
(2003) 04 GAU CK 0023

In the Gauhati High Court

Case No : Writ Petition (C) No's. 6274 and 6606 of 2002

Ramen Chandra Kalita and Another

APPELLANT

Vs

State of Assam and Others

RESPONDENT

Date of Decision : 07-04-2003

Acts Referred:

Assam Engineering (Public Works Department) Service Rules, 1978 — Rule 13(4)

Citation : (2004) 1 GLR 239 : (2003) 3 GLT 369

Hon'ble Judges : Ranjan Gogoi, J

Bench : Single Bench

Advocate : P.K. Goswami, B.K. Sharma, M. Chanda, K.N. Choudhury and I. Choudhury, for the Appellant; J. Roy, Government Advocate, P.C. Deka and S.K. Medhi, for the Respondent

Judgement

Ranjan Gogoi, J.—Both the writ petitions being directed against the promotion of the Respondent No. 4 made by order dated 19.9.2002 were taken up for consideration together and are being disposed of by this common judgment and order.

2. The core facts are not in dispute and may be very briefly recited as hereinunder :

The petitioner in WP(C) No. 6274 of 2002 Ramen Ch. Kalita was at the relevant point of time, at Sl. No. 19 of the gradation list of Executive Engineer in the Public Works Department of the State of Assam. The writ petitioners in WP(C) No. 6606 of 2002, i.e., Smti. Nayan Sarma and Hrisikesh Choudhury were placed at Sl. Nos. 14 and 43 of the said gradation list of Executive Engineer. The position of the Respondent No. 4 Ajoy Chandra Bordoloi in the said gradation list was at Sl. No. 61.

Under Rule 13 of the Assam Engineering (Public Works Department) Service Rules, 1978 the post of Executive Engineer is a feeder post for promotion to the rank of Superintending Engineer. A selection for promotion to the post of

Superintending Engineer was held on 23.7.2002 and a select list was published on 1.8.2002. In the aforesaid select list while the name of the Respondent No.4 appeared at Sl. No. 1, the petitioner were placed at Sl. Nos. 18, 14 and 43 respectively. Pursuant to the aforesaid selection, by an order dated 19.9.2002, the Respondent No. 4 was promoted to the rank of Superintending Engineer. Being aggrieved, the instant recourse to the writ remedy of this court has been made by the writ petitioners, who, during the pendency of the proceeding have also been promoted to the rank of Superintending Engineer. As the promotion of Respondent No. 4, made earlier, has the effect of conferring seniority on the said respondent in the rank of Superintending Engineer over the writ petitioners, the grievance expressed in the writ petition continue and have been agitated in the course of the oral arguments advanced.

3. The criteria for promotion under Rule 13(4) of the Rules is merit and suitability with due regard to the seniority upto the rank of S.E. and thereafter to the other higher posts in the Department, promotions are to be made following the principle of merit-cum-seniority. The aforesaid position was brought in by an amendment to the Rules made in the year 1983. Earlier, it must be noticed, the criteria for promotion was merit-cum-seniority upto the rank Executive Engineer and thereafter to the other higher posts on the basis of merit alone. Promotion to the post of SE, under the earlier Rules, was therefore, on the basis of merit which criteria was altered to one of merit and suitability with due regard to seniority.

4. The records of the selection held on 27.3.2002 have been placed before the court by the learned Government Advocate. A perusal of the aforesaid record would go to show that before proceeding with the selection for promotion to the post of SE, the parameters for promotion was clearly identified. On the basis of gradings in ACRs of the previous five years of all eligible officers, marks as present were to be awarded and on the basis of the marks secured by each eligible candidate, candidates were required to be classified into 3 categories. In category 1 those who had secured 18 marks and above were to be included, whereas in category-2, candidates securing between 11 to 17 marks were required to be included. Those securing ten marks and below are to be graded in the 3rd category and were considered as unfit for promotion. Candidates falling in each of the categories 1 and 2 were required to be arranged in order of their inter se seniority in the feeder post. It is on the application of aforesaid parameters that the instant selection were made. It may also be pertinent to record at this stage that in another selection for promotion to the post of Addl. CE from the level of S.E.. held on 18.7.2002, minutes of which have been placed before this court, the same parameters were applied. The first question that has to be answered by this court, on the basis of the arguments made by the parties, is whether the parameter as noticed above and applied to the selection for promotion to the post of S.E., conforms to the requirement of the principle of merit and suitability with due regard to seniority, as prescribed by the Rules.

5. The learned Government Advocate has also placed before this court the relevant ACRs of all the petitioners as well as the Respondent No. 4 in course of hearing of the case. As inspection of the aforesaid records by the parties, had revealed certain alleged anomalies and irregularities particularly in respect of Respondent No. 4 in the ACR for the years 1999 and 2000, and the writ petitioner Ramen Kalita for the same years, additional pleadings have been brought on record by the contesting parties requiring the court to determine the further question as to whether such alleged anomalies/irregularities have in any way vitiated the selection held on 23.7.2002.

