
(2014) 05 SHI CK 0063
In the High Court Of Himachal Pradesh
Case No : C.W.P. No. 1227 of 2014

Shanti Swaroop Gupta

APPELLANT

Vs

State of H.P.

RESPONDENT

Date of Decision : 17-05-2014

Acts Referred:

Constitution of India, 1950 — Article 14, 16

Citation : (2014) LabIC 3330

Hon'ble Judges : Sureshwar Thakur, J;Rajiv Sharma, J

Bench : Division Bench

Advocate : Jyotsna Rewal Dua, Advocate for the Appellant; Anup Rattan, Addl. A.G., Vivek Singh Attri, Dy. A.G. and D.K. Khanna, Advocate for the Respondent

Judgement

1. Provisional seniority list of Junior Engineers (Civil), as it stood on 31.12.2008, was published on 20.11.2009. Petitioner was at Sr. No. 275. The seniority list was finalized on 29.12.2009. The Departmental Promotion Committee was convened for promotion to the post of Assistant Engineer on 2.9.2012. Petitioner was eligible as per the memorandum prepared for the consideration of Departmental Promotion Committee to the post of Assistant Engineer (Civil) in Irrigation and Public Health Department. Case of the petitioner was also considered along with other eligible, departmental Junior Engineers (Civil). However, fact of the matter is that Departmental Promotion Committee has taken into consideration previous Annual Confidential Reports for the years 1999-2000, 2000-2001, 2001-2002 and 2002-2003 due to non-availability of the Annual Confidential Reports for the years 2007-2008, 2008-2009, 2009-2010, 2010-2011 and 2011-2012. Petitioner was assessed as "Good" as per the final assessment of the Departmental Promotion Committee. The fact of the matter is that since the petitioner has been assessed as "Good", persons junior to him have been promoted to the post of Assistant Engineer (Civil). Precise case of the petitioner is that Annual Confidential Reports for the relevant period preceding convening of Departmental Promotion Committee were available with the Department and despite this; the same were not furnished to the Departmental

Promotion Committee. According to Annexures P-7, P-8, P-9, P-10 and P-11, the Annual Confidential Proceedings have already been supplied by the concerned authority to the Department. Reasons assigned by the respondents for not considering the case of the petitioner for promotion is that Annual Confidential Reports were not available for the relevant period. This is factually incorrect. Rather, it has come in the reply that the borrowing department had submitted Annual Confidential Reports of the petitioner to respondent No. 2 for the years 2006-2007 and 2007-2008. The averment contained in the reply that the other Annual Confidential Reports for the period 2008-2009, 2009-2010 and 2010-2011 were under correspondence is also factually incorrect. The department had received the Annual Confidential Reports as per Annexures P-7 to P-12 and thus, it cannot be said that the Annual Confidential Reports of the petitioner remained under correspondence. It is the duty cast upon the employer that the Annual Confidential Reports are received from the borrowing department well in advance. Petitioner cannot be penalized for inaction on the part of respondent-Department for not furnishing up to date Annual Confidential Reports before the Departmental Promotion Committee which met on 28.9.2013. Petitioner has been assessed as "Good" in the previous Annual Confidential Reports, which have been recorded on the basis of F.I.R. No. 437/1999. Petitioner has already been acquitted in that criminal case on 30.9.2011. Since the up to date Annual Confidential Reports of the petitioner have not been furnished to the Departmental Promotion Committee, persons junior to the petitioner as per seniority list notified on 20.11.2009 have been promoted resulting in grave miscarriage of justice.

2. Their Lordships of the Hon'ble Supreme Court in Syed Khalid Rizvi and Others and Ramesh Prasad Singh and Others Vs. Union of India (UOI) and Others, have held that preparation of annual select-list under IPS (Appointment by Promotion) Regulations, 1955 was mandatory and failure to do so would not result in collapse of rule 3(3)(b) of Seniority Rules. Their Lordships have further held that it would subserve the object of the Act and the rules and afford an equal opportunity to the promotee officers to reach higher echelons of the service. The dereliction of the statutory duty must satisfactorily be accounted for by the State Government concerned and the Court has taken serious note of wanton infraction. Their Lordships have held as under:

