
(2015) 04 MAN CK 0010
In the Manipur High Court
Case No : Writ Petition (C) No. 311 of 2015

Maimom Lukhoi Singh

APPELLANT

Vs

The State of Manipur and Others

RESPONDENT

Date of Decision : 15-04-2015

Acts Referred:

Citation : (2015) 2 GLT 432

Hon'ble Judges : Kh. Nobin Singh, J

Bench : Single Bench

Advocate : Y. Nirmolchand, for the Appellant; A. Mohendro, Advocate and Y. Ashang, Govt. Advocate, Advocates for the Respondent

Final Decision : Allowed

Judgement

Kh. Nobin Singh, J.—Heard Shri Y. Nirmolchand, learned counsel appearing for the petitioner and Shri A. Mohendro, learned counsel as well as Shri Y. Ashang, learned Govt. Advocate appearing for the respondents.

2. On 30-03-2015 this court issued notice to the respondents and directed that the matter be listed on the third day for consideration of interim prayer. However, the matter was listed on 06-04-2015 when this court passed over it on the joint request made by the counsels for the parties. On 08-04-2015 when the matter was again listed, the counsel appearing for the petitioner insisted that the matter be considered for grant of interim prayer staying the operation of the impugned order dated 24-03-2015 issued by the Under Secretary (MI), Government of Manipur. After hearing the counsels for the parties for a while, this court felt that any interim order being passed staying the operation of the impugned order would be as good as passing the final order and therefore, suggested that since there was no dispute on facts, the matter could be heard for disposal at the stage of admission provided the counsels appearing for the parties agreed to for the same. The counsels for the parties agreed to the suggestion and accordingly, the matter was taken up for final disposal on 09-04-2015 at the stage of admission and after hearing the counsels for the parties at length, the judgment

was reserved.

3. The present writ petition has been filed by the petitioner for quashing the impugned order dated 24-03-2015 as regards appointment/posting of the respondent No. 3 as i/c Executive Engineer, MID - I on look after basis.

4. The undisputed facts are that both the petitioner and the respondent No. 3 are working as Assistant Engineers in the Minor Irrigation Department, Government of Manipur and both of them are not yet eligible for appointment on promotion as Executive Engineer. As per the seniority list of Assistant Engineers published vide O.M. dated 30-07-2013, the petitioner's name appears at Sl. No. 8 and that of the respondent No. 3 at Sl. No. 9 showing clearly that the petitioner is senior to the respondent No. 3. However, the Under Secretary (MI) issued the impugned order dated 24-03-2015 transferring/posting the respondent No. 3 as i/c EE/MID-I on look after basis. Being aggrieved by the impugned order, the petitioner challenged it by way of the present writ petition.

5. It is submitted by the learned counsel appearing for the petitioner that the impugned order has been issued arbitrarily so as to give undue favour to the respondent No. 3 by allowing him to hold the post of Executive Engineer ignoring the senior namely, the petitioner. The petitioner being senior to the respondent No. 3 ought to have been given an opportunity to work as i/c EE/MID-I and denial of such opportunity would cause heart-burn and frustration not only to the petitioner but to other Assistant Engineer also who is senior to the respondent No. 3. It is further submitted that the impugned order has been issued in violation of the judgment and order dated 28-01-2008 passed by the Hon'ble Gauhati High Court, Imphal Bench in writ petitions being W.P. (C) No. 265 of 2007 and W.P. (C) No. 666 of 2007, Potsangabm Super Singh and ors Vs. State of Manipur and ors. To substantiate his submission, the learned counsel appearing for the petitioner has relied upon another judgment and order dated 18-11-2009 passed by the Hon'ble Gauhati High Court, Imphal Bench in W.P. (C) No. 358 of 2009, Laitonjam Muhindro Singh and ors. Vs. State of Manipur and ors.