6. I have heard Mr. P.K. Goswami, learned Sr counsel appearing on behalf of the writ petitioner in WP(C) No. 6274 of 2002 and Mr. K.N. Choudhury, learned Sr counsel appearing for the two writ petitioners in WP(C) No. 6606 of 2002. I have also heard Mr. J. Roy, learned counsel appearing for the official respondents in both the cases as well as Mr. P. C. Deka, learned Sr counsel appearing for the Respondent No. 4.

7. Promotion being a cherished expectation of all eligible incumbents, allegations of illegal/irregular appointments frequently confront the courts and the present is one such instance. The principles that required to be followed while making a particular promotion are invariably set out in the service rules or in the executive instructions holding the field. When promotion is required to be made solely on the basis of seniority or on the basis of pure merit, not much problem arises. In between the two extremes, promotion is often required to be made by application of various other criteria which call for an effective fusion between seniority and merit. Seniority cum fitness or seniority cum merit, as commonly understood, are two well known and well established principles governing promotion, which expressions have been judicially interpreted to mean that in promotions made by application of the said criterion the emphasis is on the seniority and merit, being of a minimum level, takes a back seat. Merit cum seniority, on the other hand, has been understood by judicial pronouncements to mean a criterion which is essentially one of merit, where seniority comes into play only when merit is equal on an inter se comparison of the merit of all eligible candidates.

To what category the expression "merit and suitability with due regard to the seniority" belongs and what are the parameters for due application of the said principle is the moot question. To understand and answer the aforesaid questions recourse must be had to the predecessor Rule in force until the year 1983 as well as the change brought about by the existing Rules. Promotion to the post of SE under the old Rules, it has already been noticed, was required to be made on the basis of pure merit which criterion was altered to one of merit and suitability with due regard to seniority by the amendment to the Rules. A discernible attempt to give some weight to seniority, by the amendment, is therefore, noticeable, though the proportion and the stage of application thereof would require determination. That Rule 13(4) has two limbs prescribing two different

parameters for promotion to two different sets of posts must also be kept in mind. That the Rule making authority consciously applied two different principles/parameters to two sets of posts is of utmost significance. Obviously, the two expressions appearing in Rule 13(4), i.e., "merit and suitability with due regard to seniority" and "merit cum seniority" cannot be understood to convey the same meaning, as the appointing authority would like the court to understand, a stand advanced in the course of oral arguments as well as manifested in its actions in applying the same parameters/principles while making promotion to the post of S.E. as well as the next higher post of Additional Chief Engineer.

8. The expression merit and suitability with due regard to seniority, it is agreed at the Bar has been subjected to judicial interpretation in a very few cases, perhaps because the said expression has been less frequently used by the Rule making authority. In Union of India (UOI) Vs. Mohan Lal Capoor and Others, the aforesaid expression came up for consideration before the Apex Court in the context of the prescription contained in the Promotion Regulation for promotion to the Indian Administrative Service. Though in the separate but concurring judgment of Mathew, J, there are some indications that the aforesaid principle really prescribe a merit based criteria for promotion, the main judgment delivered in the case would go to indicate that the necessary fusion between merit and seniority has to be established by giving some weight age to seniority along with inter se merit of all the eligible candidates, and such weightage must be given at the time of making the assessment of candidates for being included in the select list.

In the case of Union of India and Ors. v. Lt. Gen. Rajendra Singh Kadyan and Anr. (2000) SCC 698 relied upon by the respondents the aforesaid expression "merit and suitability with due regard to seniority" was again considered by the Apex Court. But the observation of the Apex Court in that case must be understood in the true context in which the Apex Court was in session of the matter. As would be evident from a reading of the judgment, in Union of India and others (supra), the Apex Court was really concerned with the question as to whether the post of Army Commander was a selection post or promotion to the said post was required to be made on the basis of seniority alone.

9. The parameters applied while selecting the candidates in the selection held on 23.7.2002 has already been noticed. Inter se merit of all the eligible candidates were taken into consideration and a particular standard of merit was prescribed. Candidates who reached the prescribed standard of merit were to be arranged in order of their inter se seniority in the feeder post. The parameters noted above really pertain to the realm of selection by application of the principle of "merit cum seniority", a conclusion which this court, feel, fortified in reaching, from the decision of the Apex Court in C P Kalra v. Air India through its C.P. Kalra Vs. Air India through its Managing Director, Bombay and Others, In the aforesaid case, promotions in Air India to the level of Station Superintendents was required to be made by application of principle of merit cum seniority. The practice followed was

to assess the merit of each eligible candidate and 70 marks was prescribed as the minimum marks. All those who had qualified by reaching the said standard, were arrayed in the select list in order of their inter se seniority. The Apex Court held that promotion by the application of the said principles conformed to the requirements of the criteria of merit cum seniority.

