
(2009) 07 GAU CK 0010
In the Gauhati High Court
Case No : Writ Petition (C) No. 854 of 2008

Neeraj Bharali

APPELLANT

Vs

State of Assam and Another

RESPONDENT

Date of Decision : 02-07-2009

Acts Referred:

Assam Services (Confidential Rolls) Rules, 1990 — Rule 10, 13

Citation : (2009) 5 GLT 260

Hon'ble Judges : Amitava Roy, J

Bench : Single Bench

Advocate : A.K. Bhattacharjee and S. Chamaria, for the Appellant; B.J. Ghosh, for the Respondent

Judgement

Amitava Roy, J.—The Petitioner presently serving as Sr. Inspector of Factories under the Labour and Employment Department of the Government of Assam is before this Court seeking an appropriate writ directing his promotion to the post of Additional Chief Inspector of Factories, Labour and Employment, Assam, which he perceives is due to him in terms of the judgment and order dated 9.7.2007 passed by this Court in WP (C) 5037/2004.

2. I have heard Mr. A.K. Bhattacharjee, Sr. Advocate, assisted by Mr. S. Chamaria, Advocate for the Petitioner and Mr. B.J. Ghosh, learned State Counsel for the Respondents.

3. The pleaded assertions to adequately appreciate the rival submissions would first be essential to be scripted. According to the Petitioner, he joined as the Inspector of Factories in the year 1980 and was promoted as Sr. Inspector of Factories on 13.10.1999. Projecting his grievance that not only his promotion as Sr. Inspector of Factories which was otherwise due in the year 1996 had been delayed and that though he was due to be elevated as the Additional Chief Inspector of Factories in the year 2000, he was unfairly denied the same, he had approached this Court earlier with WP (C) 5037/2004 for redress. This proceeding was disposed of on 19.7.2007 with a direction to the Respondents to

consider his case along with that of the private Respondents involved therein and other eligible incumbents for promotion to the post of Additional Chief Inspector of Factories in accordance with the Recruitment Rules. A time frame of three months was prescribed by this Court to complete the exercise as ordered.

4. The Petitioner has imputed that though he duly placed a copy of the aforementioned order before the concerned authorities, nothing materialised in terms thereof. On necessary enquiries being made by him, he thereafter came to learn that meanwhile on 27.2.2008, the issue of promotion of eligible Inspector of Factories had been discussed by the Departmental Selection Board and that though his name for the post of Additional Chief Inspector of Factories was not recommended those of two officers junior to him i.e. Shri C. Purakayastha and Shri G.C. Borah had been selected therefor. According to him, for the third post of Additional Chief Inspector of Factories, one Shri Samiran Das, also an officer junior to him has been identified by denying his preferential right. The Petitioner has also alleged bias against two members of the Departmental Promotion Committee namely Mr. K.K. Mittal and Mr. C.R. Deka against whom Contempt Case (C) 9/2008 had been instituted by him asserting deliberate non-compliance of the directions of this Court contained in the judgment and order dated 19.7.2007 passed in WP (C) 5037/2004. The Petitioner has insisted that as neither anything adverse to him had been indicated by the Respondents in course of the adjudication of the earlier writ proceeding nor any material bearing on his unsatisfactory performance had been communicated to him thereafter and prior to the date of the meeting of the Departmental Promotion Committee i.e. 27.2.2008, denial of his promotion is unfair, unjust and discriminatory.

5. The Respondents in their affidavit have denied the charge of bias and arbitrary deprivation of promotion of the Petitioner on 14.10.1996 to the post of Joint Inspector of Factories. As a departmental proceeding was then pending against the Petitioner, the Selection Committee's recommendation qua him was kept in a sealed cover. However, the above recommendation could not be given effect to in view of C.R. No. 1458/97, Shri Chittaranjan Patowari v. State of Assam and Ors. which was finally disposed of on 12.11.1998. While contending that the Petitioner was not eligible for promotion to the post of Additional Chief Inspector of Factories in the year 2000 for not having five years service in the post of Sr. Inspector of Factories as prescribed under the Assam Factories Service Rule, 1990 (hereafter referred to as the Rules), the answering Respondents have averred that his case along with others was duly placed before the Departmental Selection Board in deference to the order dated 19.7.2007 passed in WP (C) 5037/2004 but he was not found suitable for promotion. He, however, was confirmed as Sr. Inspector of Factories on 20.2.2008.

