
(2011) 09 GAU CK 0074
In the Gauhati High Court

Pratul Kumar Ganguly

APPELLANT

Vs

State of Assam

RESPONDENT

Date of Decision : 13-09-2011

Acts Referred:

Citation : (2011) 09 GAU CK 0074

Hon'ble Judges : B.D.Agarwal, J

Bench : Single Bench

Advocate : Advocates for the petitioners: Sri HRA Choudhury, Sr. Adv., Sri R. C. Das, Sri P. Gogoi, Smt D. Baruah Advocates for the respondent: Dr B. Ahmed, Nos. 1 to 4 SC, Irrigation Deptt., Assam., Advocate for the respondent : Sri H I Choudhury. Nos. 5 to 17., Advocates appearing for Parties

Judgement

1. Since the facts in all the five writ petitions are identical and since common legal issues have been raised in all the writ petitions, these are being disposed of by this common judgment.
2. Heard Sri HRA Choudhury, learned senior counsel for the writ petitioners, assisted by Sri RC Das, learned counsel. The state respondents are represented by Dr B Ahmed, learned Standing Counsel for the Irrigation Department and Sri HI Choudhury for the private respondents. Also perused the pleadings of both the parties.
3. The writ petitioners are basically challenging the selection and appointment of private respondents and praying for a writ in the nature of Certiorari so as to quash and set aside the appointment orders dated 23rd November, 2007, issued by the Executive Engineer, Dhubri Division (Irrigation) Gauripur, Asam under Annexure15 series.
4. The admitted facts are that both the writ petitioners and the private respondents were initially appointed as muster roll workers in the Irrigation Department. The other admitted fact is that the writ petitioners were appointed as muster roll workers prior to the engagement of the private respondents as

muster roll/work charged employees etc. The further admitted fact is that the writ petitioners were regularized in the year 1993, whereas, the private respondents were regularized only in the year 2005. In the year 2004, on the strength of clearance from the Finance Department, Govt. of Assam, the office of the Chief Engineer, Irrigation Department initiated the process of filling up various posts in grade III category on promotion from eligible Grade IV employees. Thereafter, vacancies were notified to the Selection Board. The selection board held interview for filling up various posts on promotion, viz, the posts of Junior Assistants, Section Assistants and Power Pump Operators. After holding the selection tests, the board recommended the names of respondents for their appointments as LDAs (Junior Assistants), Section Assistants and Power Pump Operator, whereupon, the respondent No.4 issued the impugned appointment orders.

5. In the midst of the selection process, the writ petitioners approached this Court by filing Writ Petition No. 4820 of 2007 to direct the state respondents to consider their seniority, while filling up the posts on promotion basis. The writ petition was disposed of on 01.10.2007 observing that the seniority of the writ petitioners shall be taken into consideration. Thereafter, a contempt case was also filed, which was registered as Contempt Case (c) No. 5 of 2008. The contempt case was disposed of on 28.05.2009 on the submission of the learned counsel for the respondents that before the judgment of this Court in writ petition, the selection process was already over. However, while closing the contempt case, the writ petitioners were given the opportunity to challenge the appointment orders individually.

6. Pursuant to the observations made in the contempt case, the writ petitioners filed appeals before the Assam Administrative Tribunal. The Administrative Tribunal has dismissed all the appeals on 31.08.2010. Being aggrieved with the judgment of the tribunal, the writ petitions have been filed.

7. Mr. Choudhury, learned senior counsel for the writ petitioners has basically challenged the appointment of the private respondents on the ground that the appointments have been made de hors to the Rules. According to the learned counsel, at the time of initiation of selection process the private respondents were not eligible to be considered for promotion. The learned counsel further contended that the relevant rules did not provide for any test or interview. According to the learned counsel for the petitioner, rules have laid down the procedure for filling up promotion quota and as such, the interview was held only to select favourable persons and as such, the entire selection process was illegal and the appointment orders are liable to be set aside.

