

(2009) 12 GAU CK 0080
In the Gauhati High Court
Case No : Writ Petition (C) No. 4269 of 2007

Rajeev Bhuiyan

APPELLANT

Vs

State of Assam and Others

RESPONDENT

Date of Decision : 07-12-2009

Acts Referred:

Assam Urban Water Supply and Sewerage Board Act, 1985 — Section 22, 22(1), 22(2), 22(3), 88

Citation : (2011) 1 GLR 113

Hon'ble Judges : C.R. Sharma, J

Bench : Single Bench

Advocate : N. Chaudhury, for the Appellant; B.K. Sharma, S.C. Keyal and D.C. Bora, for the Respondent

Final Decision : Dismissed

Judgement

C.R. Sarma, J.—The notification dated 16.2.2007 (Annexure-9 to the writ petition) and the notification dated 24.7.2007 (Annexure-6 to the writ petition) are under challenge in this writ petition.

2. By the notification dated 16.2.2007, the Managing Director, Assam Urban Water Supply and Sewerage Board ("the Board"), i.e., the Respondent No. 3 in pursuance to Government order absorbed the services of Sri Naba Kumar Sonowal, Jr. Engineer, Public Health Engineering (PHE) department, the Respondent No. 4 permanently in the Board as Jr. Engineer with effect from the date he applied for permanent absorption, i.e., 18.3.1993. By notification dated 24.7.2007, the Respondent No. 3 subject to approval of the Selection Committee of the Board temporarily promoted Sri Nava Kumar Sonowal aforesaid to the post of Asst. Engineer. In the said notification, it is also stated that he may be reverted back to his original post at any time without giving any notice and without assigning any reason thereof.

3. The Petitioner's case, in a nutshell, may be stated as follows:

The Respondent No. 4 Sri Naba Kumar Sonowal, a Jr. Engineer of the Public Health Engineering (PHE department") joined the Board on 1.4.1990 on deputation basis. On 24.1.1992, under the provisions of Section 22(2) of the Assam Urban Water Supply and Sewerage Act, 1995 ("the Act") the Respondent No. 4, conveyed to his authorities, his willingness to go back to his parent department, i.e., PHE department, Government of Assam. On 30.1.1996, the Petitioner joined the Board as a Jr. Engineer. Though the Respondent No. 4 intimated his option to revert him to his parent department, the Respondent Nos. 2 and 3 failed to issue any order to that effect. The DPC selected ten Jr. Engineers for promotion to the rank of Asst. Engineers and the Petitioner was placed at Sl. No. 7. Out of the select list, five candidates were accommodated against the vacant posts of Asst. Engineers. Being aggrieved one Sri Munindra Deka, a candidate, whose name was at Sl. No. 6, approached this Court by filing a writ petition and subsequently, the Board promoted the said writ Petitioner to the post of Asst. Engineer. In the mean time, on 27.6.2007, the Board issued a notification publishing the seniority list of the Jr. Engineers. In the said seniority list, the name of Respondent No. 4 was shown at Sl. No. 21 whereas the name of the writ Petitioner was shown at Sl. No. 6. In the said notification, it was divulged, for the first time, that the Respondent No. 4, who was on deputation from the PHE department was absorbed in the Board with effect from 16.2.2007. As, in spite of availability of vacancies and the selection by the promotion committee, the Petitioner was not promoted to the post of Asst. Engineer, he submitted a representation to the Respondent No. 3 on 16.7.2007 seeking promotion. But the Respondent No. 3, without giving any due consideration to the said representation, vide notification dated 24.7.2007 issued an order promoting the Respondent No. 4 to the post of Asst. Engineer, who was junior to the Petitioner as per the seniority list aforesaid. Subsequently, the Petitioner came to know that vide notification dated 16.2.2007 aforesaid, the Respondent No. 3 permanently absorbed the Respondent No. 4 in the service of the Board with effect from 18.3.1993. According to the Petitioner, the said absorption of the Respondent No. 4 was arbitrary, unreasonable and prejudicial to the interest of other diploma engineers of the Board. It is stated that though the Respondent No. 4 was asking for reversion to his parent department, he, for the first time, by filing a writ petition being WP(C) No. 22 of 2006 made a claim for absorption in the Board and this Court by order dated 6.1.2006 disposed of the said writ petition directing the Respondents to consider his prayer for absorption and accordingly, the Respondent No. 3 by a speaking order dated 21.4.2006, rejected the prayer of the Respondent No. 4 for absorption and referred the matter to the Government to revert the Respondent No. 4 to his parent department. According to the Petitioner, in view of the said order issued by the Respondent No. 3, the subsequent absorption of the Respondent No. 4 with effect from 18.3.1993 was arbitrary. It is also alleged that the promotion of the Respondent No. 4, who was not included in the select list prepared by the DPC, was illegal, arbitrary and discriminatory and as such the same was liable to be adjudged illegal and untenable. Being aggrieved by the said absorption and promotion of the