6. The answering Respondents have stated that the case of the Petitioner for promotion to the post of Additional Chief Inspector of Factories could not be considered within the period fixed by the Court for non-finalisation of the process relating to his relevant Annual Confidential Reports, which contained adverse

remarks. While confirming that in the meeting held on 27.2.2008, the Departmental Selection Board had recommended Shri G.C. Bora and C. Purkayastha for promotion to the two posts of Additional Chief Inspector of Factories, the Respondents have averred that the third vacancy would be filled up in due course as per the existing Rules. They have denied that the pendency of the Contempt Case (C) 9/2008 has any bearing on the evaluation of the Petitioner vis-a-vis the post of Additional Chief Inspector of Factories. The Respondents have indicated about the existence of adverse remarks against the Petitioner in his Annual Confidential Report for the years 2002-03 and 2005-06 and the communication thereof to him. According to them, on representations being submitted by the Petitioner, some of such adverse remarks have been expunged as well. They have reiterated that though his case in terms of the judgment and order dated 19.7.2007 passed by this Court in WP (C) 5037/2009 has been duly considered in terms of the Rules along with others similarly situated, he was not recommended for not having been found suitable.

7. In his affidavit in reply, the Petitioner in substance while reiterating his averments in the writ petition has stated that the adverse remarks recorded in his Annual Confidential Report for the period 2002-03 and 2005-06 were communicated to him only on 19.7.2007 in response where to he submitted his representation on 20.4.2007 for the excision thereof. He however admitted that by the letter dated 16.11.2007, he was intimated that some of the adverse remarks as referred to therein for the years 2002-03 and 2005-06 has been expunged. The Petitioner thereafter on 26.12.2007 submitted another representation praying for obliteration of the other adverse remarks as well and though he followed up his request by subsequent correspondences, the same remained unheeded. The Petitioner has questioned the belated communication of his adverse remarks as unfair and arbitrary. According to him, this Court having dwelt on the issue of his promotion to the post of Additional Chief Inspector of Factories in the earlier round of litigation, he by no means, could have been denied such promotion on the purported basis of some adverse remarks in his Annual Confidential Reports for the year 2002-03 and 2005-06. The Petitioner has asserted that reference to such adverse remarks in his Annual Confidential Reports demonstrates lack of bonafide on the part of the Respondents.

8. The learned Sr. Counsel for the Petitioner has emphatically urged that the rejection of his (Petitioner) case for promotion on the ostensible justification of adverse remarks in his Annual Confidential Reports (for short referred to as the ACR) for the years 2002-03 and 2005-06 is not only patently illegal and discriminatory but also opposed to the quintessence of the directions contained in the judgment and order dated 19.7.2007 passed by this Court in WP (C) 5037/2004. As admittedly these adverse remarks had been communicated to the Petitioner only on 11.4.2007 the very purpose thereof stood frustrated by the undue delay and, therefore, the evaluation of his suitability by taking note of the same (adverse remarks) is obviously flawed, he urged. Mr. Bhattacharjee, without prejudice to the above, has argued that as admittedly some of the

adverse remarks for the year 2002-03 and 2005-06 had been expunged on representations being made by the Petitioner, the assessment made by the Departmental Selection Board against his suitability for promotion is manifestly unsustainable. The adverse remarks not having been communicated to the Petitioner in time as required by the Assam Services (Confidential Rolls) Rules, 1990, (hereafter referred to as the ACR Rules) the same could not have been acted upon to the prejudice of the Petitioner, he not having been accorded any scope to make amends therefore in time. The learned Sr. Counsel for the Petitioner contended that in any view of the matter, the adverse remarks contained in the Petitioner's ACR for the years 2002-03 have, as on date become stale and, therefore, his case ought to be considered afresh on the basis of the current relevant ACRs for promotion to the post of Additional Chief Inspector of Factories.

