
(1995) 12 GAU CK 0008
In the Gauhati High Court
Case No : Civil Rule No. 5181 of 1994

Naresh Chandra Goswami

APPELLANT

Vs

Gauhati Municipal Corporation and Ors.

RESPONDENT

Date of Decision : 14-12-1995

Acts Referred:

Gauhati Municipal Corporation Act, 1971 — Section 425(2)(b), 425(2)(b), 72(1), 72(1)

Citation : (1996) 2 GLJ 44 : (1996) 1 GLT 319

Hon'ble Judges : D.N.Baruah, J

Bench : Single Bench

Advocate : B.P.Todi, D.N.Choudhary, A.B.Choudhary, N.Dutta, H.N.Sharma,
Advocates appearing for Parties

Judgement

1. In this application under Article 226 of the Constitution, petitioner has challenged the Annexure IX order dated 8th December, 1994 issued by the Commissioner, Guwahati Municipal Corporation (the 1st respondent) promoting the respondent Nos.4 and 5 to the posts of Superintending Engineers with effect from 1.12.94. Respondent No.4 was appointed against the vacant post in which one P. Chaliha was the previous incumbent and respondent No.5 was appointed against the post created vide Annexure VIII order dated 8.12.94. Petitioner has also prayed for issuance of appropriate writ or direction for setting aside the Annexure IX order and to promote him to the post of Superintending Engineer.

2. Briefly the facts, as stated in the petition, are that the petitioner obtained Diploma in Civil Engineering from Assam Engineering Institute, Chandmari under the State Council for Technical Education, Govt of Assam in the year 1960. Thereafter, he was appointed Overseer Grade I in the Public Works Department, Assam. On being appointed he discharged his duties in the said capacity till June 1961. Petitioner was also appointed Grade I Overseer by the Gauhati Municipal Board (as then was it) with effect from 15.6.61 and he joined duties accordingly. He was promoted to the post of Assistant Engineer by the Board wef 20.4.66. In 1969 the 1 st respondent was established as pci provisions of Gauhati Municipal

Corporation Act, 1969 and the petitioner became an employee under 1st respondent. The Corporation promoted the petitioner to the rank of Assistant Executive Engineer vide Annexure I order dated 10.2.77. By Annexure II order dated 12.4.78 the petitioner was promoted to the rank of Executive Engineer and his service was confirmed by Annexure III order dated 4.8.82 issued by the Commissioner of the Corporation.

3. The volume of the work in the Civil Engineering Wing of the Corporation, had increased because of new construction of roads, bye lanes, culverts, bridges, drains etc. The Commissioner, Gauhati Municipal Corporation by Annexure IV letter dated 25.2.85 wrote to the Secretary to the Govt of Assam, Municipal Administration Department, Guwahati recommending promotion of the petitioner to the rank of Superintending Engineer, however, nothing was done. Petitioner also made representation for his promotion to the post of Superintending Engineer by Annexure V.

4. In 1985 Sri RK Deka, Senior most Executive Engineer was promoted to the rank of Superintending Engineer on the basis of his seniority. At that time, there were four Executive Engineers, viz RK Deka, M. Ghosh, the petitioner and BK Deka. The other three Executive Engineers were not called for any interview or selectioa and the promotion was only on the basis of seniority. According to the petitioner, seniority was only the criterion for promotion. The Corporation has not framed any service rules for its employees regulating their promotion and other condition of service. By Annexure VI letter dated 28.2.92 the Corporation again wrote to the Government enclosing the representation of the petitioner. In the said letter it had mentioned that the petitioner was senior most amongst all Executive Engineers. However, at that time there was no vacant post of Superintending Engineer. The 4th respondent came to the Corporation on deputation as Assistant Engineer from Public Works Department of Assam after the constitution of the Corporation. He was sent back to his parent department in the year 1982 and accordingly He joined in his original post of Assistant Engineer (Mechanical). Again he came to the Corporation on deputation in 1983 and promoted to the post of Executive Engineer by the Corporation in 1986.

