
(2000) 03 GAU CK 0014
In the Gauhati High Court
Case No : Writ Appeal No. 87 of 1999

Mrinal Kanti Bhowmik (Dr)	Vs	APPELLANT
Ilalodhnee (Dr.) (Mrs.)		RESPONDENT

Date of Decision : 02-03-2000

Acts Referred:

All India Services (Confidential Roll) Rules, 1970 — Rule 5, 5(1), 5(2), 5(4), 5(5)
Constitution of India, 1950 — Article 226

Citation : (2000) 1 GLT 610

Hon'ble Judges : M.L. Singhal, J; H.K.K. Singh, J

Bench : Division Bench

Advocate : S. Deb, K.N. Bhattacharjee and S.B. Dutta, for the Appellant; U.B. Saha, S. Chakravorty, A.K. Bhowmik and P.K. Biswas, for the Respondent

Judgement

H.K.K. Singh, J.—This Writ Appeal is against the judgment dated 1.12.1999 passed by the learned Single Judge in Civil Rule No. 1 of 1991 by which the learned Single Judge partly allowed the prayer of the writ Petitioner and certain directions were given to the Respondents.

2. Mr. S. Deb, the learned senior counsel appearing for the Appellant has prayed for reconsidering certain observations and directions made by the learned Single Judge stating, inter alias, that those observations/decisions were beyond the scope of the power of the judicial review of the High Court under Article 226 of the Constitution of India.

3. Bereft of the details, short facts necessary for decision of the present appeal may be noted and for convenience the nomenclature of the parties in this judgment are used as were given in the original writ petition.

The writ Petitioner joined in Central Health Services as Civil Assistant Surgeon, Grade-I on 19.3.65 and was posted at Tripura. She was re-designated as General Duty Officer, Grade-II with effect from 20.2.67. The Respondent No. 3 (Appellant herein) also joined Central Health Services as Civil Assistant Surgeon, Grade-I on

4.2.66 and was re-designated as General Duty Officer, Grade-II with effect from 20.2.67. Tripura Health Services (hereinafter THS) was constituted by Tripura Health Services Rules, 1974 (hereinafter 1974 Rules) which came into force with effect from 18.5.74. Under 1974 Rules there are various Grades Viz. Grade-I to Grade-V. Under the provisions of 1974 Rules existing members of the State Health Department were absorbed on the commencement of the 1974 Rules against such duty post as may be considered suitable according to their qualifications and experiences as decided by the Selection Committee. There is a provision under 1974 Rules which prescribes that any member having lien to any other services under the Government of India or any other State Government shall not be so absorbed, unless he exercises option to come over to the THS and the option once exercised shall be final. As recommended by the Selection Committee the Petitioner and the Respondent No. 3 were absorbed in Grade-IV of the THS by an order dated 29.5.76 issued by the Government of Tripura and as per seniority list in respect of THS the Petitioner was found senior to Respondent No. 3. On 25.1.82 both the Petitioner and Respondent No. 3 were promoted to Grade-II of the THS on adhoc basis and subsequently their appointment was regularised with effect from 16.6.92 vide notification dated 11.4.83. The Respondent Nos. 4 and 5 are direct recruit to Grade-III of the THS and they were appointed with effect from 1.1.80 and as per seniority list of Grade-III of THS as on 31.11.86 circulated under Memo dated 23.12.86 of the Government of Tripura, the Respondent Nos. 4 and 5 are shown in 5th and 6th position and the Petitioner and Respondent No. 3 are shown in 12th and 13th position respectively. In the meantime it so happened that by a judgment and decree dated 25.11.87 passed in T.S. 49/79 (re-numbered as T.S. 100/86) by the Sub-Judge, West Tripura, Agartala, the Respondent No. 3 was declared to be entitled to be absorbed in Grade-II of the THS with effect from 18.5.74 and some ancillary reliefs were also prayed. The Respondent Nos. 4 and 5 filed an appeal being T.A. 1/88 and T.A. 5/88 against the aforesaid decision of the trial court which were dismissed by the judgment and decree dated 30.6.88 by the District Judge. Subsequently, the Respondent Nos. 4 and 5 filed an appeal against the aforesaid judgment being S.A. 166/88 before this Court. During the pendency of the aforesaid appeal, the present writ Petitioner apprehending that the Respondent No. 3 might be given seniority over her, made several representations not to give effect to the judgment and decree passed by the Civil Courts. Still by a notification dated 13.9.90 the Respondent No. 3 was promoted to the Grade-II of THS on adhoc basis and by another notification dated 30.9.90 the Respondent No. 4 was also promoted to Grade-II of the THS on adhoc basis. Thereafter, the Respondent No. 5 was also promoted to Grade-II of the THS by another notification dated 21.11.90 on ad-hoc basis. Being aggrieved, the Petitioner filed the aforesaid writ petition No. 1/99 praying, inter alia, for declaring the Petitioner to be entitled to be absorbed in Grade-III of the THS with effect from 18.5.74 ahead of Respondent No. 3 and for quashing the aforesaid orders of appointment of the Respondent Nos. 3, 4 and 5 to Grade-II of the THS. During the pendency of the writ petition a seniority list of Grade-III of THS as on

