

(2009) 07 GAU CK 0051

In the Gauhati High Court

Case No : Writ Petition (C) No. 27 (AP) of 2008

S.A. Bora and Another

APPELLANT

Vs

State of Arunachal Pradesh and Others

RESPONDENT

Date of Decision : 17-07-2009

Acts Referred:

Constitution of India, 1950 — Article 309

Citation : (2009) 2 GLD 447 : (2009) 4 GLT 674

Hon'ble Judges : P.K. Musahary, J

Bench : Single Bench

Advocate : P.K. Tiwari, Bpul Sarma and A.K. Singh, for the Appellant; R.H. Nabam, Sr. Govt. Advocate, T. Siram, T. Jamoh, A. Mize and T. Tapak, for the Respondent

Final Decision : Dismissed

Judgement

P.K. Musahary, J.—Heard Mr. P.K. Tiwari, assisted by Mr. A.K. Singh, learned Counsel, appearing for the petitioners. Also heard Mr. R.H. Nabam, learned Senior Government Advocate, appearing for State respondent Nos. 1 and 2 and Mr. T. Jamoh, learned Counsel appearing for private respondent No. 3.

2. The brief facts leading to filing of this writ petition are that the petitioners No. 1 and 2 were initially appointed in the cadre of Junior Engineer (JE) in the Rural Works Department on 19.6.1978 and 14.6.1979 respectively. They were later on promoted to the next higher post of Technical Assistant on 1.7.1985 and 9.12.1986 respectively. Likewise, the private respondent No. 3 was also initially appointed in the cadre of Junior Engineer (JE) in the same Department on 4.6.1979 and subsequently promoted to the post of Technical Assistant on 17.11.1986. In the year 1995, the Department of RWD was trifurcated into 3 different departments namely (1) Rural Works Department, (2) Irrigation and Flood Control Department, and (3) Public Health Engineering Department. On trifurcating of the erstwhile Department of RWD, the petitioners opted for Irrigation and Flood Control Department (IFCD in short) which is again renamed

as Water Resources Department. A final gradation list of Junior Engineers under the IFCD as on 2.6.2001 was circulated on 13.6.2001 wherein the names of the petitioners 1 and 2 were shown at serial Nos. 4 and 5 respectively while the name of private respondent No. 3 was shown at serial No. 6. Likewise, a final gradation list of Technical Assistants under the IFCD as on 16.12.1999 was circulated on 16.12.1999 and in the said list, the names of the petitioners 1 and 3 and the private respondent No. 3 found places at serial Nos. 4, 5 and 6 respectively. The petitioners, therefore, were shown senior to the private respondent No. 3 both in the cadre of Junior Engineer (JE) and Technical Assistant.

In the year 2000, the post of Technical Assistant was abolished and the cadre of Technical Assistant was merged with the cadre of Junior Engineer (JE) and hence, since the year 2000, the cadre of Junior Engineer (JE) became the sole feeder cadre of Assistant Engineer. On the basis of recommendation of the Departmental Promotion Committee (DPC in short), the petitioners and the private respondent No. 3 were promoted vide order dated 18.12.2001 on regular basis alongwith 21 others Junior Engineers to the post of Assistant Engineer retrospectively with effect from various dates as specified in the said order. By the aside order, the promotion of the petitioners 1 and 2 was regularized with retrospective effect from 11.7.1997 and 14.7.1997 respectively. By the same order, the promotion of respondent No. 3 to the post of Assistant Engineer was regularized with retrospective effect from 22.7.1997. The position of petitioners 1 and 2 and respondent No. 3 was shown in the said promotion order at serial Nos. 4, 5 and 6 respectively. It is, however, not specifically mentioned in the said promotion order as to whether the date of promotion/regularization as shown against the incumbents would be counted for the purpose of seniority in the post or whether the inter-se-seniority position would be determined subsequently in terms of the recommendation of the Departmental Promotion Committee (DPC) in the cadre of Assistant Engineer. However, by a corrigendum issued by the State Government on 2.8.2003, it has been clarified that the order of promotion dated 18.12.2001, i.e. the date of promotion/regularization shown against each officers is only for the purpose of regularization and the same shall not be counted for the purpose of seniority in the post.

After the aforesaid promotion order was made, a provisional gradation list of Assistant Engineers in the Department of IFCD was circulated on 14.6.2004 showing the inter-se-seniority position of the Assistant Engineers as on 31.3.2004 wherein the position of petitioners 1 and 3 and private respondent No. 3 was shown at serial Nos. 13, 14 and 15 respectively.

