
(2010) 09 RAJ CK 0018

In the Rajasthan High Court

Case No : Civil Special Appeal (Writ) No. 470 of 2007

Ram Khilari Meena

APPELLANT

Vs

State of Rajasthan and Others

RESPONDENT

Date of Decision : 23-09-2010

Acts Referred:

Rajasthan Civil Services (Classification, Control and Appeal) Rules, 1958 — Rule 17
Rajasthan Industries Service Rules, 1960 — Rule 22

Citation : (2011) 2 RLW 1071

Hon'ble Judges : Jagdish Bhalla, C.J; Mohammad Rafiq, J

Bench : Division Bench

Final Decision : Allowed

Judgement

Mohammad Rafiq, J.—This appeal has been filed by Appellant Ram Khilari Meena, being aggrieved by the judgment dated 22.5.2006 passed by the learned Single Judge. Learned Single Judge, by the aforesaid judgment, dismissed the writ petition filed by the Appellant.

2. In the writ petition, the Appellant had prayed for issuance of a writ of mandamus, directing the Respondents to promote him on the post of Assistant Director Industries w.e.f. 17.7.1991, when his junior was so promoted. Appellant further prayed that the order imposing penalty and subsequent orders by which his appeal and review petition against such order of penalty were dismissed, be quashed and set aside. Prayer was also made for quashing the order dated 7th June, 1993 by which representation of the Appellant against the adverse entries in his APAR for the year 1991-92 was rejected. Appellant has also challenged the notice under Rule 17 of the Rajasthan Civil Services (Classification, Control and Appeal) Rules, 1958, issued to him vide order dated 17th April, 1990.

3. Learned Single Judge, upon hearing counsel for the Appellant, dismissed the writ Petitioner in limine, holding that since the appellate authority has already reduced the punishment of stoppage of two grad increments without cumulative effect to mere recorded warning, therefore, no interference is called for. Prayer

with regard to quashment of the order rejecting representation against adverse entries in the APAR was also rejected because the learned Single Judge found that no malafide was alleged either against the Reporting Officer or Reviewing Authority. However, on the question of promotion with retrospective effect, learned Single Judge held that no interference can be made as the affected persons alleged to be juniors to the Appellant have not been impleaded as party to the writ petition.

4. No one has appeared from either side. Nevertheless, we have considered the matter on merits in the light of averments made in the petition and the stand of the Respondents taken in the reply, as also the position of the Rajasthan Industries Service Rules, 1960 (hereinafter to be referred to as "the Rules").

5. Contention of the Appellant is that so far as penalty of censure is concerned, this reduced penalty was awarded to him after the Appellate Authority vide order dated 7th June 1993 modified the original order dated 6th April, 1992 passed by the Disciplinary Authority awarding punishment of stoppage of two annual grade increments without cumulative effect. This order of penalty related to the period subsequent to the year of selection in question, inasmuch as the candidature of the Appellant was required to be considered for promotion against the vacancies of the years 1989-90 and 1990-91. It has been contended that Appellant was the only candidate belonging to ST category and was entitled to be promoted on the post of Assistant Director, Industries in his own right. Not only that he was entitled to be promoted as Assistant Director, Industries against the vacancy reserved for ST category, but was also entitled to be promoted on the basis of his seniority, inasmuch as in the seniority list dated 5.12.1990 published by the Department, his name appeared at serial No. 54, whereas the name of Shri K.L. Paliwal appeared at No. 55. Subsequent seniority list dated 3.7.1992 again indicated the same position, in which name of the Appellant was shown at serial No. 33, whereas the name of Shri K.L. Paliwal was shown at serial No. 34. It is contended that despite Appellant being senior, Shri K.L. Paliwal has been promoted by the Respondents vide order dated 17th July, 1991. Adverse remarks conveyed to the Appellant vide order dated 28th September, 1992 relating to the year 1991-92 were totally baseless and unfounded. In the first place, service record of the Appellant for preceding five years earlier than the year of selection i.e. 1991-92 was to be considered for the purpose of promotion and secondly representation of the Petitioner against such adverse remarks was rejected by subsequent order dated 7th June, 1993. Therefore, such adverse remarks could not have come in the way of promotion of the Appellant from the post of District Industries Officer to that of Assistant Director, Industries.

6. As regards maintainability of writ petition, it has been contended that the Appellant being a member of S.T. category could not be said to have any lis with Shri K.L. Paliwal, who was a member of SC category and also junior to him. Mere non impleadment of Shri K.L. Paliwal could not, therefore, be fatal to maintainability of writ petition. Moreover, when the learned Single Judge

examined the matter on merits, there was no reason to observe that writ petition would not be maintainable for non impleadment of Shri K.L. Paliwal.

