

(2015) 03 GAU CK 0010

In the Gauhati High Court

Case No : Writ Petition(C) Nos. 4922/2013 and 2146, 2416, 3116, 3461, 4254 and 6569/2014

Matiur Rahman Laskar and Others

APPELLANT

Vs

State of Assam and Others

RESPONDENT

Date of Decision : 16-03-2015

Acts Referred:

Citation : (2015) 03 GAU CK 0010

Hon'ble Judges : Ujjal Bhuyan, J.

Bench : Single Bench

Advocate : B. Banerjee, Learned Senior Counsel, M.U. Mahmud, M. Nath, B. Ahmed, B. Talukdar and B.U. Laskar, Learned Counsels, for the Appellant; B. Goswami, Learned SC, Personnel Department and B. Gogoi, Learned SC, Finance Department, Advocates for the Respondent

Final Decision : Dismissed

Judgement

Ujjal Bhuyan, J.—Heard Mr. B. Banerjee, learned Senior Counsel, Mr. M.U. Mahmud, Mr. M. Nath, Dr. B. Ahmed, Mr. B. Talukdar and Mr. B.U. Laskar, learned counsel for the petitioners. Also heard Mr. B. Goswami, learned Standing Counsel, Personnel Department and Mr. B. Gogoi, learned Standing Counsel, Finance Department, Assam.

2. The subject matter of all the writ petitions being identical, those were heard together and are being disposed of by this common order.

3. Basic issue raised in all the writ petitions is the claim of the petitions for promotion from Grade-IV (Khalasi) to the post of Section Assistant, which is in Grade-III.

4. Since the subject matter is identical, it may not be necessary to refer in detail the facts in the individual cases. However, for proper adjudication, the essential facts in brief are narrated hereunder.

5. Two petitioners, namely, Matiur Rahman Laskar and Amdad Hussain Choudhury filed a writ petition being WP(C) No. 4922/2013 stating that they were engaged in the Water Resources Department on daily wage basis. Thereafter they were engaged as Work Charged Khalasi. Following a policy decision taken by the Govt., service of the petitioners along with other Work Charged Khalasi were regularized w.e.f. 22.07.2005, vide order dated 07.10.2005. Thus, their services were regularized as Khalasi in Grade-IV.

6. Petitioners applied before the Chief Engineer of the Department for promotion from Khalasi to Section Assistant. Thereafter, Executive Engineer, Water Resources Division, Hailakandi issued order dated 20.12.2008 promoting them to the post of Section Assistant.

7. With the grievance that they were denied salary of the post of Section Assistant, the two petitioners filed the said writ petition seeking a direction to the respondents to release the salary as Section Assistant w.e.f. the date of their joining the post of Section Assistant on promotion.

8. An affidavit has been filed on behalf of the Chief Engineer, Water Resources Department. Stand taken in the affidavit is that the two petitioners were initially engaged as Muster Roll workers in Hailakandi Water Resources Division. Later on, they were engaged as Work Charged Khalasi and thereafter, their services were regularized as per policy decision of the Govt. against personal posts created for the purpose of such regularization. Persons working against personal posts are not entitled to further promotion. Petitioners were erroneously promoted to the higher post of Section Assistant by the concerned Executive Engineer vide order dated 20.12.2008. Though steps were taken to obtain retention from the Finance Department, Govt. of Assam in the promoted post of Section Assistant, no such retention was granted as petitioners were regularized as Khalasis against personal posts. Personnel Department also did not agree to such promotion, as there is no policy to allow promotion to employees working against personal posts created for the purpose of regularization of Muster Roll/Work Charged employees. Ultimately, order dated 08.10.2012 was passed by the Executive Engineer reverting the petitioners back to the original post of Khalasi. Promotion order was cancelled. It is stated that only the regular Khalasis are entitled to promotion to the post of Section Assistant.

9. This led the two petitioners, Matiur Rahman Laskar and Amdad Hussain Choudhury to file the second writ petition i.e., WP(C) 4254/2014. In this writ petition, the two petitioners have challenged the legality and validity of the order dated 08.10.2012, passed by the Executive Engineer, Hailakandi Water Resources Division cancelling the promotion orders of the petitioners and reverting them back to their personal post of Khalasi.