Respondent No. 4, the Petitioner has come up with the present writ petition with the following prayer:

In the premises aforesaid it is prayed that your Lordship may be pleased to admit this petition, call for records, issue rule upon the Respondents asking them to show cause as to why a writ in the nature of mandamus be not issued directing them to withdraw, recall or otherwise forbear from giving effect to the impugned notifications dated 16.2.2007 (Annexure-9) and 24.7.2007 (Annexure-6) and/or why a writ in the nature of certiorari be not issued quashing and setting aside the said two notifications, i.e., Annexures 6 and 9 of the writ petition and/or why they should not be further directed to promote the Petitioner to the post of Asst. Engineer on the basis of his position in the select list and on cause or causes being shown make the rule absolute and/or may pass such further or other order or orders as your Lordship may deem fit and proper.

AND

During pendency of the case be further pleased to direct the Respondent Nos. 1 to 3 not to confirm the services of the Respondent No. 4 as Asst. Engineer on the basis of impugned order dated 24.7.2007.

4. The Respondent Nos. 2 and 3, i.e., the Board and its managing director contested the Petitioner's claim by riling an affidavit-in-opposition. In their affidavit-in-opposition, it was stated that as per rule, thirty per cent of the available vacancies, in the rank of Asstt. Engineer of the Board, are required to be filled up from amongst the Jr. Engineers and accordingly, out of 19 vacancies, the DPC recommended five persons for promotion to the post of Asst. Engineer out of a select list of ten candidates. As Sri Munindra Deka approached this Court challenging the decision of the Board, in pursuance of the order of this Court, Sri Deka was also promoted to the post of Asst. Engineer. It was further averred that during the relevant period, six posts of Asst. Engineers, being thirty percent of the 19 vacancies were filled up by promotion and due to non-availability of ST(P) and ST(H) candidates at the relevant time, the DPC recommended dereservation of the reserved posts and accordingly, with the permission of the appropriate authority in the Government, 6(six) Jr. Engineers were promoted to the posts of Asst. Engineers. Regarding absorption of the Respondent No. 4 in the Board, the answering Respondents, in their affidavit, stated that on receipt of the representation of the Respondent No. 4 praying for his permanent absorption in the Board, the same was communicated to the Government for its approval for absorption and accordingly, on the basis of the approval of the Government, the Respondent No. 4 was absorbed in the Board with effect from 18.3.1993 by the impugned notification dated 16.2.2007. In respect of the promotion of Respondent No. 4, it is stated that at the relevant time of promotion of the Jr. Engineers to the post of Asst. Engineers, due to non-availability of candidates belonging to the STP and STH category the reserved posts were dereserved. It is stated that the Respondent No. 4 belongs to STP category and as such, after his absorption in the Board, he was temporarily promoted to the post of Asst.

Engineer by the impugned order dated 24.7.2007 and that this promotion was subject to approval of the DPC. The promotion was made with the approval of the chairman of the Board against the sanctioned vacant post at Guwahati division. It was further stated, in the affidavit, that on his absorption in the service of the Board, the Respondent No. 4, under the provisions of Section 22(2) (ii) of the Act became entitled to all service benefits under the Board. Regarding the representation submitted by the present writ Petitioner seeking promotion, the contesting Respondents, in their affidavit, stated that as the writ Petitioner had immediately approached this Court without giving any opportunity to dispose of the representation the same was still pending for consideration.

5. In his representation dated 16.7.2007, the writ Petitioner requested the Respondent No. 3 to promote him to the post of Asst. Engineer as per decision of the selection committee against the vacant post. The Respondent No. 4 also by filing an affidavit-in-opposition stated that as per provisions of Section 22(1) of the Act, his services should have been permanently absorbed in the Board and that due to failure of the Board to absorb him, he had to approach the High Court by filing a writ petition being WP(C) No. 22 of 2006. It is stated by the said deponent that he had to pursue the matter and that the Government was pleased to direct the Board to absorb him as an Asst. Engineer in the Board with all benefits. He further stated that as he was rendering the service in the Board without any break with effect from 1.3.1990, i.e., the date of his joining in the Board and as such his seniority should have been correctly shown in the gradation list prepared by the Board. The deponent further submitted that as, he had joined the Board in 1990, in view of his absorption, he cannot be junior to the writ Petitioner and as such his inter se seniority should have been correctly shown by giving the benefit of ST(P) category. By riling an additional affidavit, the writ Petitioner submitted that though thirty percent of the nineteen vacancies were originally earmarked for promotion, the Board in its meeting held on 11.1.2007 decided to fill up twelve vacancies by direct recruitment and, thus, decided to fill up seven vacancies by promotion. It is stated in the said additional affidavit that the writ Petitioner being the 7th candidate a right had accrued to him for being appointed as the Asst. Engineer after promotion of all those six candidates above him.