9. The learned State Counsel in reply has argued that promotion is not a matter of right and the case of the Petitioner having been duly considered in terms of the Rules in deference to the directions contained in the judgment and order dated 19.7.2007, his grievance to the contrary is obviously untenable. As the Petitioner has not been found suitable for promotion on an appraisal of his relevant A.C.Rs. and other materials on record, his plea of non-compliance with the directions of this Court is plainly frivolous. With reference to the Petitioner's A.C.Rs. for the subsequent years 2006-07, 2007-08 and 2008-09, the learned State Counsel has urged that the Petitioner's performance has not yet improved to entitle him to the promotion as sought for. The official records have been produced by the learned State Counsel for the perusal of this Court.

10. The pleadings of the parties and the arguments founded thereon have received the cautious consideration of this Court. A bare reading of the judgment and order dated 19.7.2007 rendered in WP (C) 5037/2004 demonstrates that this Court while negating the Petitioner's claim for retrospective promotion to the post of Sr. Inspector of Factories had directed the State Respondents to consider his case along with that of the private Respondents therein and other eligible incumbents for promotion to the post of Additional Chief Inspectors of Factories in accordance with the Rules. The order discloses that the official Respondents in that proceeding had not filed their counter. It does not bear any reference of any adverse remarks in any of the A.C.Rs. of the Petitioner. It is a matter of record that the adverse remarks recorded in his A.C.Rs. for the years 2002-03 and 2005-06 had been for the first time communicated to him only on 11.4.2007 i.e. during the pendency of the earlier writ petition. Noticeably, however, in spite of the above, though the Petitioner insisted on a direction for consideration of his case for promotion to the post of Additional Chief Inspector of Factories, no disclosure thereof was made by the official Respondents before this Court. The documents accompanying the pleadings of the parties proclaim that on a representation being made by the Petitioner to the adverse remarks on 20.4.2007, the Commissioner and Secretary, Labour and Employment Department, by his order dated 16.11.2007 had expunged some of such remarks

contained in his A.C.Rs. for 2002-03 and 2005-06 while retaining the rest. The Petitioner represented further against this decision on 26.11.2007. While the same was pending for consideration, he was communicated on 11.2.2008 with some adverse remarks in his A.C.R. for the period 26.8.2002 to 31.3.2003. He represented against the same on 19.2.2008 and eventually by order dated 26.2.2008, the aforementioned authority while disposing of his representations dated 20.4.2007 and 19.2.2008 expunged the remarks in his A.C.R. for the period 26.8.2002 to 31.3.2003 to the extent it was done for his ACR of 2002-03 earlier. The negative remarks for his A.C.R. 2005-06 were, however, retained. The meeting of the Departmental Selection Board incidentally was held on the next date i.e. 27.2.2008 and as the minutes thereof would reveal the Petitioner was not recommended for promotion being construed as unsuitable on the basis of the adverse remarks in his A.C.R. for the last five years. Evidently the Departmental Selection Board decided against his suitability, taking note of the adverse remarks of the Petitioner's A.C.R. for the period 2002-03 and 2005-2006. This is so inspite of the fact that these remarks had been admittedly conveyed to him on 11.4.2007 i.e. about 4 years from the recording thereof vis-a-vis his A.C.R. of 2002-03 and one year from his A.C.R. of 2005-06.

11. The A.C.R. Rules which codifies the procedure for writing confidential reports of the employees of the Government of Assam inter alia mandate the communication of the adverse remark of the person concerned as well as consideration of any representation by him or her against the same. Rule 10 makes it obligatory on the part of the authorities concerned to communicate such an adverse remark to the person concerned within one month of its acceptance by the Accepting Authority. If a representation is submitted by the employee, the same has to be peremptorily considered by the authority receiving the same and if considered necessary in consultation with the Reporting, Reviewing or Accepting Authority and pass orders thereon as far as possible within three months from the date of its submission. Thereby, the authority concerned may either reject the representation or tone down the remark or expunge the same. Rule 13 propounds that where the Reviewing and the Accepting Authority grades the employee concerned as Good, Very Good, Above Average and Outstanding inspite of adverse remarks recorded by the Recording Officer, the entries recorded in the ACR are not to be treated as Adverse. This provision, however, makes it incumbent on the Reviewing Authority and Accepting Authority to record in writing that they are not in agreement with the assessment of the Recording Officer as well as the reasons for their said conclusion.

