impugned order of promotion on 18 October, 1994, departmental proceeding was going on against the 7th respondent and indeed the Enquiry Officer submitted report after the enquiry was completed. As mentioned above, the order of exoneration was issued on 14th March, 1995. On careful perusal of this order I entertain no doubt in my mind that the 7th respondent was under suspension with effect from 20.8.1993 to 9.12.1994 as is stated in the Government order. As such the submission made by Mr. Madhusoodhanan and Mr. Mickael is belied by this document. Even assuming that order of suspension had been revoked before the order of promotion was issued, there is no doubt that departmental proceeding was pending against the 7th respondent when the order of promotion was issued.

9. It is rather strange that the case of the 7th respondent was considered by the competent authority for promotion to the post of Executive Engineer and indeed promotion order was issued in his favour when the 7th respondent was under suspension and departmental proceeding was pending against him in respect of various charges levelled against him. It is not the case of the Government that the case of the 7th respondent was considered for promotion after the order of exoneration was issued. As stated above, the order of exoneration was issued only on 14th March, 1995 and indeed in terms of the aforesaid order, the 7th respondent was under suspension when the order of promotion was issued, inasmuch as the order of promotion was already issued on 18.10.1994. In my view there is absolutely no justification for consideration of the case of the 7th respondent for promotion when he was under suspension and departmental proceeding was pending against him.

10. It has been urged on behalf of the Govt. as well as on behalf of the 7th respondent that the petitioner has not exhausted alternative remedy by filing an appeal before the Government. It appears when there is allegation of violation of

statutory rule and when the petitioner himself asserts his right in terms of the provisions of the rules for consideration of promotion to the post of Executive Engineer and in the light of the fact that he had represented to the Government stating that the 7th respondent's case should not be considered in view of the various reasons now raised in the present petition, this Court in exercise of power under Article 226 of the Constitution can certainly entertain the petition and dispose of the petition on merit which I propose to do in this case.

11. Although notice was received on 20th January, 1995, the 6th respondent, Secretary, Mizoram Public Service Commission has not contested this petition.

12. In view of the facts and circumstances that I have narrated above, it seems clear to me now that when the impugned order of promotion was issued in October, 1994, the 7th respondent had not passed the departmental examination which is prescribed under the rules, that his regular appointment in the post of AE/SDO was effective only from 10th July, 1990, whereas the petitioner's regular appointment in the same grade was effective from 12 October, 1987 and that when the order of promotion was issued the 7th respondent was under suspension in connection with some charges levelled against him and a departmental enquiry was pending against him. It also seems clear to me that the period of contract service rendered by the 7th respondent cannot be taken into consideration for the purpose of promotion inasmuch as contract service is clearly on a different footing. At the same time there is no Government order by which the contract service is sought to be taken into consideration for such purpose. It further appears to me that a Civil Engineer would only be required to pass subjects of Civil Engineering notwithstanding the fact that a Civil Engineer is employed under Power and Electricity Department to carry out Civil Works of the Power Department.

13. In the result this petition is allowed. The impugned order dated 18.10.1 994 in so far as it concerns the 7th respondent is quashed.

The respondent Government shall consider the case of the petitioner for promotion to the post of Executive Engineer making it clear that Selection Committee shall consider cases of all officers who are within the zone of consideration in terms of relevant Recruitment Rules.

Let the selection be made by the Selection Committee not later than three months from today. I pass no order as to costs.