5. RK Deka, who became the Chief Engineer of 1 st respondent retired from service on 28.2.94. On his retirement, it became necessary to promote an Executive Engineer to the rank of Superintending Engineer. According to the petitioner he being the senior most Executive Engineer having experience of 16 years in that capacity has a legitimate expectation for promotion to the post of Superintending Engineer. According to him his service was unblemished and there was no adverse remarks against him. The post of Superintending Engineer should be filled up only on the recommendation of Public Service Commission, however, the Joint Commissioner of 1st respondent by Annexure VI (A) letter dated 21.4.94 directed the Executive Engineer including the petitioner to appear before a Selection Committee on 25.4.94 for selecting the candidates for promotion to the post of Superintending Engineer with all testimonials and other

documents. The Additional Commissioner of the 1st respondent was the Chairman and the Additional Chief Engineer, Water Works, GMC, The Accounts Adviser and the Chief Audit and Accounts Officer were the other three members of the said Selection Committee. No prescribed procedure was adopted. The Selection Committee only considered the testimonials and certificates for the purpose of promotion. On the other hand, RK Deka the then Executive Engineer was promoted to the post of Superintending Engineer only on the basis of the seniority. If that criterion is taken into consideration the petitioner being the senior most Executive Engineer was entitled to be promoted to the post of Superintending Engineer. In fact, after the retirement of RK Deka the petitioner used to look after the daytoday affairs and functions of the Chief Engineer of the Corporation.

6. In view of the enormous increased work load, a new post of Superintending Engineer was created under section 69 of the Gauhati Municipal Corporation Act, 1971 by Annexure VIII order dated 8.12.94. Though the petitioner was expecting promotion, by Annexure IX order dated 8.12.94 the respondent Nos.4 and 5 had been promoted to the rank of Superintending Engineers ignoring the claim of the petitioner. According to the petitioner he was overlooked without any reasonable ground. The criteria for promotion to the post of Superintending Engineer was given a complete go bye while selecting the respondent Nos.4 and 5 to the post of Superintending Engineers, therefore, the appointment made by Annexure IX is illegal, arbitrary and contrary to the established principles of law. No reason had been assigned while overlooking the case of the petitioner. The respondent Nos.4 and 5 being juniors to the petitioner and there was nothing against the petitioner, the promotion of respondent Nos.4 and 5 was illegal and violative of Article 14 of the Constitution.

7. Petitioner further states that the constitution of the Selection Committee for selecting the candidates for promotion to the post of Superintending Engineer was illegal, arbitrary and without any authority of law and the recommendation of the said Committee cannot be binding upon the Corporation. Hence the present petition.

8. Respondent Nos. 1 and 2 filed an affidavit in opposition, where the respondents have denied the averments made by the petitioner. These respondents have conceded that earlier promotion to the post of Superintending Engineer had been given on the basis of seniority, however, that would not debar the Corporation from adopting a different procedure for promotion to the post of Superintending Engineer. The petitioner as a matter of right could not claim promotion to the post of Superintending Engineer and it was for the Corporation to decide whom should be promoted. According to these respondents though the 4th respondent was a Mechanical Engineer, he had been discharging the duties of Executive Engineer with ability and satisfaction. There was no bar in appointing the petitioner to the post of Superintending Engineer. They have further stated that during the first part of 1994, some posts of Engineers, viz Executive Engineers,

Superintending Engineers and Additional Chief Engineers were lying vacant and for filling up the posts from the existing staff a Selection Committee was constituted. On 25.4.94 five candidates including the petitioner appeared before this Selection Committee. The Committee assessed the seniority, past record, present performance and also took interview. For seniority column 5 marks were awarded for each block of 6 years of service to the candidate. After selection the Corporation appointed respondent No.4 against the vacant post held by PD Chaliha, who retired from service. Similarly the respondent No.5 was also appointed and promoted to the post of Superintending Engineer against the newly created post wef 1.12.94. These respondents have also stated that in the instant case the question of appointing on the recommendation of Public Service Commission did not arise.

9.1 heard Mr. DN Chowdhury, learned counsel for the petitioner, Mr. AB Choudhury, learned counsel for the respondent Nos. 1 and 2, Dr. BP Todi, learned Government Advocate for the respondent No.3 and Mr. N. Dutta, learned counsel for the respondent Nos.4 and 5.