1.4.94 was published in which the Respondent No. 3 was shown senior to the Petitioner. Thereafter, on the basis of the recommendation of the Selection Committee held on 26.9.95, the Respondent Nos. 3 and 4 were promoted to the Grade-II of the THS with effect from 14.9.90 by a notification dated 27.11.95. By an amendment the Petitioner challenged the subsequent seniority list in which the Respondent No. 3 was shown senior to the Petitioner and also the proceedings of the Selection Committee meeting held on 26.9.95 and also the promotion of Respondent Nos. 3 and 4 to Grade-II of THS with effect from 14.9.90 on regular basis. Again, the Petitioner was also prayed for quashing the notification dated 21.1.97 by which the Respondent No. 3 has been promoted to Grade-I of THS on adhoc basis.

4. It may be noted that in the meantime, the aforesaid second appeal against the decree passed by the Sub-Judge which was affirmed by the learned District Judge was allowed and the suit filed by the Respondent No. 3 was dismissed by the judgment and order dated 1.12.99 i.e. on the same day on which the writ petition being C.R. 1/91 was disposed of by the same learned Single Judge.

5. The learned Single Judge while disposing of the Civil Rule passed the following directions which for convenience and also in view of the decision we propose to make are quoted below:

6. For the reasons stated above, while I am not inclined to quash the proceedings of the meeting of the Selection Committee held on 26.9.95 and its recommendations for promotion of Respondent Nos. 3 and 4 and the promotions of the said Respondents made to Grade-II of the Tripura Health Service on the basis of the said recommendations. I direct that the ACRs of the Petitioner for the years 1986 and 1987 be placed before the Selection committee for comparison of merit with ACRs of 1986 and 1987 of the Respondent Nos. 3 and 4 and in case the Selection Committee on such comparison finds the merit of the Petitioner to be better than that of either Respondent No. 3 or Respondent No. 4 or both, it will make its recommendations accordingly, for promotion of the Petitioner to Grade-II of the Tripura Health Service and when the said recommendations are accepted by the State Government such promotions of the Petitioner to Grade-II of the Tripura Health Service will be given retrospective effect from the date from which the Respondent Nos. 3 and 4 were promoted to Grade-II of the Tripura Health Service, i.e. from 14.9.90 for the purpose of her seniority in Grade-II of the Tripura Health Service and other notional benefits. But the Petitioner will not be given salary and allowances with retrospective effect prior to 1.8.91, i.e. the date with effect from which she was appointed to Grade-II of the Tripura Health Service on ad hoc basis by the notification dated 31.7.91 of the Government of Tripura, Health and Family Welfare Department. But I am not inclined to quash the notification dated 21.1.97 giving ad-hoc appointment to Respondent No. 3 to Grade-I of the Tripura Health Service as it is only an adhoc appointment and instead direct that the State Respondents will comply with the directions for re-consideration of the case of the Petitioner for

promotion to Grade-II of the Tripura Health Service in accordance with this judgment within 2 months from the date of receipt of a certified copy of this judgment from the Petitioner by the Principal Secretary to the Government of Tripura, Health and Family Welfare Department and will soon thereafter take up the regular promotion of officers in Grade-II of the Tripura Health Service to Grade-I of the service in accordance with the rules and law.

6. It is admitted by the learned Counsel of both sides that the Selection Committee which met on 26.9.95 for the purpose of this case is for promotion to Grade-II post of THS and in respect of the vacancy for the year 1988. It is also admitted that there were 2 posts unreserved and 2 other reserved posts available by then. It is also admitted that the promotion on the basis of Selection of merit with due regard to the seniority. It is also not disputed that the selection is to be made as per the procedure prescribed in Appendix 29 of the Civil Service Regulation Volume-III. As noted above, in the aforesaid directions of the learned Single Judge the selection and appointment of the Respondent Nos. 3 and 4 to Grade-II of the THS and also subsequent promotion of Respondent No. 3 to Grade-I of the THS on ad-hoc basis have not been quashed.

7. Mr. S. Deb, the learned Counsel for the Respondent No. 3 (Appellant herein) has submitted that the procedure and method for selection is prescribed under the 1974 Rules and the aforesaid Appendix 29 of CSR. According to learned Counsel the direction of the learned Single Judge for considering promotion of the writ Petitioner on the basis of comparison of merit by the Selection Committee confining to the ACRs of 1986 and 1987 only is not contemplated as it is against the norms and procedure given in Paragraph VI. 1 and 2 of the aforesaid Appendix 29 of the CSR Vol-III. According to the learned Counsel the Selection Committee should have been given a free-hand in this regard.