8. Per contra, Dr. Ahmed submitted that the post of Power Pump Operator is a technical post and the same has to be filled up as per the procedure laid down in the Assam Irrigation Establishment (Technical) Rules 1990 (hereinafter, ? Technical Rules 1990?) and the other nontechnical posts are governed by the Assam Ministerial District Establishment Service Rules, 1967(hereinafter, ?

Establishment Rules 1967?). Dr. Ahmed further submitted that for filling up technical posts, the selection board has to conduct the suitability tests, as required under Rule 8 and as such there was no infirmity in the selection process. The learned Counsel also submitted that under Rule 10, the selection was to be made on the basis of 'meritcum seniority' and because of this service condition also, interview was necessary. Dr. Ahmed also submitted that since recruitment rules were not exhaustive, it was supplemented by OM No. CEI (E) 78/2004/106 dated 14.09.2005 and the selection board also followed the guidelines given in the aforesaid circular.

9. Since, the selection process and appointment orders have been challenged on the ground of violation of the prescription of the Rules, it is necessary to reproduce the relevant provisions of the Rules, which are as under:

9.1. Assam Irrigation Establishment (Technical) Rules 1990.

5. Method of Recruitment:

(1) Recruitment to the service shall be made by the Appointing Authority on the following manner:

(a) By directed recruitment of on the basis of written or oral or both and practical test in accordance with ruleZ..

(b) By promotion in accordance with rules, 8, 9 and 10.

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8. Appointment on promotion

Subject to suitability as may be decided by the Selection Board and by the Appointment Authority as set forth in Rule 9 (1), 9 (2) and also subject to possessing such qualification as may be prescribed by the Government from time to time, a member shall be eligible for promotion to the corresponding next higher cadre in the manner as provided below:

(1) From the post of Helper/Handiman may be promoted to the post of Assistant Mechanic/Assistant Turner/Assistant Electrician/Assistant Fitter/Assistant Welder/Assistant Blacksmith/Assistant Painter/Assistant Pump Operator (Electrical) Assistant Carpenter/Stationery Engine Driver GradeII/Assistant Boring Mechanic if he had rendered minimum of 8 years of continuous service in the cadre. 50% of the cadre posted shall be filled up by promotion.

(2) From the post of Assistant Mechanic/Assistant Turner/Assistant Electrician/Assistant Fitter/Assistant Welder/Assistant Blacksmith/Assistant Painter/Assistant Pump Operator (Electrical) Assistant Carpenter/Stationery Engine Driver GradeII/Assistant Boring Mechanic may be promoted to the psot of Mechanic/Turner/ Electician/Fitter/Welder/Blacksmith/Carpenter/Pump Operator/Stationery Engine Driver GradeI/Boring Mechanic, if he had rendered minimum of 5 years of

continuous service in the cadre 60% of the cadre post shall be filled up by promotion.

(3) to (7) *****

Rule 10 . General Procedure for promotion

(1) Before the end of each year the Appointing Authority shall make an assessment of the likely number of vacancies to be filled up by promotion in the next year in each category of post.

(2) The Appointing Authority shall then furnish to the Selection Board the following documents and information with regard to as may candidates in order of seniority as 4 times the number of vacancies as assessed under each category post:

(a) Information about the number of vacancies.

(b) List of candidates in order of seniority eligible for promotion indicating the post for which promotion is to be considered.

(c) Character Rolls and personal Files of the candidates.

(d) Details about reservation and about carryforward of vacancies as provided in ScheduleII.

(e) Any other documents and information as may be considered necessary by the Appointing Authority or as required by the Board.

(3) The selection shall be made on the basis of meritcum seniority.

(4) The Selection Board, after examination of the documents and information furnished by the Appointing Authority shall recommend to the Appointing Authority a select list of candidates about double the probable number of vacancies in order of preference, found suitable for promotion.

(5) The select list shall remain valid for 12 calendar months from the date of approval by the Appointing Authority.?

Rule 9 relates to constitution and composition of Selection Boards only.