The private respondent No. 3 represented before the respondent authorities claiming seniority over the petitioners 1 and 2 and the respondent Secretary, Water Resources Department, vide order No. SWRD-30/2007 dated 1.10.2007 re-fixed the date of regularization of petitioner No. 2 in the cadre of Assistant Engineer w.e.f. 14.6.1999 instead of 14.7.1997 and by the same order, the

seniority position of private respondent No. 3 was re-determined and fixed at seiiai(sic) No. 13 in the provisional gradation list showing his name before one Sri D.K. Dutta and above the petitioner No. 1. This order is under challenge in this petition.

3. Mr. Tiwari, learned Counsel for the petitioners, submits that the impugned order dated 1.10.2007 was passed without providing any opportunity of hearing to the present petitioners. Moreover, the common order of promotion to the post of Assistant Engineer dated 18.12.2001 was made pursuant to the recommendation of the Departmental Promotion Committee (DPC) and under the then Recruitment Rules, the post of Assistant Engineer is a selection post wherein the promotion is to be made on the basis of merit-cum-seniority and hence, there is no reason to believe that the inter-se-seniority of the petitioners and the private respondent No. 3 was on the basis of their inter-se- seniority assessed by the DPC while recommending the promotion of the Junior Engineers. The further submissions of Mr. Tiwari, learned Counsel, is that the inter-se-seniority of the petitioners 1 and 2 and respondent No. 3 and the effective date of promotion to the post of Assistant Engineer could not have been altered or re-determined contrary to the recommendation of the Departmental Promotion Committee (DPC). No such alteration or redetermination could be done without constituting review DPC in conformity with the Recruitment Rules and order could be passed to the prejudice of the petitioners without affording them any opportunity of hearing.

4. Based on the aforesaid submissions, the petitioners have made the following prayers:

- (1) issuance of a writ of certiorari quashing the impugned order dated 1.10.2007,
- (2) issuance of a writ of mandamus directing the official respondents to constitute a review Departmental Promotion Committee (DPC) for reconsideration of the respective dates of promotion on which the petitioners 1 and 2 and private respondent No. 3 are to be treated as promoted to the cadre of Assistant Engineer, and
- (3) determination of inter-se-seniority of the petitioners 1 and 2 and private respondent No. 3 in the cadre of Assistant Engineer on the basis of recommendation to be made by a review Departmental Promotion Committee (DPC).

5. The submissions of the learned Counsel appearing for the petitioners have been countered by Mr. R.H. Nabam, learned Senior Government Advocate, by placing the grounds taken in paragraph-5 of the affidavit-in-opposition filed by the respondent Nos. 1 and 2 which are quoted below:

"5. That with regards to the statement made in paragraph 7 of the writ petition, the humble deponent begs to State that the respondent No. 3 cleared his Departmental Professional Examination, a prerequisite qualification for promotion

from Junior Engineer (JE) to Assistant Engineer on dated 14.3.1986. The actual date of regularization of the respondent No. 3 is 22.7.1996 but not 22.7.1997 as erroneously shown in the writ petition. It is true that the name of the first and the second petitioner appeared at serial No. 4 and 5 respectively and the respondent No. 3's name at serial No. 6 in the Government order No. SIFCD-48(Pt)/I dated 18.12.2001. However, the said order is only an order of appointment/regularization in the post of Assistant Engineer, which cannot be seen as gradation list of inter-se- seniority position of Assistant Engineers. It would be wrong to infer the order dated 18.12.2001 was silent on the date of regularization shown against the petitioners and respondent No. 3 rather that has been explicitly mentioned in the said order. The extract of the operative portion of the said order is reproduced hereunder for the perusal of the Hon"ble Court, "on the recommendation of the DPC, the Governor of Arunachal Pradesh is pleased to promote the following Junior Engineers to the post of Assistant Engineer/Assistant Surveyor of Works in the pay scale of Rs. 8000-275-13500/- (enhanced) plus other allowances as admissible from time to time under the Irrigation and Flood Control Department with effect from the date as shown against each" which prima facie indicated that the date of promotion of respondent No. 3 is 22.7.1996.

Further, it has also been specifically mentioned in the bottom of the said order that "other terms and conditions which are not specified herein shall be governed by the relevant rules and orders in force from time to time."

Accordingly, the respondent No. 3 having been cleared his Departmental Professional Examination in 1986, his date of regularization in the cadre of Assistant Engineer has been indicated with effect from 22.7.1996 and those of the petitioners with effect from 11.7.1997 and 14.7.1997 respectively. The petitioner No. 1 was not qualified for such promotion before the amendment of Recruitment Rules, 1986, on 21.4.1997 due to non-clearance of prerequisite Departmental Professional Examination and petitioner No. 2 could only qualify on 27.3.1998 when he passed Departmental Accounts Examination. The respondent No. 3 was qualified even earlier than the existence of the new Recruitment Rules, 1997.