10. Counter-affidavit has been filed on behalf of Chief Engineer. While reiterating the stand taken by the Department in the earlier writ petition i.e., WP(C) No. 4922/2013, it is further stated that Commissioner and Special Secretary to the

Govt. of Assam, Water Resources Department has issued an office order dated 25.11.2013 whereby, it is provided that 10% of the cadre strength of Section Assistant (Grade-III) is to be filled up by way of promotion from Grade-IV (Khalasi) in the manner as provided in the Assam Ministerial District Establishment Service Rules, 1967. In other words, 90% of the cadre strength of Section Assistant is to be filled up by way of direct recruitment and 10% by way of promotion from Grade-IV (Khalasi). The eligibility conditions for such promotion have been mentioned in the said order. It is, however, stipulated that persons holding personal post do not come within the ambit of the said order.

11. The other connected writ petitions have been filed challenging the legality and correctness of the said office order dated 25.11.2013 excluding Grade-IV Khalasis holding personal posts from promotion to Section Assistant (Grade-III). In addition, in WP(C) No. 3116/2014, an advertisement dated 30.06.2013, issued by the Executive Engineer, Majuli Water Resources Division, inviting applications for direct recruitment to consider nine vacancies in the post of Section Assistant has been put to challenge.

12. Contention of the petitioners is that such exclusion of Khalasis holding personal posts from further promotion to the next higher post of Section Assistant (Grade-III) is arbitrary, unreasonable and unjust. It is discriminatory as well because those Khalasis who are holding regular posts are entitled to the benefit of promotion, whereas, such benefit has been denied to Khalasis holding personal posts. It is also contended by Mr. M Nath, learned counsel that in Karimganj Water Resources Division one Khalasi holding personal post was promoted to the post of Section Assistant. Therefore, denial of promotion to the petitioners would not be justified. Petitioners further contend that they had put in long years of service, initially as Muster Roll worker and following their regularization, as Grade-IV Khalasi. Considering the long service rendered by them, they are entitled atleast to one promotion in their service career. Therefore, in the interest and fairness, Court should intervene in the matter and direct the respondents consider the case of the petitioners for promotion to Section Assistant (Grade-III). In case of the reversion order of the two petitioners in WP(C) No. 4922/2013 and 4254/2014, it is contended that such reversion was not preceded by any notice or hearing and, therefore, such reversion is illegal being in violation of the principles of natural justice.

13. Per contra, all the learned Standing Counsel submitted that considering the long engagement of the petitioners and others as Muster Roll workers and as Work Charged Khalasis, the Govt. of Assam took a sympathetic view and a policy decision was taken to regularize the service of such persons w.e.f. 22.07.2005. The service of the incumbents were regularized as Khalasi (Grade-IV), but their regularization was against personal posts. In other words, the posts would be personal to the incumbents and the moment they relinquished the posts, on whatever exigency, such as, superannuation, death etc., the personal posts would automatically stand abolished. Being holders of personal posts, petitioners

are not entitled to promotion and this has been rightly mentioned in the impugned order dated 25.11.2013. Therefore, the contentions advanced on behalf of the petitioners are untenable and are liable to be rejected.

14. Submissions made have been considered.

15. As already indicated at the outset, the point for consideration is whether Khalasis (Grade-IV) holding personal posts are entitled to promotion to the post of Section Assistant (Grade-III).

16. To appreciate the controversy in the light of the above issue, it would be apposite to briefly refer to the policy decision of the Govt.

17. It is seen from the documents placed on record that the Cabinet in its meeting held on 22.07.2005 decided to regularized the services of Work Charged/ Muster Roll workers of different State Govt. departments, who were prior to 01.04.1993 and were in continuous service without any interruption/break, irrespective of their length of service. Consequent upon the Cabinet decision, Finance Department gave concurrence on 22.08.2005 to the creation of 5829 numbers of different Work Charged Grade-IV posts and 25069 numbers of different Grade-IV posts w.e.f. 22.07.2005 for regularization of the services of 5892 Work Charged employees and 25069 numbers of Muster Roll workers. The Finance Department laid down certain guidelines for the purpose of regularization and it was clarified that such guidelines should be strictly adhered to. As per guideline No. 5, the posts created are personal to the respective Work Charged employees/Muster Roll workers and will be abolished as soon as the incumbents relinquished the posts in any manner.