On the other hand, the learned counsel appearing for the respondent No. 3 has submitted that though the respondent No. 3 is junior to the petitioner, there is nothing wrong in the impugned order because the respondent No. 3 being a degree holder would become eligible for promotion to the post of Executive Engineer earlier than the petitioner and as an interim arrangement only, the impugned order has been issued. Moreover, since the Assistant Engineer with degree qualification is a class by itself different from that of the Assistant Engineer with diploma qualification and the doctrine of necessity mandates, the respondent No. 3 being more qualified with degree in engineering, has been allowed to hold the charge of Executive Engineer. To substantiate his submission, the learned counsel appearing for the respondent No. 3 has relied upon the following decisions rendered by the Hon'ble Supreme Court and in particular, the judgment rendered in the case of Narsing Prasad Vs. Anil Kumar Jain and Others,

AIR 2012 SC 1569 : (2012) 133 FLR 400 : (2012) 4 SCC 642 : (2012) 2 SLJ 250 : (2012) AIRSCW 2784 : (2012) 3 Supreme 78 :

(a) Rajasthan State Electricity Board Accountants Association Vs. Rajasthan State Electricity Board and Another, (1997) 2 JT 342 : (1997) 3 SCC 103 ; (c) Election Commission of India and another Vs. Dr. Subramanian Swamy and another, (1996) 3 AD 750 : AIR 1996 SC 1810 : (1996) 4 JT 463 : (1996) 3 SCALE 734 : (1996) 4 SCC 104 : (1996) 1 SCR 637 Supp ; (d) Express Newspapers (Private) Ltd. and Another Vs. The Union of India (UOI) and Others, AIR 1958 SC 578 : (1964) 1 LLJ 9 : (1961) 1 LLJ 339 : (1959) 1 SCR 12 and (e) N.K. Chauhan and Others Vs. State of Gujarat and Others, AIR 1977 SC 251 : (1977) LabIC 38 : (1977) 1 SCC 308 : (1977) 1 SCR 1037 .

The learned counsel appearing for the State respondents supported the submissions made on behalf of the respondent No. 3 and based on the instructions received by way of parawise comments from the respondent No. 2, he further submitted that the respondent No. 3, a more qualified engineer who would be eligible for promotion to the next higher post earlier than the petitioner, is allowed to work as Executive Engineer on look after basis.

6. It is an accepted principle that in public service, transfer is an incident of service. The appointing authority has a wide discretion in the matter. In other words, the transfer and posting of its employee is the prerogative of the State Government but it shall be done in accordance with rules or guidelines/ instructions framed for that purpose by the State Government and in the absence of such rules or guidelines, the State Government must act fairly and reasonably. As has been stated in the preceding para, the petitioner is senior to the respondent No. 3 as per the Seniority List published vide O.M. dated 30-07-2014. It appears that the said Seniority List has not been challenged by anyone before any appropriate forum. The impugned order dated 24-03-2015 is silent about the reason as to why the petitioner, being admittedly senior to the respondent No. 3, has not been given an opportunity to work as i/c Executive Engineer. On a query being put to the counsel appearing for the State respondents as to whether there is any rule or guideline governing the manner in which the employee will be allowed to work on look after basis in the higher post, he replied in the negative and if that be so, the general principle that the State Government being an institution must act fairly and reasonably, shall be followed.

7. In support of their contentions, the counsels appearing for the parties have relied upon the decisions rendered by the Hon''ble Gauhati High Court as well as the Hon''ble Supreme Court. The learned counsel for the petitioner has submitted that the issue involved herein has already been settled by the decisions of the Hon''ble Supreme Court and in particular, the decision rendered in the case of Government of A.P. and Another Vs. A.V. Venugopala Rao, (1997) 10 JT 451 : (1994) 4 SCALE 1118 : (1995) 1 SCC 179 : (1994) 5 SCR 473 Supp : (1995) 2 SLJ 76 wherein the interim arrangement of the Government keeping the seniormost in the provisional list who are eligible for promotion to the post of the