In the Recruitment Rules, 1984, for the post of Assistant Engineer before 21.4.1997 (before amendment of the RR, 1986) for the promotion from Junior Engineer to Assistant Engineer, prerequisite qualification was minimum four years as Technical Assistant having a regular service for Diploma holders taking into services of both the Grades (as JE/TA) subject to passing of the Departmental Professional Examination in three subjects:

- (i) Engineering Theory,
- (ii) Engineering Practical, and
- (iii) Accounts for Diploma Holders.

On dated 21.4.1997, the said Recruitment Rules, 1984, had been amended. According to the new Recruitment Rules, the prerequisite qualification for promotion from Technical Assistant (now merged with Junior Engineer) to the post of Assistant Engineer is "three years of regular service in the grade with minimum qualification of Diploma in Civil/Agri Engineering and also having passed in Accounts Examination as Junior Engineer failing which from amongst Junior Engineers of the Department with eight years of regular service in the grade for diploma holder and five years for degree holder respectively provided they have passed in accounts examination as Junior Engineer." In short, now instead of four years, now it is three years regular service and two subjects viz. Engineering Theory and Engineering Practical has been lifted, leaving a single subject, viz. accounts paper as prerequisite qualification. Therefore, the petitioner No. 1 become qualified for the post of Assistant Engineer only after the amendment of the Recruitment Rules, 1986, for the post of Assistant Engineer only (i.e. on dated 21.4.1997) his date of regularization in the post has been shown from 11.7.1997 as he could not clear the required subject before amendment of the Recruitment Rules, 1986.

Further, it is to be stated here that petitioner No. 2 was erroneously regularized in the post of Assistant Engineer w.e.f. 14.7.1997 though he had not qualified for the promotion to the post of Assistant Engineer as per the existing Recruitment Rules. However, he qualified for the post only on 27.3.1998 (date of passing Departmental Professional Examination) a prerequisite qualification for the promotion from Junior Engineer to the post of Assistant Engineer as per the new Recruitment Rules of 1997.

Therefore, the petitioners having qualified for promotion to the post of Assistant Engineer later than the respondent No. 3 cannot claim seniority over the respondent No. 3 to the post of Assistant Engineer.

6. Mr. R.H. Nabam, learned Senior Government Advocate refers to Assistant Engineer (Civil) Group-B Recruitment Rules, 1997, framed under the proviso of Article 309 of the Constitution of India particularly column 12 to the schedule which provides for filling up the post of Assistant Engineer by promotion from Technical Assistant requiring that a candidate has to pass the Accounts Examination as Junior Engineer (JE). The contention of the respondent authorities that the petitioner No. 1 was not qualified for promotion before amendment of Recruitment Rules of 1986 on 21.4.1987 and the petitioner No. 2 could qualify only on 27.3.1998 could not be controverted by the petitioners. Similarly, the contention that the private respondent No. 3 was qualified in the Departmental Professional Examination even before coming into force the new Recruitment Rules of 1997 has also not been questioned or controverted by the petitioners. No rejoinder has been filed by the petitioners controverting the aforesaid position and therefore, the aforesaid position stands undisputed and admitted one.

7. The respondent No. 3 filed a counter-affidavit wherein it has been specifically

stated that he cleared the Departmental Professional Examination (DPE in short), a prerequisite qualification for promotion from Junior Engineer to Assistant Engineer as far back as on 14.3.1986 and his actual date of regularization is 22.7.1996 and not 22.7.1997 as has been shown erroneously in the petition. It is also stated that although the names of the petitioners 1 and 2 appeared at serial Nos. 4 and 5 respectively in the order dated 18.12.2001 passed by the respondent Secretary, IFCD, it would be wrong to infer that the said order is silent on the date of regularization as shown against the petitioners 1 and 2 and respondent No. 3. In the said counter-affidavit, the private respondent No. 3 categorically stated that the petitioner No. 1 passed his Departmental Professional Examination Accounts Paper on 17.11.1987, Engineering Theory Paper on 10.12.1990 but failed in Engineering Practical Paper and thus, he (petitioner No. 1) could not clear all the 3 subjects before the new Recruitment Rules of 1997 came into force, which is the prerequisite qualification for promotion to the post of Assistant Engineer. Likewise, it is averred that the petitioner No. 2 cleared his Departmental Professional Examination Accounts Paper only on 27.3.1997 but he (petitioner No. 2) was appointed/regularized in the post of Assistant Engineer with effect from 14.7.1997. Thus, according to the respondent No. 3, the petitioner No. 1 became qualified under the amended Recruitment Rules of 1997, which came into force w.e.f. 9.12.1997 only, and he was not qualified to be promoted before 9.12.1997 as he could not clear the said examination particularly Engineering Practical Paper. In regard to the petitioner No. 2, it is stated that he cleared his prerequisite qualification/examination particularly Accounts Paper only on 27.3.1997 and he was erroneously regularized to the post of Assistant Engineer w.e.f. 14.7.1997 i.e. with retrospective effect. The aforesaid contention of private respondent No. 3 made in his counter-affidavit having not been disputed/controverted/denied by the petitioners by filing any rejoinder to the same and for want of such rejoinder, it can be treated as correct and admitted position.