10. Mr. DN Chowdhury submitted that there being no service rules the Corporation on earlier occasion promoted Executive Engineers to the post of Superintending Engineer solely on the basis of seniority and, therefore, the Corporation had no right to change the accepted norms for promotion in the case of the petitioner. Therefore, the promotion given to the respondent Nos. 4 and 5 was illegal, arbitrary and contrary to the professed norms. Hence, the Annexure IX order dated 8.12.94 was liable to be struck down. The Corporation having recommended the case of the petitioner, for promotion to the post of Superintending Engineer, there was no reason why the petitioner should be overlooked. Moreso, the respondent No.4 was only a Mechanical Engineer and came to the Corporation on deputation and was promoted to the post of Executive Engineer only after the petitioner became the Executive Engineer. Mr. Chowdhury further submitted that as per section 72 (1) of the Gauhati Municipal Corporation Act all the appointments to the post of Corporation carrying a salary not below Rs. 1,0007 per month should be made on the recommendation of the Assam Public Service Commission. The post of Superintending Engineer of the Corporation, admittedly, above Rs. 1,000/ per month, therefore, the promotion to the said post without recommendation of the Assam Public Service Commission was illegal and contrary to the law. Hence the impugned order of promotion was liable to be set aside. Further, the constitution of the Selection Committee was also not in accordance with law, therefore, the said Committee had no authority for making any selection for promotion to the post of Superintending Engineer. Besides, except looking into the certificates and other testimonials no other procedure was adopted for selection of candidates for promotion to the post of Superintending Engineer. The Assam Public Service Commission being the authority as per law ought to have been made selection. On earlier occasion, when RK Deka was promoted to the post of Superintending

Engineer no Selection Committee was constituted and he was promoted solely on the basis of seniority. This established norms could be changed only by the proper authority after making service rules. There being no reasonable ground or reasons for overlooking the petitioner to promote to the post of Superintending Engineer, the promotion given to the respondent Nos. 4 and 5, who were much juniors to the petitioner, was illegal! arbitrary and without jurisdiction.

11. Mr. N. Dutta, learned counsel appearing on behalf of the respondent Nos.4 and 5, on the otherhand supported the action of the respondent Corporation. According to him, at the relevant time the Corporation was under supersession, therefore, the person or persons appointed would exercise and perform the powers and duties of the Corporation and should be deemed to be the Corporation for the purpose and such person or persons shall comply with such direction as may be given to him or them, from time to time, for carrying out for the purpose of this Act. In the instant case, according to Mr. Dutta, as the Corporation was under supersession, the officer actually exercised the power of the Corporation, therefore, there was nothing wrong in changing the policy.

12. Mr. AB Choudhury, learned counsel appearing on behalf of the respondent Nos. 1 and 2 supported the impugned order. Mr. Choudhury tried to justify the action of the Corporation by saying that though reason was not disclosed in the impugned order, however, it was disclosed in the affidavit in opposition filed by the Corporation and such disclosure is permissible.

13. On the rival contentions of the parties the question falls for determination is whether the impugned Annexure IX order dated 8.12.94 is justified and can sustain in law.

The admitted position is that the petitioner was the senior most Executive Engineer of the Corporation. RK Deka was senior to the petitioner and he was promoted to the rank of Superintending Engineer being senior most Executive Engineer and ultimately he retired as Chief Engineer. At the time of promotion of RK Deka no Selection Committee was constituted and seniority was the only criterion for promotion. No service rule was framed, however, that norms was changed by a circular issued on 8.3.94. During the relevant period the Board was under supersession and an Executive Officer was appointed for the purpose of discharging the duties of the Corporation. Under section 425 of the Act, when the Corporation is under supersession person or persons as the Government may appoint in that behalf, shall, so long as the supersession of the Corporation lasts, exercise and perform, so far as may be, the powers and duties of the Corporation and shall be deemed to be the Corporation for the purpose, and such person or persons shall comply with such direction as may be given to him or them by the Government, from time to time, for carrying out the purpose of this Act. But the rule making power is vested with the Government and in the absence of any rule the norms followed earlier should be adhered to, however, the Government can change the policy Sri MGVK Bhanu, IAS, was the Commissioner of the Corporation. By order dated 8.3.94 the Commissioner constituted a Selection

Committee to examine the promotion and appointment cases for the employees of the Corporation with Additional Commissioner as Chairman, Joint Commissioner as Member Secretary, Account Adviser, CAAO and the Additional Chief Engineer, W/W as members. This procedure was adopted by the Commissioner, which was not prevalent prior to that. As mentioned above, RK Deka was promoted to the post of Superintending Engineer solely on the basis of seniority". By the said order dated 8.3.94 this professed norms of promotion had been changed. At the time of constitution of the committee, Sri MGVK Bhanu was not appointed as the Administrator, therefore, at that time he was discharging his duties as an officer and not a person appointed by the Government to exercise and perform the duties of the Corporation under section 425 (2) (b) of the Act. Sri Bhanu was appointed only on 10.5.94 by notification No.GDD.74/94/Pt/6 issued by the Secretary to the Government of Assam, Guwahati Development Department, therefore, Sri Bhanu did not exercise the power under subsection 2 (b) of section 425 of the Act, and accordingly, the Selection Committee was not constituted by an officer within the meaning of section 425 (2) (b) of the Act. It will appear that it is the Government or the Corporation may take up a decision in respect of change of giving promotion. Therefore, the constitution of the Selection Committee and changing the procedure followed for giving promotion is not in accordance with the provisions of the Act.

