(1998) 02 GAU CK 0024

In the Gauhati High Court

Case No : Civil Rule No. 1789 of 1992

Paramananda Pegu APPELLANT

Vs

State of Assam and Others RESPONDENT

Date of Decision : 20-02-1998

Acts Referred:

Assam Taxation Service Rules, 1962 — Rule 14, 14(1), 14(2), 14(3), 15
Constitution of India, 1950 — Article 226

Citation : (1998) 1 GLT 306

Hon'ble Judges : A.K. Patnaik, J

Bench : Single Bench

Advocate : N.M. Lahiri, G.N. Sahewalla, A.K. Goswami and M.P. Sarma, for the Appellant; R. Borbora, for the Respondent

Judgement

A.K. Patnaik, J.—In this application under Article 226 of the Constitution, the Petitioner has prayed for quashing of the notification dated 24.8.92 by which the Respondents 3 to 5 were promoted to the posts of Assistant Commissioner of Taxes and the Respondents 6 to 19 were promoted to the posts of Superintendent of Taxes and for a direction on the Respondents 1 and 2 to consider the case of the Petitioner for promotion to the said post.

2. The facts briefly are that the Petitioner appeared in the competitive examination held by the Assam Public Service Commission and was selected for Assam Taxation Service -Class-II and was appointed as Superintendent of Taxes by notification dated 19.2.76. He joined the said post of Superintendent of Taxes on 2.3.76 and has been working as such in the said post. By a notification dated 25.6.82, the Government of Assam in the Finance Department (Taxation Branch) approved a gradation list of Superintendent of Taxes and in the said gradation list, the Petitioner was shown against serial No. 54. Thereafter by a notification dated 31.12.91, the Government of Assam approved provisionally under Rule 17 of the Assam Taxation Service Rules, 1962 (for short, ''the 1962 Rules), a gradation list of Superintendent of Taxes in order of their seniority. In the said

gradation list, the position of the Petitioner was shown against serial No. 8 and the position of the Respondents 3 to 19 were shown against serial Nos. 1, 11, 12, 2, 3, 4, 6,7, 9, 10, 15, 16, 18, 19, 20, 23 and 30 respectively. By a notification dated 24th August 1992, the Respondents 3 to 5 were promoted to the posts of Assistant Commissioner of Taxes and by another notification dated 24.8.92, the Respondents 6 to 19 were promoted to the posts of Senior Superintendent of Taxes, a new cadre which was created by notification dated 20th November, 1991 of the Government of Assam, Finance (Taxation Branch) Department. The Petitioner''s grievance is that although some of the private Respondents are junior to him in service, they have been promoted to the said posts of Assistant Commissioner of Taxes and Senior Superintendent of Taxes while the Petitioner''s case has not been considered at all for such promotion contrary to Rule 7 of the 1962 Rules which provides for promotion on the basis of seniority-cum-merit.

3. At the hearing of the writ petition, Mr. G.N. Sahewalla, learned Counsel appearing for the Petitioner, submitted that the only ground for not considering the case of the Petitioner for promotion to the post of Assistant Commissioner of Taxes and Senior Superintendent of Taxes taken by the State-Respondents 1 and 2 is that the Petitioner has not taken the departmental examination and was consequently not confirmed in service, but this ground was not legally tenable as the Petitioner is deemed to have been confirmed in service on completion of the maximum period of 4 years'' probation as provided in Rule 14 of the 1962 Rules. Mr. Sahewalla relied on the decision of the Supreme Court in the case of Dayaram Dayal Vs. State of M.P. and another [OVERRULED], in which it has been held that where the Rules provided for maximum period of probation and the officer continued beyond the said maximum period of probation, he is deemed to have been confirmed on expiry of the said maximum period of probation. According to Mr. Sahewalla, since Rule 14 of the 1962 Rules provided for a maximum period of probation of 4 years and the Petitioner has completed the said maximum period of probation of 4 years on 2.3.80, he is deemed to have been confirmed in service with effect from 2.3.80 and he should have been considered for promotion to the post of Assistant Commissioner of Taxes/Senior Superintendent of Taxes before his juniors in service were considered for promotion to the said post in accordance with the principle of seniority-cum-merit laid down in Rule 7 of the 1962 Rules. Mr. Sahewalla cited the decision of a Division Bench of this Court in the case of Tulika Das v. State of Assam and Ors. (1995) 2 GLR 449 : 1995 (2) GLT 450, in support of his argument that the merit of the Petitioner who was senior to some of the private Respondents should have been judged first before the cases of the junior officers were considered for promotion to the posts of Assistant Commissioner of Taxes and Senior Superintendent of Taxes.