6. I have heard Mr. N. Chaudhury, learned Counsel appearing for the Petitioner. I have Also heard Mr. S.C. Keyal, learned Counsel for the Respondent Nos. 2 and 3, Mr. D.C. Bora, learned Counsel for the private Respondent No. 4 and Mr. B.K. Sharma, learned Counsel for the State Respondent.

7. Mr. Choudhury, learned Counsel for the Petitioner advanced the arguments that in view of the order dated 21.4.2006 passed by the Respondent No. 3, the subsequent absorption of the Respondent No. 4 and his promotion to the post of Asst. Engineer was illegal and arbitrary. The learned Counsel relying on the decisions held in the case of Suruj Ahmed v. State of Assam 1992 (1) GLR 69 and the Purtabpur Co. Ltd. v. Cane Commissioner of Bihar and Ors. AIR 1970 SC

1869 submitted that in view of rejection of the prayer of the Respondent No. 4 for his absorption in the Board, the subsequent absorption in pursuance to Government order was illegal. The learned Counsel strenuously argued that as the selection committee had duly selected the Petitioner, whose name stood at Sl. No. 7 in the seniority list, the Petitioner should have been given promotion to the post of Asst. Engineer, but the authority committed illegality by giving promotion to the Respondent No. 4 instead of the Petitioner. Refuting the said argument, the learned Counsel appearing for the Respondents submitted that in the light of the provisions prescribed by Section ` of the Act, a person, who joins the Board on deputation, if not reverted to his parent department can opt for absorption substantively in the service of the Board and as such if such person is not sent back to the parent department, his service stands absorbed in the Board and as such the subsequent absorption in pursuance of the Government order was not at all illegal. Referring to Section 88 of the Act, it has been submitted, on behalf of the Respondents, that the Government may issue order and directions, as may be necessary, to the Board and it is the duty of the Board to carry out such orders. Admittedly, the Minister in charge of the department was the chairman and as such the absorption of the Respondent No. 4 with the approval of the Government was not lawful and arbitrary. The learned Counsels appearing for the Respondents further submitted that in view of the categorical statement made by the contesting Respondent Nos. 2 and 3, the Petitioner's representation for his promotion was pending before the Board and that the same could not be disposed of due to filing of the writ petition.

8. Section 22(2) and (3) of the Act provides that every officer or employee of the State Government, whose services are transferred to the Board should inform the Government in writing within two years from the date of his transfer to the Board regarding his option for absorption. Section 22(3) of the Acts indicates that in the event of failure of any employee to give such intimation within a period of two years from the date of his transfer to the Board, he shall opt for absorption and accordingly he should be absorbed. From the order, dated 21.4.2006, passed by the Respondent No. 3, it appears that though the Respondent No. 4 initially on, 24.1.1992, addressed to the Secretary to the Government of Assam, PHE department indicating his option to revert back to his parent department, he had subsequently submitted a representation for his absorption in the Board with due service benefits. Accordingly, due to failure of the Board to absorb him, the Respondent No. 4 approached this Court by filing a writ petition aforesaid. In pursuance of the order passed in the said writ petition, the Respondent No. 3 disposed of the representation of the Respondent No. 4 for permanent absorption in the Board rejecting his prayer for absorption, holding that earlier he wanted to revert back to his parent department. By the said order, the Respondent No. 3 referred the matter to the Commissioner and Secretary to the Government of Assam, Urban Development Department, for taking necessary action regarding deputation of the employees including the Respondent No. 4. Subsequently, in pursuance to Government order, the Respondent No. 3

permanently absorbed the Respondent No. 4 in the Board with effect from 18.3.1993. The said absorption was made with the approval of the Minister in charge of the Board.

9. Now the question is whether the said absorption was illegal and if the same caused any prejudice to the Petitioner. In deciding the case of Suraj Ahmed (supra), a Division Bench of this Court made reference to the following observation made in the Cane Commissioner's case (supra).