14. It is a well established principle of law that when a particular policy for promotion is adopted and in case of change of an accepted policy is made by the competent authority it is always advisable to adopt the policy or change the existing policy only after giving adequate publicity by way of public notice, so that person interested may make proper representation for consideration of their view points. The established policy of the Corporation so far promotion to the rank of Superintending Engineer was solely on the basis of seniority. The petitioner being the senior most Executive Engineer of the Corporation definitely had a legitimate expectation to get his promotion on the basis of the professed norms.

15. The Supreme Court in *Navajyoti Coop Group Housing Society vs. Union of India*, AIR 1993 SC 155, while dealing with a matter relating to registration of a society held that normally when a particular policy is followed persons interested may have a legitimate expectation to get the benefit of the said policy. The existence of legitimate expectation may have a number of different consequences and one such consequence was that the authority ought not to act to defeat the legitimate expectation without some overriding reason of public policy to justify its doing so. In a case of legitimate expectation if the authority proposes to defeat a person's legitimate expectation it should afford him an opportunity to make representations in the matter. The Supreme Court in the said decision agreed to a decision of the House of Lords in *Council of Civil Service Unions vs. Minister for Civil Service*, reported in (1984) 3 All ER 935, wherein it was held that an aggrieved person was entitled to judicial review if he could show that a decision of the public authority affected him of some benefit or

advantage which in the past he had been permitted to enjoy and which he legitimately expected to be permitted to continue to enjoy either until he was given reasons for withdrawal of such benefit and the opportunity to comment on such reasons. The Supreme Court further observed thus :

"It may be indicated here that the doctrine of legitimate expectation" imposes in essence a duty on public authority to act fairly by taking into consideration all relevant factors relating to such "legitimate expectation". Within the conspectus of fair dealing in case of legitimate expectation", the reasonable opportunities to make representation by .the parties likely to be affected by any change of consistent past policy, come in."

16. In the present case, the earlier policy of giving promotion had been changed and because of that the right of the petitioner to get promotion on the basis of seniority was frustrated. The petitioner legitimately expected that he being the senior would get promotion on the basis of seniority and had a legitimate expectation to get promotion on the basis of such policy. When the earlier procedure of selection was changed it was expected that the Corporation would have given notice to parties interested to enable him/them to make representation and also an opportunity to persue the authority not to change the existing policy.

Therefore, even if we assume that the policy was changed by the competent authority no opportunity was given, and therefore, it cannot be said that the procedure adopted for promotion by changing the existing policy can be justified. Moreover, the existing policy was changed by Sri Bhanu, the Commissioner of the Corporation, as he then was, and as a Commissioner had no authority to change the policy because it is only the Corporation alone could change the policy. He was appointed as Administrator subsequent to that as per provisions of section 425 (2) (b) of the Act. Before Sri Bhanu became the Administrator, the Selection Committee was constituted, interview was held and selection was made. Therefore, it cannot be said that such selection was valid and legal, which was made by changing the existing policy.

17. The other ground of attack of learned counsel for the petitioner was that promotion was given without recommendation of the Assam Public Service Commission. However, subsection (5) of section 72 speaks that consultation with the Public Service Commission may not be necessary where a vacancy in a post is not likely to exceed four months or if the post is created for a temporary period not likely to exceed six months. Admittedly, these posts are for a longer period and one post is a newly created and another one is an existing post. From the reading of section 72 of the Act, it is abundantly clear that consultation with the Public Service Commission is necessary. However, in the present case such consultation was not done. In view of the above, the action of respondentCorporation giving promotion to respondent Nos.4 and 5 ignoring the provisions\\ of Act and overlooking the case of the petitioner cannot sustain. Accordingly, I set aside the order of appointment dated 8th December, 1994

issued by the Commissioner, Guwahati Municipal Corporation, Guwahati and direct the respondent Corporation to select person strictly in accordance with the provisions of law and the observations made hereinabove.

In the result, the petition is disposed of. Considering the entire facts and circumstances of the case, I make no order as to costs.