18. Pursuant to the Finance Department concurrence dated 22.08.2005, the Water Resources Department issued consequential order dated 01.10.2005 sanctioning the allotted posts to the Department for the purpose of regularization of the Work Charged employees and Muster Roll workers. Thereafter, orders were issued by the concerned Executive Engineers wherein, it was clarified that the posts sanctioned are personal to the respective employees/workers holding the posts and would stand automatically abolished as soon as the incumbent relinquishes his/her post in any manner.

19. A number of writ petitions came to be filed before this Court by persons serving as Grade-IV (Khalasi) in the Water Resources Department, Govt. of Assam seeking promotion to the post of Section Assistant (Grade-III), the lead case being WP(C) No. 3818/2013 (Netralal Pandit and Ors. Vs. State of Assam and Ors.). Grievance expressed was that those petitioners were serving in Grade-IV post for a long time without any promotional avenue. Without considering such grievance, advertisements were issued in various divisions to fill up vacancies in the post of Section Assistant through direct recruitment which were impugned in the writ petitions. In the course of hearing of the writ petitions, it was brought to the notice of the Court that the Water Resources Department through its Commissioner and Special Secretary had issued an office order dated

25.11.2013 providing for promotional avenue for Grade-IV (Khalasi) to Grade-III (Section Assistant) to the extent of 10% of the cadre strength of Section Assistant. Eligibility criteria to be fulfilled for such promotion were mentioned in the office order. It was, however, clarified that persons holding personal posts would not be entitled to promotion. In view of the issuance of the aforesaid office order dated 25.11.2013, all the writ petitions were disposed of by a common order dated 03.03.2014 by directing the Secretary to the Govt. of Assam, Water Resources Department and Chief Engineer, Water Resources Department to ensure that the provisions of the office order dated 25.11.2013 are strictly followed. When a plea was raised that those Khalasis, who were holding personal posts have been debarred from promotion, it was observed that in the absence of any challenge, such grievance would not be considered. Liberty was granted to the persons holding personal posts who feel aggrieved by the office order dated 25.11.2013 to challenge the same in an appropriate proceeding.

20. Having noticed the above, the impugned office order dated 25.11.2013 may now be adverted to:-

"OFFICE ORDER

Dated Dispur, the 25th November, 2013

No. WR(E)144/2013/246 : The Governor of Assam is pleased to accept recommendations of the Committee constituted for earmarking percentage of vacancies in Grade-III (SA) to be filled up on promotion from Grade-IV (Khalasi) under Water Resources Department as follows:-

The percentage of quota for Grade-IV (Khalasi) employees for promotion to Grade-III (SA) is fixed at 10% of the cadre strength of SA i.e., 90% posts of Grade-III (SA) will be filled up by direct recruitment and 10% posts will be kept reserved for eligible Grade-IV (Khalasi) to be filled up by way of promotion in the manner as provided in "The Assam Ministerial District Establishment Service Rules, 1967" in respect of promotion of Grade-IV to Grade-III in District Level Offices.

The conditions for filling up of the 10% promotional posts of Grade-III (SA) from Grade-IV (Khalasi) will be as follows:-

- 1) Minimum 8 (eight) years of continuous service in respect of those Khalasis who are HSLC passed or equivalent at the time of entry in the Govt. Service or had procured the qualification with due permission from the appointing authority and 70% promotional posts are to be filled up by these incumbents.
- 2) Minimum 10 (ten) years of continuous service in respect of those Khalasis who have read upto Class-IX (ten) at the time of entry in the Govt. service or have procured the qualification with due permission from the appointing authority and 20% promotional posts are to be filled up by these incumbents.
- 3) Minimum 15 (fifteen) years of continuous service in respect of those Khalasis

who have read upto Class-VIII (eight) and 10% promotional posts are to be filled up by these incumbents.