Executive Engineer as in charge so as to avoid heart-burning among the officers was the subject matter in issue. The Hon''ble Supreme Court refused to interfere with the interim arrangement holding that the Tribunal was not justified in upsetting the interim arrangement which has got a rational and reasonable basis to avoid administrative hardship or heart-burning to the persons who claimed to the posts of respective Executive Engineers, Superintending Engineers and the Chief Engineers as the case may be. Relying upon this decision of the Hon''ble Supreme Court, the Hon''ble Gauhati High Court, Imphal Bench had allowed writ petitions being W.P. (C) No. 625 of 2007 and W.P. (C) No. 666 of 2007, Potsangbam Super Singh and ors. Vs. State of Manipur and ors. arising out of identical facts in respect of the same Department namely Minor Irrigation Department, Government of Manipur. In the above two writ petitions, all the petitioners were senior to the respondent No. 3 therein who had been transferred to MID - I as Assistant Engineer with a direction to look after the division as Executive Engineer vide order dated 21-07-2007 and surprisingly, after the said order dated 21-07-2007 having been stayed by the Hon''ble High Court, the State respondents issued another identical order within a period of less than a month. The Hon''ble Gauhati High Court, Imphal Bench held:

"17. Reverting back to the facts of the writ petitions, I find least justification to transfer the respondent No. 3 to MID - I and more particularly, giving the charge of the office of Executive Engineer. Neither the learned Government Advocate or the affidavit of respondents No. 1 and 2 could justify such action. It should be made known to the respondents that any order woven with political fabric and blenched with executive biasness can not sustain in the eye of law. Any such limping order would tumble down even before facing the judicial test. Had it been a transfer simpliciter, it could have been presumed that the transfer order was issued in the public interest and without any malice. However, facts and circumstances of the case clearly suggest that it is a malafide transfer. I do not hesitate to hold that the impugned transfer order has violated all canons and norms of fairness, reasonableness and transparency in the executive actions. Bad smell of favouritism and foul play is sneezing out of the impugned order. It is out and out a motivated and biased order. The state respondents also have disregarded the stay order passed in W.P. (C) No. 553 and 555 of 2007."

The Hon''ble High Court not only allowed the said writ petitions but also imposed costs of Rs. 21000/- to be shared equally by the seven petitioners.

Similarly, in the case of Laitonjam Muhindro Singh and ors. Vs. State of Manipur and ors, W.P. (C) No. 358 of 2009 wherein the respondents No. 4 to 7 who were junior to the petitioners in the cadre of Junior Youth Officer/Coach/Superintendent of Physical Education etc., were posted and allowed to function as District Youth Affairs and Sports Officers ignoring and overlooking the interest and claim of senior officers in the cadre, the Hon''ble Gauhati High Court, Imphal Bench held:

"11. As the issue involved in this case is no longer res-integra in view of various

decision passed by this court as well as the Apex Court, this court need not burden itself with further reference to the judgment passed by this court as well as by the Apex Court on the question of appointment on in-charge basis vis-a-vis the seniority position. Mr. Ashang, learned Government Advocate has fairly submitted that in absence of any appeal filed against the order dated 18-05-2009, passed by this court in W.P. (C) No. 827 of 2007 where this court has quashed the order appointing a junior incumbent as DYASO by ignoring the claim of the senior person, the Government is bound by the ratio laid down in the aforesaid judgment and more so because the Department and the post are the same.

12. In the backdrop of the discussion made above, and upon consideration of the submissions made by the learned counsel appearing for the parties, this court is of the view that the petitioners have been able to make out a case for interfering with the in-charge appointment of the respondents No. 4, 5, 6 and 7 as DYASO. Accordingly, the impugned order dated 04-01-2006 (Annexure - A/9) and impugned order dated 31-10-2007 (Annexure - A/11) are quashed in so far as the respondents No. 4 and 6 are concerned and the impugned order dated 01-04-2006 (Annexure - A/10) and the impugned order dated 17-02-2008 (Annexure - A/12) are also quashed as unsustainable in law. It is also made clear that if any in-charge appointment is to be made to the post of DYASO in the youth Affairs and Sports Department, Government of Manipur, seniority position of the officers in the feeder post should be strictly observed."