4. Mrs. Rita Borbora, learned Junior Government Advocate, Assam appearing for the State-Respondents 1 and 2, on the other hand, submitted that Sub-rule (2) of Rule 14 of the 1962 Rules provides that during the period of probation, a

member is required to pass the departmental examination. Sub-rule (3) of Rule 14 further stipulates that a member on probation is liable to be discharged from the cadre if he fails to pass the departmental examination. Thus, passing of departmental examination is a pre-requisite for confirmation in service after the period of probation. But the Petitioner did not take the departmental examination despite the fact that such departmental examinations were notified from time to time and the Petitioner had due notice of the same. According to Mrs. Borbora, unless and until the Petitioner passes the departmental examination he cannot be confirmed in service. She relied on Sub-rule (3) of Rule 16 of the 1962 Rules which provided mat if the confirmation of a member is delayed beyond two years of probation on account of his failure to qualify for confirmation, he shall lose his position in the order of seniority, vis-a-vis, such of his juniors as may be confirmed earlier. Mrs. Borbora submitted that although the Petitioner was initially senior to some of the private Respondents, on account of his failure to qualify for confirmation he has lost his position in the order of his seniority, vis-a-vis, the said private Respondents who have already been confirmed. Mrs. Borbora therefore submitted that the Petitioner having not been confirmed in service and having lost his seniority, vis-a-vis, the said private Respondents, he could not be possibly considered for promotion before the cases of the said private Respondents were considered for promotion to the posts of Assistant Commissioner of Taxes and Senior Superintendent of Taxes.

5. The point for consideration, therefore, is as to whether the Petitioner is to be treated as confirmed in service with effect from 2.3.80 when he completed 4 years of service or whether he continues to be on probation. In the case of Dayaram Dayal v. State of M.P. (supra), cited by Mr. G.N., Sahewalla, learned Counsel appearing for the Petitioner, the Supreme Court on an examination of the rulings of the Apex Court on the question of probation and confirmation found that in some cases the Court has held that mere continuation beyond the period of probation did not amount to confirmation unless the order of appointment or the rule contained a deeming provision while in some other cases, it has been held that in certain exceptional situations, it was permissible to hold that the services must be deemed to be confirmed. In the said decision of Dayaram Dayal v. State of M.P. (supra), the Supreme Court however observed that there was no real conflict between the two sets of decisions and it depended on the conditions contained in the order of appointment and the relevant rules that were applicable. While in one line of cases, it has been held by the Court that if in the rule or order of appointment a period of probation was specified and the power to extend probation was also specified and the officer was continued beyond the prescribed period of probation, he could not be deemed to be confirmed, in the other line cases where while there was a provision in the rules for initial probation and extension thereof, the maximum period for such extension was also provided beyond which it was not permissible to extend probation, and it was held that the presumption of the officer continuing as a probationer was negatived by the fixation of the maximum time-limit for the

extension of probation and in all such cases in which the maximum period for extension of probation was prescribed, the officer must be deemed to have been confirmed after the maximum period for extension of probation. In the said case of Dayaram Dayal (supra), the Supreme Court, however, noted that even in some cases where maximum period for extension of probation was provided, the Court did not treat the officer as deemed to be confirmed in service-after the expiry of the maximum period for extension of probation if there were special provisions in the rules which negatived the intention that the officer was deemed to be confirmed after the maximum period for extension of probation.