"9. It would, thus, be clear that the Selection Committee shall consider the eligibility and suitability of the members of the State Police Service on the basis of merit, ability and suitability. Seniority will be considered only where merit, ability and suitability are approximately equal and it should prepare the select-list of such suitable officers in the order of merit in each category such as "outstanding", etc. and send the select-list in order of seniority to the State government who with its comments would forward the same to the UPSC for approval. The UPSC again would review the list, if necessary, with prior notice to the State government and revise the order of names (seniority) in the list which should be final and operative for a period of 12 months. The list should consist of

such number plus 20 per cent or two officers whichever is more and of three times the anticipated substantive vacancies in the cadre posts. The appointment to the cadre posts should be made by the central government in the order in the list on the recommendation of the State government. The word "may" in Regulation 5 indicates that the Committee ordinarily meets at intervals not exceeding one year. Though the word "may" indicates that it is not mandatory to meet at regular intervals, since preparation of the select-list is the foundation for promotion and its omission impinges upon the legitimate expectation of promotee officers for consideration of their claim for promotion as INDIAN POLICE SERVICE officers, the preparation of the select-list must be construed to be mandatory. The Committee should, therefore, meet every year and prepare the select-list and be reviewed and revised from time to time as exigencies demand. No officer whose name has been entered in the list has a vested right to remain in the list till date of appointment. The list would be liable to shuffle and the name may be excluded from the list on the comparative assessment of merit, ability and suitability based on the anticipated or expected availability of the vacancies within quota etc. The junior may supersede the senior and may be ranked top.

34. It is next contended that by non-preparation of the select-list, the promotees had lost their chances of promotion to get into super timescales of pay and so on. Preparation of the annual seniority list is, therefore, mandatory and that by its non-preparation the rules have been collapsed. The argument *ex facie* is alluring but lost validity on close scrutiny. The contention bears two facets: firstly preparation of the seniority list and secondly the consequences flowing from the omission to prepare the seniority list. It is already held that the Committee shall prepare the seniority list every year and it shall be reviewed and revised from time to time taking into account the expected or anticipated vacancies during the year plus 20 per cent or two vacancies whichever is more. It is already held that a wide distinction exists between appointment by direct recruitment and one under Regulation 9 of Promotion Regulations and Rule 9 of Recruitment Rules on the one hand and under Regulation 8 thereof read with Rule 9 of Cadre Rules on the other hand. Their consequences are also distinct and operate in different areas. Prior approval of the Union public service commission and prior concurrence of the central government are mandatory for continuance of temporary appointment under Regulation 8 beyond six months and three months respectively together with prompt report sent by the State government supported by reasons therefore. In their absence it is not a valid appointment in the eye of law. Unless an officer is brought on the select list and appointed to a senior cadre post and continuously officiated thereon he does not acquire right to assignment of the year of allotment. Eligibility age for consideration was only up to 52 years and presently 54 years. If the list was not prepared, though for the succeeding year the age barred officers may be considered but were made to compete with junior officers who may eliminate the senior officer from the zone of consideration. Suppose in 1980 the senior officer was not qualified though the

list was made, but in 1981 he could improve and become eligible. Non-preparation of the select-list for 1980 disables the officer to improve the chances. In Sehgal case, this court held that chances of promotion and the aspiration to reach higher echelons of service would enthuse a member of the service to dedicate himself assiduously to the service with diligence, exhibiting expertise, straightforwardness with missionary zeal, self confidence, honesty and integrity. The absence of chances of promotion would generate frustration and an officer would tend to become corrupt, sloven and a mediocre. Equal opportunity is a fertile resource to augment efficiency of the service. Equal chances of promotion to the direct recruits and the promotees would produce harmony with accountability to proper implementation of government policies. Unless the select-list is made annually and reviewed and revised from time to time, the promotee officers would stand to lose their chances of consideration for promotion which would be a legitimate expectation. This court in Mohan Lal Capoor case held that the Committee shall prepare every year the select-list and the list must be submitted to the UPSC by the State government for approval and thereafter appointment shall be made in accordance with the rules. We have, therefore, no hesitation to hold that preparation of the select-list every year is mandatory. It would subserve the object of the Act and the rules and afford an equal opportunity to the promotee officers to reach higher echelons of the service. The dereliction of the statutory duty must satisfactorily be accounted for by the State government concerned and this court takes serious note of wanton infraction."