7. We have given our anxious consideration to the arguments noticed above.

8. It is clearly borne out from the record that penalty of censure was awarded to the Appellant by order dated 7th June 1993 passed by the Appellate Authority, which modified the original order dated 6th April, 1992 passed by the Disciplinary Authority, awarding penalty of stoppage of two annual grade increments without cumulative effect. It is also evident from the record that the vacancies against which the Appellant was considered for promotion and adjudged not suitable were pertaining to the year 1990-91 and 1991-92. In the first place, two relevant years would therefore cover the period from 1st April, 1989 to 31st March, 1991. Neither of the two orders, one passed by the Disciplinary Authority and another modified order of penalty passed by the Appellate Authority, would come in the way of promotion of the Appellant, for the simple reason that adverse remarks were conveyed to the Appellant on 20 28th September, 1992. This could not be an obstruction for granting him promotion, because, although, those adverse remarks pertained to the year 1991-92, but were in fact conveyed to the Appellant on 28th September, 1992 and consideration of candidature of Appellant for promotion against the vacancies of 1990-91 and 1991-92 had taken place much earlier as is evident from the communication dated 15th April, 1992 sent to Appellant by the Additional Director. Reason for coming to this conclusion is that the adverse remarks, in any case, were not communicated to the Appellant and un-communicated remarks could not have been acted upon by Departmental Promotion Committee. It may be true that when adverse remarks were communicated to the Appellant, he filed a representation there-against, but the same was rejected. Even if we do not go into correctness of the order rejecting representation or otherwise examinee validity of the adverse remarks, the fact still remains that the adverse remarks were either not recorded when meeting of DPC was convened or at any rate, were not communicated to the Appellant when the DPC was met to consider his case for promotion.

9. Accordingly to Rule 22 of the Rules, criteria for promotion from the post of District Industries Officer to that of Assistant Director, Industries is seniority-cum-merit and on that criteria, more weightage has to be given to the person who is senior and he cannot be denied promotion merely because his junior is more meritorious. In such criteria, a senior can be ignored only if it is found that he is unfit for promotion. However, when criteria for promotion is entirely merit based, meritorious performance irrespective of seniority, even of a junior person, has to be given preference.

10. The Supreme Court in B.V. Sivaiah and Others etc. Vs. K. Addankl Babu and Others etc., considered the question as to what would be the true meaning and import of "seniority cum merit" criteria vis-a-vis "merit cum seniority" criteria. In paras 17 and 18 of the judgment, their Lordships observed as under:

On behalf of the promoted officers, it was urged that for the purpose of promotion on the basis of seniority-cum-merit, seniority means the length of service and that among officers who were appointed on the same date and have the same length of service, seniority can have no bearing and promotion has to be made on a comparative assessment of merit of such officers. We are unable to agree. While applying the principle of seniority-cum-merit for the purpose of promotion, what is required to be considered is the inter se seniority of the employees who are eligible for consideration. Such seniority is normally determined on the basis of length of service, but as between employees appointed on the same date and having the same length of service, it is generally determined on the basis of placement in the select list for appointment. Such determination of seniority confers certain rights and the principle of seniority-cum-merit gives effect to such rights flowing from seniority. It cannot, therefore, be said that in the matter of promotion on the basis of seniority-cum-merit, seniority has no role where the employees eligible for promotion were appointed on the same date and have the same length of service.

18. We thus arrive at the conclusion that the criterion of "seniority-cum-merit" in the matter of promotion postulates that even the minimum necessary merit requisite for efficiency of administration, the senior, even though less meritorious, shall have priority and a comparative assessment or merit is not required to be made. For assessing the minimum necessary merit, the competent authority can lay down the minimum standard that is required and also prescribe the mode of assessment of merit of the employee who is eligible for consideration for promotion. Such assessment can be made by assigning marks on the basis of appraisal of performance on the basis of service record and interview and prescribing the minimum marks which would entitle a person to be promoted on the basis of seniority-cum-merit.

11. In view of settled position of law as noticed above, even if there existed any minor penalty or some minor adverse remark here and there, promotion could not be denied to the Appellant because the criteria for promotion in this case was not entirely merit based but was on "seniority-cum-merit" where seniority has to be given more weightage as compared to merit. In that criteria, even penalty of censure could not be a ground to deny promotion to the Appellant because what is to be seen is minimum necessary merit requisite for efficiency of administration and in that view of the matter, a senior person, even though less meritorious, shall have primacy in the matter of promotion and comparative assessment of merit is not required to be made.

12. So far as non-impleadment of Shri K.L. Paliwal as a party Respondent in the writ petition is concerned, suffice it to observe that non impleadment of said Shri K.L. Paliwal could not be a reason to deny consideration of the writ petition on merits, particularly when the learned Single Judge has considered the matter on merits. Nonetheless, we shall deal with the effect of non-impleadment of Shri K.L. Paliwal vis-a-vis maintainability of the writ petition.

13. In our considered view, non-impleadment of Shri K.L. Paliwal would not be an impediment for consideration of writ petition on merits, because, in the first place, it is an admitted position that he was through out shown junior to the Appellant in all seniority lists issued by the Respondent department from time to time and, secondly the Appellant is claiming his promotion from the post of District Industries Officer to that of Assistant Director, Industries against the vacancy reserved for Scheduled Tribe category, whereas said Shri K.L. Paliwal was a member of Schedule Caste. Therefore, in our considered view, there could be no lis or contest between the two.

14. In view of what has been discussed above, this special appeal succeeds and is hereby allowed. Impugned judgment dated 22.5.2006 passed by learned Single Judge is set aside and writ petition is allowed in the terms prayed for. Appellant is held entitled to promotion on the post of Assistant Director, Industries with effect from the date his junior Shri K.L. Paliwal was promoted, with all consequential benefits together with interest @ 6% p.a.

15. Compliance of the judgment be made within three months from the date of receipt of copy thereof. A copy of this judgment be sent to the concerned department for necessary compliance.

16. In the facts and circumstances of the case, parties are left to bear their own costs.