6. One has therefore to find out from the 1962 Rules as to whether a maximum period for extension of probation is provided for and further as to whether there is anything in the Rules which indicates an intention that even after expiry of the maximum period for extension of probation an officer is not to be deemed to be confirmed. Rules 14, 15 and 16 of the 1962 Rules, which are relevant in this regard are quoted hereinbelow in extensor:

14. PROBATION - (1) A member in a cadre appointed against a permanent post shall be on probation for a period of two years:

Provided that the period may for good and sufficient reasons be extended by the Governor for any specified period or periods in any case not exceeding a period of two years.

Illustration - If at least three departmental examinations are not held during this period, it may be treated as good and sufficient reasons for extending the period of probation.

(2) During the period of probation, a member shall be required to pass the departmental examination, if he has not already done so, and to undergo such training as the Governor may, from time to time prescribe.

Note - The Rules for departmental examinations are given in Schedule II.

(3) A member on probation shall be liable to be discharged from the cadre if:

(a) he fails to pass the departmental examination or training if any, within the prescribed period, or

(b) on any information received relating to his nationality, age, health, character and antecedents, the Governor is satisfied that he is ineligible or otherwise unfit for being a member of the Service ;

(c) a member entertained against a temporary post shall be taken against a permanent post on the basis of seniority.

15. CONFIRMATION-When a member on probation completes his period of probation to the satisfaction of the Governor he shall be confirmed in the respective cadre of the Service.

16. SENIORITY - (1) The seniority of a member shall be determined according to

the order of preference in the list referred to in Sub-rule (2) of either Rule 7 or Rule 8, if he joins his appointment within 15 days of the receipt of the order of appointment:

provided that if a member is prevented from joining within this period by circumstances of a public nature or for reasons beyond his control, the Governor may extend it for a further period of 15 days. If a member fails to join within the period so extended his seniority shall be determined in accordance with the date of joining.

(2) A member appointed by promotion in a year shall be senior to a member appointed by direct recruitment in the same year.

Note - Sub-rule (2) along with the Note thereunder of Rule 16 has been substituted by Notification No. FEB. 172/77/67, dated 17.3.1979 and the amendment took effect from the date of notification.

(3) If the confirmation of a member is delayed beyond two years of probation on account of his failure to qualify for confirmation, he shall lose his position in the order of seniority, vis-a-vis, such of his juniors as may be confirmed earlier. On confirmation, his original position shall be restored.

(4) Where a cadre consists of both permanent and temporary posts, the order of seniority shall be maintained in placing a member against a permanent post and no temporary post shall be made permanent in such a way as to adversely affect the seniority of a member fixed in accordance with this rule.

It is clear from Sub-rule (1) of Rule 14 quoted above that the period of probation for a member of the service is to be initially two years. The proviso to Sub-rule (1) however states that for good and sufficient reasons the period of probation can be extended by the Governor for any specified period or periods in any case not exceeding a period of two years. Thus the maximum period for which the period of probation can be extended is two years after the initial period of two years of probation. As per the law laid down by the Apex Court in various decisions as explained in the case of Dayaram Dayal v. State of M.P. (supra), a member continuing in service beyond the said maximum period for extension of probation is deemed to have been confirmed in service unless a different intention is indicated in the Rules. In the aforesaid Rules, there is no indication whatsoever that a member is to continue on probation beyond the maximum period for extension of two years provided in the proviso to Sub-rule (1) of Rule 14. On the other hand, Rule 15 quoted above clearly provides that when a member on probation completes his period of probation to the satisfaction of the Governor, he shall be confirmed in the respective cadre of the service,. The said Rule 15 of the 1962 Rules does not also specifically provide that passing of the departmental examination is a pre-requisite for confirmation. Sub-rule (2) of Rule 14 however, states that a member is required to pass the departmental examination and Sub-rule (3) of Rule 14 further provides that a member on probation shall be liable to be discharged from the service if he fails to pass the departmental examination within the prescribed period. Hence, the departmental examination, if any, has to be taken by a member within the prescribed period and for failure to pass the departmental examination a member of the service is liable to be discharged from service, but once the maximum period for extension of probation is completed by a member to the satisfaction of the Governor without being discharged from service, he is to be deemed to have been confirmed in service.