8. Mr. P.K. Biswas, the learned Counsel appearing on behalf of Respondent No. 4 has also submitted in the similar tune that the Selection Committee should have not been directed to confine only in respect of the ACRs of the aforesaid 2 years i.e. 1986 and 1987.

9. Mr. A.K. Bhowmik, the learned Sr. counsel for the writ Petitioner supporting the decision of the learned Single Judge has submitted that the Petitioner had been senior to Respondent No. 3 at all material time, when they were serving as members of Central Health Service and at the time of absorption in Grade-IV of the Tripura Health Service and also at the time of regular promotion to Grade-III of the Tripura Health Service. According to Mr. Bhowmik, only dispute arose when the decree was passed by the learned Subordinate Judge which was confirmed by the learned District Judge in which the Petitioner was ordered to be absorbed in Grade-III of the Tripura Health Service and the selection for promotion to the post of Grade-II was held while the Second Appeal being No. S.A. 28 of 1998 was pending before this Court and the learned Counsel has submitted that the direction of the learned Single Judge for comparing the merit of the Petitioner with Respondent Nos. 3 and 4 on the basis of A.C.Rs. for the year 1986-87 is

proper though me learned Counsel has submitted that the writ. Petitioner has no grievance against the decision of the learned Single Judge with regard to the protection of the appointment of the Respondent Nos. 3 and 4 to Grade-II of Tripura Health Service and subsequent promotion of Respondent No. 3 to Grade-I on ad hoc basis. Accordingly the Petitioner did not file any appeal or cross objection in respect to this decision for protecting the promotion of Respondent Nos. 3 and 4.

10. It may now be noted that consequent upon the suit filed by the Respondent No. 3 as per the judgment and decree passed by this Court in Second Appeal No. 4/90 renumbered as S.A. 28/98 as noted above, a fresh Memo dated 19.1.2000 has been issued by the Government of Tripura showing the revised final seniority list in respect of officers in the Grade-in of the THS where the name of Respondent No. 4 appears at Sl. No. 4, name of Petitioner appears at Sl. No. 8 and the name of Respondent No. 3 appears at Sl. No. 9.

11. Learned Government Advocate has reiterated the stand taken by the learned Advocate General before the learned Single Judge that the Government will comply with any direction given by the Court.

12. The procedure to be observed by the Selection Committee is given in paragraph VI. 1 of Appendix 29 of CSR Vol. III and the selection method is given at paragraph VI. 2 of Appendix 29 of CSR Vol. III. For convenience the same are reproduced below:

Appendix 29, Paragraph VI, 1 & 2 of CSR. Vol. III:

VI.1. Each Departmental Promotion Committee should decide its own method and procedure for objective assessment of the suitability of the candidates. Ordinarily a personal interview should not be regarded as necessary and the panel for promotion/confirmation may be drawn-up on the basis of assessment of the record of work and conduct of the officers concerned.

2. Selection Method, Where promotions are to be made by selection method as prescribed in the Recruitment Rules, the field of choice viz. the number of officers to be considered should ordinarily extend to 5 or 6 times the number of vacancies expected to be filled within a year. The officers in the field of selection, excluding those considered unfit for promotion by Departmental Promotion Committee, should be classified by the Departmental Promotion Committee as "Outstanding", "Very Good" and "Good" on the basis of their merit, as assessed by the D.P.C. after examination of their respective records of service. In other words it is entirely left to the DPC to make its own classification of the officers being considered by them for promotion to selection posts, irrespective of the grading that may be shown in the CRs. The panel should, thereafter, be drawn-up to the extent necessary by placing the names of the "Outstanding Officers" first, followed by the officers categorised as "Very Good" and followed by the officers belonging to any "Very Good" and followed by the officers categorised as "Good". The inter-se-seniority of officers belonging to any one category would be

the same as their seniority in the lower grade.

13. The provisions as quoted above clearly indicate that it is left to the Selection Committee to decide each on method and procedure for objective assessment of the suitability of the candidates and it has been left to the Selection Committee to make its own classification on the basis of the respective records of service and confidential report irrespective of the grading shown in the ACRs.

14. Thus, in respect of the selection we are of the considered view that the DPC is given a free hand in the matter of making choice within the ambit of the aforesaid provisions as quoted above and also the provisions of 1974 Rules.