In the matter of exercise of the power under Rule 6(1), the State Government and the Cane Commissioner are concurrent authorities. Their jurisdiction is co-ordinate. We are of the opinion that the impugned orders though purported to have been made by the Cane Commissioner, were in fact, made by the Chief Minister and, hence, they are invalid. It is true that the impugned orders were issued in the name of the Cane Commissioner. He merely obeyed the directions issued to him by the Chief Minister. The power exercised by the Cane Commissioner under Rule 6(1) is a statutory power. He alone could have exercised that power. While exercising that power he cannot abdicate his responsibility in favour of anyone not even in favour of the State Government or the Chief Minister.

10. In the light of the above decision, it stood settled that a statutory authority should exercise its power vested by the statute without being influenced by any other authority. It is also settled that such statutory authority while exercising its statutory power, cannot abdicate its responsibility in favour of anyone not even in favour of the State Government or other Ministers. In the Cane Commissioner's case (supra), it was observed by the Apex court that it was not proper for the Chief Minister to have interfered with the functions of the Cane Commissioner. The learned Counsel appearing for the writ Petitioner submitted that as the order of absorption was made in pursuance to the Government order, the Respondent No. 3, which was a statutory authority, abdicated its responsibility in favour of the Government as well as the Minister in charge of the department and as such the said order of absorption was not lawful in the eye of law. There can be no dispute that a statutory authority should exercise its statutory power as per law. The functioning of such statutory authority cannot be interfered or influenced by any other authority without due procedure of law. Section 88 of the Act reads as follows:

Power of the Government to issue order and directions to the Board. The Government may issue to the Board such order and direction as are necessary or expedient for carrying out the purposes of this Act and the Board shall give effect to all such orders and directions.

This provision of the statute has given the power to the Government to issue order and directions as may be necessary to the Board requiring the Board to act on such orders and directions. Therefore, in view of the said provisions of law, the absorption of the Respondent No. 4 in the service of the Board in pursuance

of the Government order cannot be termed to be unlawful and arbitrary. That apart, as the Respondent No. 4 had subsequently opted for absorption in the service of the Board, his absorption as per order dated 16.2.2007 was not unlawful.

11. Regarding promotion of the Respondent No. 4, it appears that by the impugned order dated 24.7.2007, the Respondent No. 4, whose service was absorbed in the Board with effect from 18.3.1993 was promoted to the sanctioned post of Asst. Engineer purely on temporary basis subject to approval of the selection committee. It was made clear in the said order of promotion that the Respondent No. 4 may be reverted back to his original post at any time without giving any notice and without assigning any reason thereof. The said promotion was made with the approval of the Minister of the department who was the chairman of the Board. In the gradation list, the name of the Respondent No. 4 was shown at Sl. No. 21 against the ST(P) category. From the contention of the Respondent Nos. 2 and 3, made in their affidavit-in-opposition, it appears that at the time of giving promotion to six selected candidates on the basis of the list prepared by the selection committee, due to non-availability of ST(P) and ST(H) candidates, the reserved posts were dereserved with due approval from the Government and as such the posts were filled up by the candidates belonging to the general category. The writ Petitioner also belongs to general category. In the affidavit-in-opposition, it was categorically stated that the Respondent No. 4 being ST(P) category candidate was given promotion on temporary basis. As the Respondent No. 4 was promoted against a reserved category post, the writ Petitioner, being a general category candidate, was in no way prejudiced by the said promotion, because no post belonging to the general category candidate was filled up by promotion of the Respondent No. 4. That apart, the promotion of the Respondent No. 4 was temporary and ad hoc in nature and the same was subject to the approval of the selection committee of the Board. Therefore, as the Board would be required to place the matter regarding promotion of Respondent No. 4 before the selection committee for consideration. The above temporary promotion against a reserved category post cannot be interfered in this writ petition.

12. A careful perusal of the writ petition reveals that the Petitioner is aggrieved for not giving him promotion to the post of Asst. Engineer. Seeking promotion he filed a representation before the Board. As stated by the contesting Respondent Nos. 2 and 3, in their affidavit-in-opposition, the said representation is pending for consideration and the same could not be disposed of due to filing of this writ petition.

13. In view of the above discussion, I find no sufficient merit in this writ petition requiring interference with the impugned notifications aforesaid. However, in view of the pendency of the representation filed by the Petitioner, the Respondent Nos. 2 and 3 are directed to consider and dispose of the representation of the writ Petitioner regarding his claim for promotion to the post

of Asst. Engineer as per law. This exercise should be completed within a period of three months from the date of receipt of this order.

14. With the above observation, this writ petition is dismissed.