9.2. Assam Ministerial District Establishment Service Rules, 1967.

?(6) Lower Division Assistant (a) By direct recruitment on the basis of a competitive examination to be conducted by the Deputy Commissioner at the beginning of each year unless otherwise directed by Government in this behalf:

Provided that in the office of the Deputy Commissioner, United KhasiJaintia Hills the recruitment shall be made through the Employment Exchange in such manner as may be directed by Government from time to time.

(b) By selection on the basis of senioritycum merit from amongst GradeIV staffs of this district establishment concerned who have passed the Higher Secondary

or equivalent examination and have rendered at least 7 years of continuous service in the district establishment on the 1st day of the year in which selection is made.?

10. Since, the respondents as well the tribunal has also considered the OM dated 14.09.2005 for the purpose of appointing and approving the appointments respectively, it is also necessary to reproduce the relevant portions of the OM, which are as below:

?As regards filling up the regular vacant post of GradeIII such as LD Asstt, Section Assistant, Tracer etc. Selection may be made only from the GradeIV staff having requisite qualification, length of service, in order of seniority cum merit only for 70% clear, vacancy in each cadre, which is expressed elaborately in last paragraph of the letter.

For the post of LD Asstt. Only GradeIV, may be considered with requisite qualification and required length of service as per provision defined in the ? The Assam Ministerial District Establishment Service Rules 1967? having type writing diploma in both English and Assamese and based on the remarks recorded in this character roll.

For the post of Section Asstt. only gradeIV (Khalashi) may be considered on promotion with the following criteria in order of seniority cum merit, as well as remarks recorded in the Character Roll.

(1) Minimum 10 years continuous service having qualification read up to Class X.

Minimum 15 years continuous service having qualification read up to class VIII.

The post of Tracer may be filled up from the Departmental GradeIV staff having requisite qualification HSLC passed, through selection by conducting a written test and a special test on tracing and handwriting.

As regards, Technical post, Selection may be made within the provision as mentioned in ? The Assam Irrigation Establishment (Technical) Rules 1990 for different cadre.

11. I have already mentioned at the outset of the Judgment that the recruitment process was initiated in the year 2004, whereas, the private respondents were regularized only in the year 2005. Referring to FR 9 (4), Sri Choudhury, learned Senior Counsel for the petitioners submitted that ?cadre? means strength of a service or a part of a service sanctioned as a separate unit. According to the learned counsel, till the private respondents were regularized in the year 2005, they could not have been considered as a member of the cadre nor their services as Muster Roll Workers could have been taken into consideration for the purpose of eligibility for consideration of promotion.

12. The learned Senior Counsel for the writ petitioners also referred to the Judgment of the Hon?ble Supreme Court, rendered in the case of The State of Assam Vs Kanak Chandra Dutta (AIR 1967 SC 884), wherein, Their Lordships

have observed that a casual labourer cannot be equated against a regular employee. The relevant observations of the Hon'ble Supreme Court are extracted below:

“(10) In the context of Arts. 309, 310 and 311, a post denotes an office. A person who holds a civil post under a State holds ‘office’ during the pleasure of the Governor of the State, except as expressly provided by the Constitution. See Art. 310. A post under the State is an office or a position to which duties in connection with the affairs of the State are attached, an office or a position to which a person is appointed and which may exist apart from and independently of the holder of the post. Article 310 (2) contemplates that a post may be abolished and a person holding a post may be required to vacate the post, and it emphasizes the idea of a post existing apart from the holder of the post. A post may be created before the appointment or simultaneously with it. A post is an employment, but every employment is not a post. A casual labourer is not the holder of a post. A post under the State means a post under the administrative control of the State. The State may create or abolish the post and may regulate the conditions of service of persons appointed to the post.”

13. With regard to the appointment of respondent Nos. 7, 9, 10 and 12 as Power Pump Operators, the learned counsel for the writ petitioners submitted that they could not have been appointed so since they did not render 8 (eight) years minimum continuous service in the cadre. Besides this, these respondents could not have been appointed as Power Pump Operators directly in violation of Rule 8 (1) of the 1990 Rules.