15. The All India Services (Confidential) Rules 1970 (hereinafter 1970 Rules) which is found at Appendix 20 of CSR Volume-in is also applicable in the present case, the same prescribes the manner of writing of the confidential reports of the officers. From a reading of Sub-clauses (4) and (5) of Rule 5 of the 1970 Rules it is clear that no authority can write the ACR of any person as Reporting authority or Reviewing authority or accepting authority unless the authority has seen the performance of the member of the service for at least 3 months during the period for which confidential report is to be written. For convenience Sub-rules 4, 5 and 6 are reproduced below:

5.(1) * * *

(2) * * *

(3) * * *

(4) Where the reporting authority has not seen and the reviewing authority has seen, the performance of a member of the service for atleast three months during the period for which the confidential report is to be written, the confidential report of any such member for any such period shall be written by the reviewing authority, and where, both the reporting authority and the reviewing authority have not seen, and the accepting authority has seen, the performance as aforesaid of any such member during any such period, the confidential report shall be written by the accepting authority.

(5) Where the reporting authority, the reviewing authority and the accepting authority have not seen the performance of a member of the service for at least three months during the period for which the report is to be written, an entry to that effect shall be made in confidential report for any such period by the Government.

(6) Notwithstanding anything contained in Sub-rules (1), (2), (4) and (5) it shall not be competent for the reporting authority, the reviewing authority or the accepting authority, as the case may be, to write a confidential report:

(a) where the authority writing the confidential report is a Government servant, after he retires from service; and

(b) in other cases, after the demits office.

All the forms are also prescribed in the 1970 Rules indicating the detailed particulars to be filled up by the different authorities.

16. The ACRs of the officers were produced before the Court. We found ACRs of all the three officers for the years 1986 and 1987. But no ACR was available for the Petitioner in respect of the years 1983, 1984 and 1985 and mat the ACRs for the years 1983, 1984 were not available in the case of Respondent No. 4. As such learned Single Judge has given a direction for considering the ACRs of the concerned officers in respect of only 1986 and 1987 as ACRs of all the persons available of these two years.

17. The two certificates issued by the Director Health and counter signed by the Commissioner Health which are found in the ACRs of Petitioner and Respondent No. 4 cannot be taken as ACRs for confidential roll within the purview of the aforesaid 1970 Rules. In this regard the learned Counsel for the Respondent No. 4 has relied upon the decision of Delhi High Court in the case of Union of India, Appellant v. Mr. Ranjit Singh Grewal and Ors. Respondents, reported in 7950 (3) SLR 256 and in reported case at para 20 it has been held that no authority can write ACR unless he has seen the performance of the member of the service for not less than 3 months during the period for which the report is to be made.

18. In the additional affidavit filed by the writ Petitioner on 3.9.99 it has been categorically testified that the Director of Health who has given the certificate became the Director only in the year 1995 and the Petitioner never worked under him. Again, Anil Mishra, Commissioner who counter signed on the certificate was never a Commissioner during the period from 1983 to 85.

19. Considering the aforesaid provisions contained in 1970 Rules and also facts in the affidavits which are not controverted, we are of the view that these two certificates which are kept in the file of confidential rolls of Petitioner and Respondent No. 4 cannot he acted as ACR within the meaning of the aforesaid 1970 Rules.

20. While hearing an appeal against a judgment and order passed by the learned Single Judge in exercise of his jurisdiction under Article 226 of the Constitution of India the judgment passed by the learned Single Judge is generally not disturbed unless there is a strong and compelling reason for doing the same. In our present case, as discussed above the method of selection, manner of selection and procedure of selection are all prescribed and indicated in the 1974 Rules, Appendix 29 of CSR Vol. III and 1970 Rules and our considered view is that it should be left to the Selection Committee who has been given a free hand by the aforesaid Appendix 29 of CSR Vol. III and Selection Committee has to decide according to what it things fit within the ambit of aforesaid provision of Appendix 29 hereinbefore. While exercising the power of judicial review we are of the considered view that the Court should not direct the Selection Committee to adopt a specific procedure which is not contemplated by Rules or instructions as

the case may be. Thus, with due respect, we differ from the learned Single Judge regarding the direction for confining the consideration only to the ACRs for the years 1986 and 1987. In our considered view the Selection Committee shall consider any other aspects permissible under the aforesaid provisions of Appendix 29 quoted above.

21. Accordingly, we modify the direction of the learned Single Judge regarding comparison of merit of ACRs of the Petitioner which that of Respondent Nos. 3 and 4 and it is directed that the Selection Committee shall consider and make classification and gradation as per the provisions of the aforesaid Appendix 29 of CSR Vol. III as quoted above.

22. Except for the modification as indicated above, we respectively agree with the affirm the decision of the learned Single Judge on all other points. Thus, all the directions of the learned Single Judge as modified be carried out within the time fixed, which will commence from the date of receipt of copy of this judgment and order.

23. In the result, the appeal is partly allowed only to the extent as indicated above. No costs.