
(2008) 01 GAU CK 0026
In the Gauhati High Court

S.D. Majumdar

APPELLANT

Vs

State of Mizoram and Others

RESPONDENT

Date of Decision : 10-01-2008

Acts Referred:

Constitution of India, 1950 — Article 32

Citation : (2008) 2 GLT 844

Hon'ble Judges : A.B. Pal, J

Bench : Single Bench

Final Decision : Allowed

Judgement

A.B. Pal, J.—The petitioner (S.D. Mazumdar) is a Diploma Engineer (Mechanical), presently serving as SDO (Mechanical) at Aizawl, which is a Grade-V post of the Mizoram Engineers Service (for short MES). He was initially appointed on 24.06.1969 to the post of Sub-Engineer (Mechanical), Assam, and posted at Silchar. In July, 1969, he was transferred to Mizoram which was then autonomous district of Assam. On 21.01.1972 Mizoram came to be a union territory. The services of the petitioner and other non-gazetted employees were placed at the disposal of the Mizoram administration. He was promoted to the post of SDO/AE (Mechanical) on 21.04.1978. He was confirmed to the said grade on 19.04.1991. Since his promotion on 21.04.1978 the petitioner served in the same post/grade for more than 29 years without any promotion. He is going to retire on 31.01.2008 from the same grade (Grade-V).

2. The 6th respondent (S.B. Bhattacharjee) is also a Diploma Engineer (Mechanical). He was initially appointed as Jr. Engineer (Mechanical) in the same department in May 1979, about 10 years after initial appointment of the petitioner. He was then serving as SDO (AE) (Mechanical) on promotion. The said respondent began his service under the petitioner. On 29.10.1994 the sixth respondent was promoted to the post of SDO/AE (Mechanical) (Grade-V of MES) more than 16 years after promotion of the petitioner to the said grade.

3. The next promotion from SDO/AE (Grade-V) is to the post of Executive Engineer (Grade-IV) of MES. According to the provisions in the MES rules 75% of the posts in Grade-IV are to be filled up from degree engineers and 25% from diploma engineers. Thus, only 5 posts in Grade-IV are available for promotion from diploma engineers in Grade-V.

4. The final seniority list of diploma engineers grade-V was published on 12.04.2002. The petitioner was shown at Sl. No. 2 and the 6th respondent at Sl. No. 6. There is no dispute that the petitioner has always been senior to the said respondent. One C.K. Dutta was at Sl. No. 1. He was, however, promoted to Grade-IV (Executive Engineer) up-grading thereby the seniority position of the petitioner to Sl. No. 1. Mr. Dutta retired from Grade-IV of the service on 31.01.2004 causing a vacancy in Grade IV. The Petitioner being the seniormost diploma engineer in Grade-V (senior to the 6th respondent by more than 16 years) was expecting promotion to the post of Executive Engineer (Grade-IV) at the fag end of his career. But Mizoram Public Service Commission (for short MPSC) decided otherwise. On 16.03.2004 MPSC recommended respondent No. 6 for promotion to Grade-IV superseding the petitioner. Admittedly, at the relevant time the bench mark for the promotion to Grade-IV was "very good". The only reason for supersession appear to be that though the petitioner was rated the bench mark "very good", the sixth respondent was rated "out standing" and this higher grading prompted the MPSC to give that respondent a march over the petitioner in terms of the memorandum issued on 10.10.2002 providing procedure for the Departmental Promotion Committee (for short "DPC Procedure"). This has, as a matter of fact, triggered the present controversy.

5. The petitioner challenged the recommendation by instituting W.P.(C) No. 44 of 2004 contending, inter alia, that the recommendation by the MPSC was not in terms of para 3.4 (g) of the DPC procedure. Admittedly, confidential reports for five years, for all the officers are to be considered for promotion. The said five years must be the years immediately proceeding the panel year, as provided in said para. The petitioner contended that the ACRs for the year 2002-2003 i.e. year ending on 31.03.2003 could not have been legitimately taken into account by the Public Service Commission. But, in taking into account ACRs commencing from 1998-1999 to 2002-2003 against the vacancy occurred on 01.02.2004 the Commission violated para 3.4 (g). According to the petitioner, the Commission should have considered the ACRs commencing from the year 1997-98 up to year 2001-2002. If considered thus, both the petitioner and the 6th respondent could be rated "very good" which is the bench-mark for promotion to Grade-IV. The petitioner being senior most officer in Grade-V would have legitimately been promoted to Grade-IV in place of 6th respondent. The reason is that in the ACRs of five years from 1997-98 to 2001-2002 the sixth respondent was rated "out standing" in two years and "very good" in three years. According to the DPC procedure a person cannot be rated over all "out standing" if he does not secure "out standing" in three years. But the Commission wrongly considered five ACRs from 1998-99 to 2002-2003 during which the said respondent secured three "out