14. In reply to the aforesaid submissions, the learned counsel for the respondents submitted that the regularization was only a matter of formality and the regularization was pending for want of policy decision of the Government and as such, the appointments cannot be faulted. Dr Ahmed also submitted that throughout Assam, Selection Boards had undertaken promotion of Grade IV staff divisionwise and various writ petitions were filed in this Court but none of the selection process was interfered with.

15. I have gone through some of the Judgments, furnished by the learned Standing Counsel for the Irrigation Department. However, in none of the writ petitions, the selection process was challenged on the ground of violation of the provisions of recruitment rules

16. In the case before me, not only the private respondents were not regular employees of the Irrigation Department in the year 2004, but they were also junior to the writ petitioners both as Muster Roll Workers as well as after their regularization. Besides this, there is no explanation as to how the respondent Nos. 7, 9, 10 and 12 were directly appointed as Power Pump Operators, without first being appointed as Assistant Pump Operators, as provided in Rule 8 (1) of the 1990 Rules. At the same time, even in the OM dated 14.09.2005, there was no requirement of any oral interview. Besides this, Rule 10 of the 1990 Rules has

laid down exhaustive procedure for the selection of Grade IV employees for promotion. The Rules do not prescribe any sort of interview. Hence, I hold that the appointment of respondent Nos. 7, 9, 10 and 12, is de hors to the rules and liable to be set aside. At this stage, I would like to mention here that the Administrative Tribunal has totally overlooked the provisions of the Rules for promotion. Hence, it warrants interference of this Court.

17. As regards the appointment of Junior Assistants (LDA), the admitted fact is that the principle of 'senioritycummerit' has to be followed. The Establishment Rules also do not prescribe any selection test, even by way of oral interview. Be that as it may, the admitted fact is that the writ petitioners are senior to the private respondents by several years and as such, the writ petitioners deserved to be considered for promotion, without undergoing any interview. In the case of Smt Padmini Mahanta Vs The State of Assam (WP(C) No. 3050 of 2010), this Court has held that if the posts have to be filled up on the principle of senioritycummerit as per the service rules, there is no scope of any merit test. In this way, the appointment of private respondent Nos. 5 and 13 are also de hors to the Rules. Consequently, their appointments are also liable to be set aside.

18. The respondent Nos. 6, 8 and 11 have been appointed as Section Assistants. Strangely, the post of Section Assistants is neither a technical post nor the same is covered by the Establishment Rules. Under such circumstances, I have to fallback upon the OM dated 14.09.2005. The relevant portion for filling up of posts of Section Assistants has already been extracted in this Judgment. As per the Office Memorandum, minimum 10 to 15 years continuous service is necessary in Grade IV. Admittedly, the aforesaid respondents were not regularized on the date of vacancy. Hence, they were out of zone of consideration for promotion. Accordingly, their promotions as Section Assistants are also liable to be set aside.

18.1. Under Rule 10 (4) of the 1990 Technical Rules, the Selection Boards are required to recommend a panel of selected candidates, comprising of double the probable number of vacancies, to the appointing authorities. However, in the present case, the Selection Board recommended the names of candidates exactly to the number of vacancies, leaving no scope for the appointing authority to exercise its jurisdiction. Consequently, the impugned appointment orders dated 23.11.2007 are also in violation of the Rules.

19. In the result, all the 5 (five) writ petitions stand allowed. The appointments of private respondent Nos. 5 to 13 are hereby set aside. However, I am not interfering with the promotion of private respondent Nos. 14, 15, 16 and 17 solely on the ground that their appointment orders have not been challenged in the writ petitions.

20. The respondent Nos. 1 to 4 are directed to pass consequential orders of cancellation of the appointment orders of the Respondent Nos. 5 to 13 with immediate effect and without any delay. At the same time, the State respondents

are directed to initiate the process of filling up of vacancies on promotion within 1 (one) month from the date of receipt of a copy of this Judgment and complete the promotion process as per the terms and the procedure prescribed in the relevant Rules, positively by 31st of December 2011. The time frame has been given keeping in mind that some of the petitioners are going on superannuation shortly and they were also deprived of promotion since long. To expedite the process of promotion, liberty is given to the writ petitioners to furnish a copy of this Judgment to the concerned authorities.