7. In the instant case, the Petitioner joined his service on 2.3.76 and completed his initial period of probation on 2.3.78 and thereafter continued on probation upto 2.3.80, which was the maximum period for extension of probation as provided in the proviso to Sub-rule (1) of Rule 14 of the 1962 Rules. If the Petitioner had not taken the departmental examination and had not passed the same before 2.3.80, he was liable to be discharged from service in accordance with Sub-rule (3) of Rule 14 of the 1962 Rules. But once he completed the maximum period for extension of probation on 2.3.80 without being discharged from service, he is deemed to have been confirmed in service. The contention of the Respondents 1 and 2 that the Petitioner is not confirmed in service has no merit.

8. Sub-rule (3) of Rule 16 of the 1962 Rules quoted above provides that if the confirmation of a member is delayed beyond two years of probation on account of his failure to qualify for confirmation, he shall lose his position in the order of seniority, vis-a-vis, such of his juniors as may be confirmed earlier, but it also provides that on confirmation, his original position shall be restored. Thus, even if the Petitioner initially lost his position in the order of seniority, vis-a-vis, some of the private Respondents on account of delay in confirmation of service due to failure on his part to qualify for confirmation, on 2.3.80 the Petitioner was deemed to have been confirmed in service as has been held above and with effect from 2.3.80 his original position in the order of seniority, vis-a-vis, some of the private Respondents was restored in accordance with Sub-rule (3) of Rule 16 of the 1962 Rules. So restored, the Petitioner was senior to some of the private Respondents when they were considered for promotion and promoted to the posts of Assistant Commissioner of Taxes and Senior Superintendent of Taxes by the impugned notifications dated 24.8.92. On the principle of promotion on the basis of seniority-cum-merit as provided in Sub-rule (1) of Rule 7 of the 1962 Rules, the Petitioner''s case was required to be considered before the cases of the said private Respondents who were junior to the Petitioner were considered for promotion to the posts of Assistant Commissioner of Taxes and Senior Superintendent of Taxes.

9. Since admittedly the Petitioner''s case was not considered on the erroneous view that he was not confirmed in service, and it has now been held above that the Petitioner was deemed to have been confirmed in service with effect from 2.3.80 and he was senior to some of the private Respondents who had been promoted to the posts of Assistant Commissioner of Taxes and Senior

Superintendent of Taxes under the impugned notifications, I direct the Respondent No. 1 to consider the case of the Petitioner for promotion to the post of Assistant Commissioner of Taxes or Senior Superintendent of Taxes on the principle of seniority-cum-merit with effect from the dates when some of the private Respondents junior to him were promoted and in case after such consideration, the Petitioner is promoted, he shall be given the benefit of seniority in the promoted post with retrospective effect from the date on which some of the private Respondents junior to the Petitioner were promoted. But considering the laches on the part of the Petitioner is not taking the departmental examinations notified from time to time by the State-Respondents due to which the Petitioner was not considered for promotion earlier, I am not inclined to direct the Respondent No. 1 to grant pecuniary benefits of higher pay and allowances in the post of Assistant Commissioner of Taxes or Senior Superintendent of Taxes with retrospective effect. The Petitioner will however be entitled, if promoted to such higher post, to higher pay and allowances with prospective effect from the date on which he joins his duties in the higher post. Consideration of the case of the Petitioner with effect from the date on which some of the private Respondents junior to the Petitioner were promoted will be completed within a period of three (3) months from the date of receipt of a certified copy of this judgment which will be filed by the Petitioner before the Commissioner-cum-Secretary to the Government of Assam, Finance Department, as early as possible.

10. With the aforesaid observations and direction, the writ petition is allowed to extent indicated above. However, considering the entire facts and circumstances of the case, the parties shall bear their own costs.