standing" which enable the Commission to rate him overall "out standing". Admittedly, at the relevant time the DPC procedure provided that a officer graded "overall outstanding" would supersede the officer graded "very good" regardless of seniority. The said procedure was later withdrawn. Now, if a senior secures "bench mark" he cannot be superseded by a junior by securing higher grading.

6. The contention of the petitioner was, however, rejected and his writ petition was dismissed on 29.11.2004 by a learned Single Judge of this Court.

7. Aggrieved, the petitioner challenged the decision of the Single Bench in Writ Appeal No. 5 of 2004. But the respondent No. 2 (Secretary, DP & AR) issued an order on 06.12.2004 promoting 6th respondent to Grade-IV of the service. The writ appeal came to be allowed on 27.01.2006 setting aside the judgment of the Single Bench and the promotion order dated 06.12.2004 of the sixth respondent. The Division Bench by order dated 27.01.2006 directed the Commission to consider afresh suitability of the officers taking into account the ACRs for five years from 1997-1998 to 2001-2002.

8. The judgment and order of the Division Bench was put under challenge in the Apex Court by three Civil Appeals, viz, 2527 of 2007 by the sixth respondent, 2528 of 2007 by the MPSC and 2529 of 2007 by the State Government. The Apex Court dismissed all the appeals on 15.05.2007. Thus, the decision of the Division Bench in WA No. 5 of 2004 received finality and, therefore, the Commission was duty bound to review the recommendation impugned taking into account, the ACRs from 1997-98 to 2001-2002.

9. Accordingly, on 10.07.2007 the Commission reviewed the matter taking into account the ACRs of the officers under consideration from 1997-98 to 2001-2002. The petitioner having graded "very good" in all the five years could be given overall grading "very good". But the sixth respondent having secured only two "out standing" and three "very good" could not be given overall grading "out standing" as per the DPC procedure. He could be rated "very good" only. In such a situation it was not possible to recommend him for promotion superseding the petitioner. The Commission then took up the ACR of the sixth respondent for the year 1997-98 and observed that the "very good" grading given by the countersigning officer did not actually commensurate with the high remarks about the officer by the Reporting and the Reviewing Authority and that would mean there was no due application of mind on the part of the countersigning officer. As if, the countersigning officer is bound to go by the remarks of his subordinate officers. The Commission then categorised the sixth respondent as "out standing" for the year 1997-98. Thus, the number of "out standing" was brought to three and then, in terms of DPC procedure gave him the overall grading "outstanding". After doing so the Commission stuck to its earlier position and again recommended sixth respondent for promotion to Grade-IV of the service superseding the petitioner who is admittedly senior to the said respondent by more than 16 years and obtained the required bench mark "very good" for promotion.

10. On the basis of the recommendation of the Commission dated 10.07.2007 the 2nd respondent issued a notification on 17.08.2007 only stating that the earlier order of promotion dated 06.12.2004 in favour of the sixth respondent would stand. Though no recommendation of the Commission is found, ex-facie, to promote the private respondent with retrospective effect, the notification under challenge has been worded in a manner to mean that the earlier promotion order dated 16.12.2004 was validated.

11. Confronted with the adverse situation the petitioner approached the Apex Court once again by means of WP(C) 49 of 2007 under article 32 of the constitution. He also filed Contempt Petition (C) No. 180-182/2007. The said writ petition and the contempt petitions came to be disposed of on 07.09.2007. The Apex Court observed that the petitioner may file a writ petition before High Court. The writ petitioner is thus, before this Court once again by means of the present writ petition.