However, the persons holding Personal Posts do not come under the ambit of this order.

This order will come into force with immediate effect until further order and cancels all other previous office orders related to promotion of Grade-IV (Khalasi) to Grade-III (SA) issued by the Department.

Sd/- (R.C. Sarma) Commissioner and Special Secretary to Govt. of Assam, Water Resources Department, Dispur, Guwahati-6."

21. From a perusal of the aforesaid office order dated 25.11.2013, it is seen that 90% of the posts in the cadre of Section Assistant is to be filled up by way of direct recruitment and 10% of the posts are to be filled up by way of promotion from amongst Grade-IV (Khalasi). The promotion is to be carried out in the manner as provided in the Assam Ministerial District Establishment Service Rules, 1967. The eligibility conditions for such promotion are mentioned in the impugned order. However, what is more relevant in the context of the lis involved in the present litigation is the exclusion of persons holding personal posts from such promotion.

22. Question is what do we understand by personal posts. The background which led to regularization of service of the petitioners as Grade-IV (Khalasi) against personal posts has already been noticed. Finance Department had made it clear, which has been reiterated by the administrative department that the regularization of service of the petitioners would be against personal posts and these posts would stand abolished the moment the incumbents relinquished their posts in any manner. This would mean that the posts held by the petitioners i.e., the personal posts are outside the cadre of Grade-IV (Khalasi). Therefore, personal posts would mean ex-cadre posts. In other words, petitioners are ex-cadre posts. They are not part of the cadre of Khalasi (Grade-IV). In service jurisprudence, promotion is necessarily from the feeder cadre to the higher cadre in the service, since respective cadres form part of the service. Unless one is encadred in the feeder cadre, he cannot claim promotion to the higher cadre. Since petitioners are holding ex-cadre posts and are not encadred, they are not entitled to promotion to the next higher cadre which is the cadre of Section Assistant. This was also a condition of their regularization. The petitioners having accepted their regularization with all the terms and conditions, including the aforesaid condition that they would be regularized against personal posts sanctioned only for the purpose of regularization and, therefore, would be holding personal posts, which decision has been followed by the administrative department, petitioners cannot now turn around and assail such decision as being arbitrary and discriminatory.

23. In the present case, the impugned decision as above, cannot be said to be arbitrary or unreasonable, it being a condition of regularization. Those holding

cadre post in the cadre of Khalasi and those holding ex-cadre post of Khalasi are not similarly situated. They cannot be treated alike for the purpose of promotion. Therefore, question of discrimination does not arise.

24. Regarding reversion of the two petitioners in WP(C) Nos. 4922/2013 and 4254/2014, while it is true that before reversion the two petitioners ought to have been put on notice, but at the same time it cannot also be overlooked that given the factual scenario, even if opportunity of hearing would be granted to those two petitioners, it would not have made any material difference to the final outcome of reversion. The two petitioners were not entitled to promotion to the post of Section Assistant and, therefore, they had to be reverted back. In such a case, even if compliance to the principles of natural justice is insisted upon, it would not make any material difference to the final outcome. Interference with the order of reversion on the ground of violation of the principles of natural justice will lead to revival of the order of promotion, which was an illegal order. Principles of natural justice cannot be pressed into service to revive and restore an illegality.

25. Coming to the other contention of Mr. Nath, learned counsel for the petitioners that since one similarly placed Khalasi holding personal post has been promoted to the post of Section Assistant in the Karimganj Division, therefore, there is no justification in denying similar benefit to the petitioners, it can only be said that right to equal treatment which is manifest in Article 14 is a positive right and cannot be applied negatively. Two wrongs will not make a right. Since the beneficiary is not before the Court and since there is no challenge to such promotion, Court would refrain from making any comment thereon, but it is always open to the administrative authority to rectify an anomalous situation. However, such rectification or correction can be done only in accordance with law.

26. Having regard to the discussions made above, this Court finds no merit in the writ petitions. Reliefs sought for cannot be acceded to. Accordingly, the writ petitions are dismissed. No costs.