3. Similarly, their Lordships of the Hon"ble Supreme Court in Union of India (UOI) and Others Vs. Vipinchandra Hiralal Shah, have held that unless there are good reasons for not preparing select list for promotion to IAS, the Selection Committee is required to meet every year for the purpose of making the selection from amongst the State Civil Service Officers who fulfill the conditions regarding eligibility on the first day of January of the year in which the Committee meets and fall within the zone of consideration as prescribed in clause (2) of Regulation 5. The failure on the part of the Selection Committee to meet during a particular year would not dispense with the requirement of preparing the Selection List for that year. Their Lordships have further held that if for any reason the Selection Committee is not able to meet during a particular year, the Committee when it meets next should while making the selection, prepare a separate list for each year keeping in view the number of vacancies in that year after considering the State Civil Service officers, were eligible and fell within the zone of consideration for selection in that year. Their Lordships have held as under:

"7. If clause (1) is read with the other provisions in Regulation 5 referred to above the inference is inevitable that the requirement in clause (1) of Regulation 5 that the Selection Committee shall meet at intervals not exceeding one year and prepare a list of members of the State Civil Service who are suitable for promotion in the Service was intended to be mandatory in nature because the eligibility of the persons to be considered both in the matter of length of service

and age under clauses (2) and (3) is with reference to the first date of January of the year in which the Selection Committee meets and the number of members of the State Civil Service to be considered for selection is also linked with the number of substantive vacancies anticipated in the course of the period of twelve months commencing from the date of preparation of the list. We are, therefore, of the view that the requirement prescribed in sub-regulation (1) of Regulation 5 regarding the Committee meeting at intervals not exceeding one year and preparing a list of such members of the State Civil Service who are suitable for promotion to the Service was a mandatory requirement which had to be followed. The earlier decisions of this court also lend support to this view.

11. It must, therefore, be held that in view of the provisions contained in Regulation 5, unless there is a good reason for not doing so, the Selection Committee is required to meet every year for the purpose of making the selection from amongst the State Civil Service officers who fulfill the conditions regarding eligibility on the first day of January of the year in which the Committee meets and fall within the zone of consideration as prescribed in clause (2) of Regulation 5. The failure on the part of the Selection Committee to meet during a particular year would not dispense with the requirement of preparing the Select List for that year. If for any reason the Selection Committee is not able to meet during a particular year, the Committee when it meets next, should, while making the selection, prepare a separate list for each year keeping in view the number of vacancies in that year after considering the State Civil Service officers who were eligible and fell within the zone of consideration for selection in that year."

4. Recently, their Lordships of the Hon^{ble} Supreme Court in Union of India (UOI) and Another Vs. Hemraj Singh Chauhan and Others, have held that Government in a welfare State like India is supposed to act as a model employer. Right of an eligible employee to be considered for promotion is virtually a part of his fundamental right under Article 16 of the Constitution of India. Their Lordships have further held that legitimate expectation for being considered for promotion was defeated due to inaction on the part of State Government in conducting cadre review in time despite reminders from Central Government. Their Lordships have held as under:

"35. The Court must keep in mind the constitutional obligation of both the appellants/Central Government as also the State Government. Both the Central Government and the State Government are to act as model employers, which is consistent with their role in a welfare State.

36. It is an accepted legal position that the right of eligible employees to be considered for promotion is virtually a part of their fundamental right guaranteed under Article 16 of the Constitution. The guarantee of a fair consideration in matters of promotion under Article 16 virtually flows from guarantee of equality under Article 14 of the Constitution.

40. This Court is not very much impressed with the aforesaid contention. The word "ordinarily" must be given its ordinary meaning. While construing the word the Court must not be oblivious of the context in which it has been used. In the case in hand the word "ordinarily" has been used in the context of promotional opportunities of the officers concerned. In such a situation the word "ordinarily" has to be construed in order to fulfill the statutory intent for which it has been used.

41. The word "ordinarily", of course, means that it does not promote a cast-iron rule, it is flexible (see *Jasbhai Motibhai Desai Vs. Roshan Kumar, Haji Bashir Ahmed and Others*, . It excludes something which is extraordinary or special *M/s. Eicher Tractors Ltd., Haryana Vs. Commissioner of Customs, Mumbai*, . The word "ordinarily" would convey the idea of something which is done "normally" *Krishan Gopal Vs. Sri Prakashchandra and Others*, and "generally" subject to special provision *Mohan Baitha and Others Vs. State of Bihar and Another*, ."

Accordingly, in view of the analysis and discussion made herein above, the petition is allowed. Respondents are directed to hold Review Departmental Promotion Committee to consider the case of the petitioner for promotion to the post of Assistant Engineer (Civil) on the basis of Annual Confidential Reports for the years 2008-2009, 2009-2010, 2010-2011 and 2011-2012, with all consequential benefits within a period of 12 weeks from today. Pending application(s), if any, also stands disposed of. No costs.