8. The Recruitment Rules require passing of DEP by Technical Assistant/Junior Engineer (JE) for promotion to the post of Assistant Engineer, and the same is the prerequisite condition for promotion to the higher post as has been discussed above. There is no escape from compliance with the said provision of law and it is clearly found and established that respondent No. 3 cleared the said Departmental Professional Examination on 14.3.1986 much before coming into force of the new Recruitment Rules of 1997 whereas the petitioners could clear the same only after coming into force of the Recruitment Rules of 1997. The private respondent No. 3 represented the respondent authorities to make necessary correction in the seniority list of Junior Engineer (JE) against which the petitioners should not have any grievance.

9. The question to be considered is as to whether such correction in the seniority list could be done or effected without affording any chance of hearing or notice to the petitioners and also as to whether such correction of seniority position requires recommendation/approval of the Departmental Promotion Committee

(DPC) as has been raised by the present petitioners. The respondent authorities while passing the impugned order dated 1.10.2007 verified the necessary facts and particulars in respect of the petitioners and private respondent No. 3 to determine their respective seniority position. There is nothing to show that the said impugned order dated 1.10.2007 has been passed contrary to the record maintained by the respondent department which are also known to the petitioners themselves. Even if the petitioners were afforded a chance of personal hearing for the purpose of determination of seniority position, they would not have been in a position to dispute or contradict the factual position, particularly non-clearance of Departmental Professional Examination before passing of the Recruitment Rules of 1997. Considering the aforesaid position, it cannot be said that the position would have been different if the petitioners were given notice or afforded with chance of personal hearing. It is, therefore, clear that it would have been a mere formality without any useful purpose to serve the notice or affording chance of hearing as claimed by the petitioners inasmuch as no prejudice has been caused to them. It is already discussed above that the petitioners could not dispute or controvert the contentions made by the respondent authorities and the private respondent No. 3 as well in regard to the non-clearance of Departmental Professional Examination by them which is the prerequisite qualification for promotion to the post of Assistant Engineer before the respondent No. 3 cleared the same much before the Recruitment Rules of 1997 came into force.

10. In *Kulwant Kumar Sood v. State of H.P. and Anr.* reported in (2005) 10 SCC 670 it is held that the seniority of an employee is always required to be determined in a cadre on the basis of relevant principles enunciated either in the rules for recruitment or in absence of a rule, by an administrative instructions which remain operative in the field. In the present case, there exists service rules, as indicated above, which prescribes pre-condition for becoming eligible, i.e. passing of certain Departmental Professional Examination as prerequisite qualification, for promotion to the next higher post. The said service rules, cannot be ignored or violated by the respondents while fixing the inter-seniority of the petitioners and respondent No. 3. In this regard, the case of *Om Prakash Shrivastava Vs. State of M.P. and Another*, may also be referred to. In the aforesaid cited case, the appellant was on probation and his probation period was extended by one year. Unlike other employees, he did not succeed in Departmental Examination even during his extended probation period. He could pass the examination only subsequently and therefore, it was held that his seniority would be determined on his confirmation depending on date of his passing the Departmental Examination. The principle of law enunciated by the Apex Court in the aforesaid cases, in my considered view, could well be applied to the present case and as such, I find no infirmity in passing the impugned order dated 1.10.2007 by the concerned respondent authority correcting the seniority position of private respondent No. 3 above the petitioners, particularly petitioner No. 1 and the same requires no interference.

11. In view of the foregoing discussions, I find the present petition is devoid of any merit and liable to be dismissed and accordingly, the same stands dismissed. Parties to bear their own costs.

12. Send down the records forthwith.