12. I have heard learned Counsel for the parties.

13. In the premises aforementioned it would be seen that the Apex Court finally settled that the ACRs of the officers under Consideration for the years from 1997-98 to 2001-2002 only should be taken into account by the Commission. The ACRs of the two officers, who are locked in the long drawn battle, were written by the Executive Engineer as reporting officer, reviewed by the Superintending Engineer as review officer and countersigned by the Chief Engineer. The assessment made by them in the ACRs for five years are as under:

Name of officer	97-98	98-99	99-2000	2000-01	01-02	S.D.	Majumder	VG	VG	VG
VG VG S.B. Bhattacharjee	VG	OS	VG	VG	OS					

The DPC procedure dated 10.10.2002 provides that an officer who gets at least three "out standing" and two "very good" in five ACRs will be categorised as "outstanding". Similarly, an officer who gets at least three "very good" and two "good" would be categorized as "very good".

There is however, no quarrel that as per year-wise grading noticed above the sixth respondent could be categorised as "outstanding" in terms of the DPC procedure.

14. Learned Counsel for the respondents correctly argued that the Commission is not bound to go by the assessment reflected in the ACRs. The DPC procedure itself provides that the DPC should not be guided merely by overall grading, if any, that may be recorded in CRs, but should make its own assessment of the entries in the CRs, because it has been noticed that some times the overall grading in ACR may be inconsistent with the grading under various parameters or attributes. In support of the contention that the Commission can reassess the ACRs during the selection committee meeting the learned Counsel have cited the decision of this Court in Ramen Ch. Kalita and Ors. v. State of Assam and Ors. reported in 2003 (3) GLT 369. This Court held:

The grading in the ACRs of the Officers under consideration will not be binding on the selection committee which will have independent powers of re-assessment of such ACRs and further that the ultimate conclusions of the selection committee are required to be based on an over-all consideration of the entire service record of the officers of whose cases are required to be considered.

(emphasis given).

The decision of the Apex Court in *UPSC v. K. Rajaiah and Ors.* reported in (2005) 10 SCC 23 has been relied on in *Ramen Ch. Kalita (supra)*. In that case the Apex Court has taken the view that if the annual confidential reports are comprehensive enough to furnish requisite materials to judge the comparative merit of the candidates, assessment by the selection committee on the basis of ACRs can not be faulted with merely because in a given case the rest of the service records may not have been made available to the selection committee. *Ramen Ch. Kalita* has been followed by this Court in a later decision in *Banikanta Das and Others Vs. State of Assam and Others*,

15. This issue need not detain me any longer for the reason that there cannot be two opinion, after the ratio enunciated by the Apex Court in *K. Rajaiah (supra)* and by this Court in *Ramen Ch. Kalita (supra)*, that the Commission/Selection Committee has independent powers of assessment of the service records of the officers whose cases are before it for the purpose of determination of their suitability for promotion. But it has to be borne in mind at the same time that such powers of independent assessment are not unbridled and the same have to be exercised on overall consideration of the entire service record with fairness and reasonableness (see emphasized portion of *Ramen Ch. Kalita* quoted in para 14). The more such powers are with the Commission/Committee, more is the necessity to exercise the same with caution and care. The Commission/Committee can, no doubt, decide on the basis of the assessment in the ACRs, as held by the Apex Court in *K. Rajaiah (supra)*. But in case of independent assessment objectivity, impartiality and fairness without any prejudice whatsoever with the highest sense of responsibility must be essential virtues. In *State Bank of India etc., Vs. Kashinath Kher and others, etc.,*, the Supreme Court observed in para 15:

The object of writing the confidential report is two twofold, i.e. to give an opportunity to the officer to remove deficiencies and to inculcate discipline. Secondly, it seeks to serve improvement of quality and excellence and efficiency of public service.

16. While considering the confidential reports the Committee/Commission is therefore, required to cross-verify from records for an independent assessment of merit and ability. If the posts are selection post the record must indicate reasons, however brief they may be, so that when tested by judicial review, the Court would be better assisted by such record to reach correct decision in law. The observation in para-16 are gainfully quoted below:

16. It would also appear from the record that the confidential reports submitted were adopted in toto by the Committee considering promotion without any cross-verification from the character rolls or the record and independent assessment of merit and ability. That would also be clearly illegal. Being a competent authority to consider the claim of the candidates, the Committee for promotion has to independently assess the merit and ability of each candidate from the reports and the records etc. consistent with the weight age prescribed in the rules and then to determine the relative merit and ability of officers and then to arrange order of merit of the officers for promotion. Being selection posts, the selection record also must indicate reasons, however brief they may be, so that when tested by judicial review, the Court would be better assisted by such record to reach correct decision in law. This exercise should also be done by the appellant. If the confidential reports written earlier are by superior officers, then the entire record could be secured by the controlling officers. They should be considered by the promotion committee and each case must be examined in the light of the record of each officer. It would be desirable to prepare a columnar statement with all relevant columns. The CRs and other relevant record should be preserved. The matters considered by the promotion committee should also be preserved.