10. In the light of the above discussions, the parameters applied while making the impugned selection, do not appear to conform to the principle of merit and suitability with due regard to seniority as prescribed by the Rules in force. The correct meaning of the expression "merit and suitability with due regard to the seniority", having regard to the context of the Rules in force and keeping in mind the earlier Rules holding the field, would be that though the criteria of merit and suitability with due regard to seniority is essentially a merit based criterion, seniority cannot altogether be ignored and has to be considered parallelly along with merit while determining the eligibility of a candidate for his inclusion in the select list. Though it would not be the duty of the court to lay down the exact modalities to cover selection by application of said criteria, it may be apposite to observe that out of the total marks earmarked for assessment, say out of 100 marks, a particular percentage can be assigned to merit and the remaining percentage to seniority. The percentage prescribed for merit must necessarily be higher than the percentage prescribed for seniority, as this court has already held that the expression in question convey primarily a merit based assessment. What marks should be given to seniority can also be worked out by taking into account each year of completed service and on that basis the necessary fusion between merit and seniority can be reached. Having reached the aforesaid conclusion, this court cannot but hold that the parameters applied in the selection on 23.7.2002 do not conform to what was required to be followed by applying the principle of "merit and suitability with due regard to the seniority". The impugned selection and the consequential promotion order dated 19.9.2002 therefore, will have to be set aside, which I hereby do.

11. The next question, to which the court has now to turn, is the grievance of parties with regard to certain alleged inter-polations in the ACRs of the writ petitioner, Ramesh Chandra Kalita and the respondent No. 4, Ajoy Chandra Bordoloi, for the year 1999 and 2000. During the year 1999 and 2000, the Respondent No. 4 Ajoy Bordoloi was on deputation with the Science and Technology Department, Government of Assam and he was assigned duties in the Guwahati Planetarium. The additional pleadings advanced on behalf of the official respondents would go to show that the Commissioner and Secretary of the Department of Science and Technology, Government of Assam; was the immediate superior of the Respondent No. 4 and the Respondent No. 4 had directly worked under the said authority during the years in question. If that be so, and this court has no other material to come to any contrary conclusion, the actions of the Commissioner and Secretary, Department of Science and Technology, in acting as the recording, reviewing and accepting authority cannot be faulted with. The said authority has consistently graded the said officer, i.e.,

the Respondent No. 4, as an outstanding officer for the two years in question. As such, the alleged interpolations in the gradings of the Respondent No. 4 as outstanding even if assumed to be correct, would not fundamentally alter the situation to require any interference by this Court.

12. Coming to the writ petitioner, Ramen Chandra Kalita, what transpires is that the officer has been graded as outstanding for the years 1999 and 2000. The aforesaid ACRs along with the ACRs of other years were put up before the Selection Committee which met on 11.7.2001 for selection to the post of SE. The Selection Committee took the view that the outstanding grading awarded to the writ petitioner Ramen Kalita were not supported by adequate reasons. The selection committee assessed the ACRs as very good. No fault can be found with the action of the Selection Committee in assessing the ACRs of the writ petitioner as very good, as such assessment were made for the purpose of the selection. It is the settled law that the selection committee cannot be expected to mechanically endorse the gradings of a particular officer as reflected in the ACRs and the selection committee have to arrive at its own conclusion on an over all consideration of the service record of the officer concerned. But what has been done in the instant case is that on the basis of the assessment made by the selection committee, for the purpose of selection the gradings made in the ACRs of the petitioner in question were altered to "very good" from "outstanding". As already indicted the functions of the selection committee in appreciating the gradings given in the ACRs for the purpose of assessment of an officer for selection is entirely different from the question of the gradings recorded in the ACR by the statutory prescribed authority. The assessment of the selection committee in respect of the gradings already recorded in an ACR cannot be understood as a sine quo non for a review of the gradings in the ACR. Any action on the said basis would reflect an abdication of the powers of the accepting authority, as the final authority, under the provisions of the Assam Services (Confidential Rolls) Rules, 1960.

13. For the aforesaid reasons, this court hereby directs that the down grading of the ACRs from "outstanding" to "very good" shall stand interfered with and the position prevailing prior to 17.11.2001 shall be brought into force meaning thereby the writ petitioner, Ramen Ch. Kalita shall be graded as "outstanding" in the ACRs of 1999 and 2000. It is also made clear that though no change would be affected in the ACRs of the said petitioner, it would be open for the selection board to accept the said gradings upon consideration of the entire service record of the officer for the purpose of selection to the next higher post, a course which the selection committee must apply while considering the cases of all eligible officers.

14. Both the writ petitions shall stand answered accordingly.