12. The above provisions of the ACR Rules therefore unambiguously promulgate the obligation of the concerned authorities not only to communicate the adverse remarks recorded in the A.C.R. of an employee within the time frame fixed but also to dispose of any representation(s) made against the same within the period prescribed. It is no longer res integra that the underlying objective of communicating an adverse remark to the employee in default in time is to acquaint him with the deficiencies in his performance at the earliest so as to

provide him a scope to rectify his failings and omissions not only to sustain, his prospects for further advancement in the career but also to foster administrative efficiency in over all public interest. Such a timely action on the part of the authorities concerned is not only a wholesome obligation on their part but also ensures transparency in State action catering to good governance. The Respondent authorities in the instant case, judged by the above imperatives of the ACR Rules have been clearly in default vis-a-vis the adverse remarks recorded in the Petitioner's ACR for the year 2002-03 and 2005-06 which visibly had contributed to the rejection of his candidature for promotion to the post of Additional Chief Inspector of Factories on 27.2.2008.

13. The Respondents noticeably appear to have remained inert in this regard qua the Petitioner's ACRs for the years 2007-08 and 2008-09 as well. Though he has been graded "Good" by the Reviewing and the Accepting Authority for the period 1.3.2006 to 31.3.2007, he has been branded as "Below Average" by the Reporting Authority as well as the Reviewing Authority for the period 1.4.2007 to 31.3.2008 and the period ending 28.2.2009. The Accepting Authority i.e. the Commissioner and Secretary to the Government of Assam, Labour and Employment and Tea Tribe Welfare Department for both the years, however, has observed that the negative remarks recorded against the Petitioner are not acceptable as those are not supported by documents and appear to be based on "biased opinion". However, this authority has rated the Petitioner as "Average". It passes one's comprehension as to how the Petitioner could be graded as "Average" by the Accepting Authority if the negative remarks bearing on his performance and other relevant aspects of his personality as recording by the Reporting Authority as well as the Reviewing Authority had been dismissed as being not supported by any document and instead founded on a "biased opinion". Toning down of the grading "Below Average" to "Average" in the above premise cannot be conceivably automatic. There is no reason what so ever to grade the Petitioner "Average" by the Accepting Authority if the adverse remarks recorded by the Reporting as well as the Reviewing stand effaced. Be that as it may, the remarks of the Accepting Authority disclose that he had not been furnished with full facts and particulars relating to the Petitioner's performance during the periods in question. Noticeably, the Petitioner has not been made aware of the grading awarded by the Accepting Authority for these periods. This assumes importance in view of the fact that at the time of consideration of the Petitioner afresh for promotion to the post of Additional Chief Inspector of Factories, if otherwise qualified therefor, the ACRs amongst others for the period 1.4.2007 to 31.3.2008 and 1.4.2008 to 28.2.2009 would assuredly be taken note of. This Court is of the opinion that having regard to the background of facts and the relevance of the ACRs for these periods on the Petitioner's prospects for such promotion, the same ought to be communicated to him so that if advised, he may submit his representation(s) whereupon those be considered by the concerned State authority so that he may not have any grievance of having been denied a timely communication thereof as had happened earlier.

14. On a totality of the considerations as above, this petition is disposed of with a direction to the Chief Inspector of Factories, Assam, Guwahati, to forthwith communicate to the Petitioner the contents of his ACRs for the period 1.4.2007 to 31.3.2008 and the period ending 28.2.2009. If the Petitioner submits his representation(s) against the same, those would be duly considered in accordance with the ACR Rules and the decision would be communicated to him without delay. As in terms of the ACR Rules, delay has already occurred in the matter of communication of such remarks, this Court considers it expedient to fix a time schedule for the exercise ordered. The Respondent authorities within a week from the date of submission of the certified copy of this order would make the communication of the contents of the aforementioned ACRs to the Petitioner and thereupon, he, if so advised, would submit his representation within a period of 60 days from the date of receipt thereof. In such a case, the concerned Respondent authority would dispose of the representation(s) within a period of one month, therefrom and communicate the decision to the Petitioner immediately thereafter. After this exercise is over, the Petitioner's case, if a vacancy exists as on date in the post of Additional Chief Inspector of Factories would be considered along with other eligible candidates under the Rules and an appropriate decision would be taken. The entire process should be completed within a period of four months herefrom.

The petition stands disposed in the above terms. No costs.