17. The above decisions go to lay the parameters as to how the Commission, while upgrading or down grading an assessment done by the reviewing or counter signing authority is required to act and the procedure to follow. No doubt, only in exceptional cases the Court shall interfere with such assessment by the Commission if it is found to have been done mala-fide. In such cases the Court shall have to apply Wednesbury doctrine to remove such malafides. On the question of powers to interfere the Supreme Court in *Badrinath Vs. Government of Tamil Nadu and Others*, observed in para-41:

41. While the Courts are to be extremely, careful in exercising the power of judicial review in dealing with assessment made by Departmental Promotion Committees, the executive is also to bear in mind that, in exceptional cases, the assessment of merit made by them is liable to the scrutinised by Courts, within the narrow Wednesbury principles or on the ground of malafides. The judicial power remains but its use is restricted to rare and exceptional situations. We are making these remarks so that Courts or tribunals may not by quoting this case as an easy precedent -- interfere with assessment of merit in every case. Courts and Tribunals cannot sit as appellate authorities nor substitute their own views to the views of Departmental Promotion Committees. Undue interference by the Courts or Tribunals will result by paralyzing recommendations of Departmental Committees and promotions. The case on hand can be a precedent only in rare cases.

18. Keeping in mind the powers of the Commission to independently assess suitability of the officers under consideration for promotion which must be exercised bonafide, without bias and within parameters noticed above, it is now

to be seen whether in the re-assessment of the ACR of 1997-98 only of the sixth respondent the Commission had acted accordingly. Before proceeding further it would be gainful to notice following observations of the Supreme Court in the Civil appeals filed by the respondents:

5. Before we embark upon the rival contentions of the parties, we may notice the assessment of ACRs of the appellant and respondent No. 1 respectively from 1997-98, which is as under:

_____	Sl.	Name of	97-98	98-99	99-2000	2000-01	01-02	02-03	Over	No.
_____	Officer	-all	1. S.D.	VG	VG	VG	VG	VG	Very	Majumdar
_____			2.	_____	_____	_____	_____	_____	_____	_____
_____			3.	_____	_____	_____	_____	_____	_____	_____
_____			4.	S.B.	VG	OS	VG	VG	OS	OS
_____										Out
_____										Bhattacharjee
_____										standing

6. Indisputably, if the ACR for the year 1997-98 is taken into consideration for the purpose of judging the suitability of the appellant and respondent No. 1 and that of the year 2002-03 is excluded, respondent No. 1 being senior, would be promoted to the post of Executive Engineer, whereas in the event the ACR for the period 1997-98 is excluded and that of the year 2002-03 is taken into consideration, as the appellant herein would be given overall grading "outstanding", the case of Respondent No. 1 would not be considered at all.

31. Respondent No. 1 is senior to the appellant by 16 years. A post was created. It for one reason or the other was sought to be filled up immediately. If the interpretation as accepted by the learned Single Judge is to be given effect to, the case of Respondent No. 1 was not to be considered at all by the MPSC. The Division Bench of the High Court, therefore, in our opinion, cannot be said to have committed any error warranting interference by this Court.

(emphasis supplied).

19. It would be very much apparent from the above observations that the fact that if the ACR of the 2002-2003 is excluded the respondent No. 1 (petitioner herein) being senior, would be promoted to the post of Executive Engineer, who is senior to the 6th respondent by sixteen years weighed very much with Apex Court in rendering the decision.

It would be significant to notice that the Commission on earlier occasion accepted in toto the assessment of the reporting officer, reviewing officer and counter signing authority for all the officers under consideration, as reflected in their ACRs for the year 1998-99 to 2002-2003. No independent assessment on the basis of the service records of each of the officers was at all done. As the sixth respondent secured three "outstanding" in five years (98-99 to 2002-2003) the Commission had no difficulty to give him overall "outstanding" and recommend him for promotion even though the petitioner herein being senior to him by 16 years obtained the required bench-mark "very good". But, when the decision of the Division Bench was affirmed by the Apex Court directing that the

ACRs of five years from 97-98 to 2001-2002 should only be taken into account and the Commission found that the sixth respondent would be short of one "outstanding" and so he could not be put into the category of "overall outstanding", it resorted to its independent power of reassessment of the ACR of 1997-98 of the said respondent only. No independent assessment in respect of ACRs of other years of the petitioner or other officers was expressly done by the Commission for undisclosed reason meaning thereby that the Commission accepted the assessment shown in the ACRs relating those years.