8. The learned counsel appearing for the respondent No. 3 has relied upon the decision rendered by the Hon'ble Supreme Court in the case of Narsing Prasad Vs. Anil Kumar Jain and ors. (Supra) wherein the respondent, Anil Kumar Jain questioned the appointment of the petitioner as Chief Engineer on officiating basis on the inter-alia ground that a seniormost person was to be given charge unless he had any other disqualification. The High Court of Allahabad opined that in the absence of merit selection, a seniormost person is entitled to hold the charge unless there is any legal impediment and quashed the order dated 30-09-2011 on an appeal, preferred by way of a petition for special leave to appeal, the Hon'ble Supreme Court held:

"9. This court had passed an order of status quo relating to promotional posts in certain civil appeals and the said order is till in force. Thus, a regular promotion can not take place and therefore, the direction of the High Court in that regard is untenable. However, as in the interest of the administration, someone has to remain in charge, the employer i.e., the Parishad can choose someone to hold the officiating charge. Regard being had to the sensitive nature of the post and the duties to be performed by the incumbent, we think appropriate to direct that the Selection Committee be constituted by the Board within a period of four weeks which shall consider the suitability of all the eligible candidates for the purpose of holding the additional charge of the post of Chief Engineer. It is hereby made clear that the decision in favour of any candidate to hold the

additional charge would not ensure to his benefit and no claim can be put forth on the said base at the time of consideration for regular promotion."

9. There is some force in the submission of the learned counsel appearing for the petitioner that decision of the Hon''ble Gauhati High Court, Imphal Bench in the case of Potsangbam Super Singh and ors. Vs. State of Manipur and ors. (Supra) would apply to the facts of the present case. The facts of the present case are almost identical to that of the above because both the cases have arisen out of the same Department and the same post. In the said Potsangbam Super Singh case (supra), the order dated 18-08-2007 was held to be malafide and also held to have violated all norms of farness, reasonableness and transparency and the manner in which the order dated 18-08-2007 was issued, had been deprecated by the Hon''ble Gauhati High Court. Since the said order dated 18-08-2007 being found to be contemptuous and malafide, the Hon''ble Gauhati High Court, Imphal Bench imposed costs of Rs. 21,000/- to be paid to the petitioners therein. The law having been laid down by the Hon''ble Supreme Court and the decisions of the Hon''ble Gauhati High Court in particular, the Minor Irrigation Department, Government of Manipur ought to have kept them in mind before the impugned order was issued. Throwing all norms in the wind, the similar act is being repeated in the present case by the Minor Irrigation Department, Government of Manipur and their callous attitude is highly uncalled for. The issuance of the impugned order dated 24-03-2015, despite the existence of the said judgment delivered by the Hon''ble Gauhati High Court, Imphal Bench in respect of this very Minor Irrigation Department, would clearly show that the impugned order was issued with malafide intention so as to favour the respondent No. 3.

So far as the decision of the Hon''ble Supreme Court in the case of Narsingh Prashad''s case (supra), relied upon by the counsel for the respondent No. 3, is concerned, it does not help his case at all rather it helps the case of the petitioner. The order dated 30-09-2011 by which the petitioner therein was allowed to hold the post of Chief Engineer on officiating basis, has not been upheld by the Hon''ble Supreme Court as is evident from the fact that the Hon''ble Supreme Court has directed that the Selection Committee be constituted which shall consider the suitability of all eligible candidates for the purpose of holding the additional charge of the post of Chief Engineer. In other words, the petitioner has been allowed to continue holding the additional charge of Chief Engineer in terms of the status quo granted by the Hon''ble Supreme Court till the Board takes a decision. Other decisions of the Hon''ble Supreme Court relied upon by the counsel for the respondent No. 3 are not applicable to the facts of the present case and hence, are not being referred to herein. The counsel appearing for the State respondents has almost adopted the submissions of the counsel appearing for the respondent No. 3.

Thus, considering the rival contentions of the counsels for the parties, this court is of the view that the impugned order dated 24-03-2015 is not sustainable in law and is liable to be set aside and quashed. However, it is made clear that in

case an Assistant Engineer is required to be posted in MID - I who can look after the work of Executive Engineer, the senior most Assistant Engineer shall be allowed to be posted, unless there is any legal impediment.

10. In view of the above observations, the present writ petition is allowed and accordingly, the impugned order dated 24-03-2015 is set aside and quashed with no order as to costs.