20. While upgrading the ACR of the private respondent of the year 97-98 only the reason recorded reads as follows:

The ACRs of all the officers for five years shown above are carefully perused and the ACR grading of Battacharjee for the year 1997-98 is upgraded to "outstanding" as the officer deserved "OS" grading from the detailed entries and remarks given by his Reporting Officer and Reviewing Officer. It is also observed that the "very good" grading given by the Countersigning Officer does not actually appear commensurate with the higher remarks and comments given by the concerned Reporting Officer and Reviewing Officer which can be construed that the Countersigning Officer had not done it with due application of mind.

(emphasis mine).

21. It would appear from the above comments that the Commission did not make any independent assessment of its own about suitability and merit of the individual officers on the basis of their service records. Even the ACR of the sixth respondent for the year 1997-98 has been re-assessed on the basis of the remarks of the Reporting Officer and the Reviewing Officer only. The Commission instead of making its own assessment on the basis of the service records questioned the correctness of the grading given by the Countersigning Officer and up graded it from "very good" to "outstanding". It would appear thus that only for the purpose of giving the sixth respondent the higher grading the Commission made the limited exercise for the year 1997-98 only in respect of the sixth respondent only. The Commission accepted all other assessment in toto as reflected in the ACRs.

22. It may reiterated at this stage that the earlier DPC procedure providing that an officer in the category of "outstanding" would supersede his senior even though he obtained the bench-mark "very good" has since been discarded as the same proved to be counter productive. According to the procedure now prevailing, if a senior gets the required benchmark he cannot be superseded by his junior whatever be his higher grading. But the old, now obsolete, procedure had given an arm to the Commission to beat down the petitioner who did not get a single promotion during a period of 29 years of service and was waiting for promotion to the post of Executive Engineer at the fag end of his career securing required bench-mark "very good".

23. That the Commission has independent powers to make assessment is no

justification of its action. The justification would be sensitivity and fairness in its action. Righteousness and justice are constitutional virtues in a democratic polity like ours. The virtues must inform every action of the constitutional and other State functionaries. Ip-se-dixit of an individual or authority has no place. Fairness and righteousness must appear to have been done in every such action.

It would be manifest from the above that the Commission acted arbitrarily with intent to stick to its gun to justify its old action by recommending again the sixth respondent for promotion. In the process the Commission failed to follow the procedural guidelines that independent assessment must be overall, on the basis of the relevant service records. It cannot, like an appellate authority, make modification in the ACR without an overall assessment. Such overall assessment must be for every officer under consideration in respect of every year of assessment.

24. That the State respondent is also anxious and keen to justify its old order of promotion, set aside by the Court, is manifest in the impugned notification dated 17.08.2007 which simply declares that the earlier order of promotion issued on 06.12.2004 would stand valid. What is to be noted here is that the Commission made no such express recommendation for validating the old order or giving promotion retrospectively.

25. For the reasons and discussions aforementioned the impugned notification dated 17.08.2007 cannot survive. Therefore, the same is set aside and quashed. The higher grading "out standing" given to the sixth respondent is tinged with arbitrariness, unfairness and bias. The same is, therefore, set aside. Both the officers would thus be in the category of "very good" which is the required benchmark. This being the position if the State respondents intend to save promotion of the sixth respondent given on 06.12.2004, a fresh order of promotion with retrospective effect has to be issued. Simultaneously, a supernumerary post in Grade-IV has to be created and the petitioner has to be promoted retrospectively from same date. The post shall lapse with the superannuation of the petitioner on 31.01.2008. As the petitioner could not serve in the promotion post, he would not get any pay and allowances attached to that post. But his pay in the higher grade shall be notionally fixed calculating from 06.12.2004 (the date of retrospective promotion) till his date of retirement for the purpose of pensionary benefit. Both the orders shall be issued simultaneously.

26. Subject to above, the writ petition is allowed. No cost.