

(2002) 01 GAU CK 0028
In the Gauhati High Court
Case No : WP (C) No. 129 (SH) of 2001

Sitaram Singh

APPELLANT

Vs

Meghalaya State Electricity Board and Others

RESPONDENT

Date of Decision : 25-01-2002

Acts Referred:

Meghalaya State Electricity Board Service Regulations, 1996 — Regulation 37

Citation : (2003) 1 GLR 573 : (2002) 1 GLT 372

Hon'ble Judges : Ranjan Gogoi, J

Bench : Single Bench

Advocate : V.K. Jindal and L. Lyngdoh, for the Appellant; S.R. Sen and P.D.B. Baruah, for the Respondent

Final Decision : Allowed

Judgement

Ranjan Gogoi, J.—The instant writ application has been filed seeking interference of this Court with the order of promotion dated 22.8.2000 by which order the respondent No. 3 has been promoted to the post of Superintending Engineer in the Meghalaya State Electricity Board (hereinafter referred to as Me. S.E.B.).

2. The details of the factual matrix on which the instant writ petition has been founded do not qualify for an elaborate recital in view of the virtually undisputed position that in the feeder post, namely the post of Executive Engineer, the writ petitioner was senior to respondent No. 3 by as many as 12 years. The said undisputed position on facts is borne out by the uncontroverted averments made in the writ petition which would go to show that the writ petitioner was promoted as Executive Engineer under Me. SEB on 9.7.1984 whereas the respondent No. 3 was so promoted on 1.6.1996.

3. The pleadings of the writ petitioner in support of the challenge made has undergone transformation at different stages. At the initial stage, the grievance of the writ petitioner was that there was no reasonable cause or basis for the impugned supersession inasmuch as his record of service was consistently good

and there were no adverse remarks/reports against him. The said position, according to the petitioner, entitled him to promotion. After receipt of the affidavit filed on behalf of the Board averring that the impugned promotion was so made on the criteria of merit-cum-seniority by a regularly constituted D.P.C. in which proceeding the case of the writ petitioner was also considered, the writ petitioner by filing a rejoinder affidavit had tried to plead a somewhat different case. In the aforesaid rejoinder affidavit, the petitioner contended that the promotion impugned in the present proceeding was required to be made by adhering to the provision of Assam State Electricity Board Engineering Service Regulations, 1973 (hereinafter referred to as 1973 Regulations) and not on the basis of the Meghalaya State Electricity Service Regulations, 1996 (hereinafter referred to as 1996 Regulations). According to the petitioner, the criteria of promotion under the 1973 Regulations was seniority with due regard to merit and the period of qualifying service in the feeder post, namely the post of Executive Engineer was 5 years. The impugned promotion of the respondent No. 3 was so made by adopting the criteria of merit with due regard to seniority and the truncated period of qualifying service of 3 years as prescribed under the 1996 Regulations. A further transformation of the case of the petitioner is noticed in the course of oral arguments advanced. As the additional questions raised were mixed questions of law and fact, this Court granted opportunity to the respondent Board to file an additional affidavit which was accordingly filed on 13.12.2001.

4. The arguments advanced by Mr. Jindal, learned Senior Counsel appearing for the writ petitioner are capable of being classified into two broad compartments. In the first compartment, the arguments advanced to the effect that the 1996 Regulations do not repeal the 1973 Regulations which continue to hold the field and even assuming that 1973 Regulations stood repealed, such repeal can not impair the vested right of the petitioner by virtue of the Section 6(c) of the General Clauses Act, may be included. The arguments in second limb advanced by the petitioner comprises of arguments made on the assumption that 1996 Regulations apply to the instant case. On the said basis, it is contended that the 1996 Regulations not having been notified as required u/s 79 of the Electricity (Supply) Act, 1948 and the same not having been placed before the State Assembly as visualised in Section 79(A) of the aforesaid Act, the 1973 Regulations will still prevail. Alternatively, it has been argued that the amendments to the 1996 Regulations as contained in Annexures-36, 37 and 38, which are relevant for the purposes of the present case, cannot have any legal and binding force as the said amendments have not been duly notified. In the absence of such one a notification, it is contended that even if it is held that the 1996 Regulations hold the field, the instant case for promotion of the petitioner and respondent No. 3 ought to have been made on the basis of unamended provisions of the 1996 Regulations.

5. Certain subsidiary arguments have also been advanced by Mr. Jindal. It is contended by the learned counsel that there is an apparent dichotomy in the

1996 Regulations which required consideration of the service records of the previous 5 years of an incumbent whereas the period of qualifying service for promotion to the rank of Superintending Engineer is only 3 years. The respondent No. 3 not having served as Executive Engineer for 5 years, an argument has been built up that his case has been erroneously considered. The grading and marks awarded the writ petitioner and the respondent No. 3 on the basis on their service records to determine their relative merit under the provisions of the 1996 Regulations has also been assailed as arbitrary.

6. A little elaboration of the arguments made by Mr. Jindal may be made at this stage. According to Mr. Jindal, the 1996 Regulations do not expressly repeal the 1973 Regulations. Mr. Jindal by referring to the provisions of Regulations 113 and 114 of the 1996 Regulations has contended that the said provisions contain an inbuilt inference against any repeal of the 1973 Regulations. According to the learned counsel, the expressed repeal of an earlier enactment being the rule and implied repeal being an exception, the 1973 Regulations not having been specifically repealed must be deemed to be in force. The impugned promotions, therefore, according to Mr. Jindal ought to have been made according to the provisions of the 1973 Regulations. Instead the authority by adopting the parameters for promotion as laid down in the 1996 Regulations have committed a serious illegality in the promotional process which calls for judicial intervention. In support of the arguments advanced Mr. Jindal has relied on the law laid down by the Apex Court in the case of AIR 1995 84 (SC) as well as in the case of Bishambar Nath Kohli and Others Vs. State of Uttar Pradesh and Others, .

7. Mr. Jindal has next argued that even assuming that the 1996 Regulations have impliedly repealed the 1973 Regulations, by virtue of the provisions of Section 6(C) of the General Clauses Act, such implied repeal can not take away the accrued rights of the petitioner. In this regard, reliance has been placed by the learned counsel on the following decisions:

Commissioner of Income Tax Vs. Shah Sadiq and Sons, . The Gujarat Electricity Board v. Shantilal R. Desai reported in AIR 1969 3C 239 and in the case of 1. Jindas Oil Mill and Another (in CA No. 15/1969) 2. Jindal Oil Mills and Others and Somalal Nathji and Others Vs. Godhra Electricity Co. Ltd., .

Continuing, Mr. Jindal has argued that the 1996 Regulations have neither been published in the Official Gazette nor placed before the State Assembly. The aforesaid regulations, therefore, not having complied with the mandatory requirement of Sections 79 and 79(A) of the Electricity (Supply) Act, 1948 does not have any legal force. Alternatively, it has been argued by Mr. Jindal that in any case the amendments to the regulations which are relevant to the resent case not having been published in the Official Gazette the said amendments are, therefore, not a part of the 1996 Regulations. In this regard Mr. Jindal has specifically contended that the amendments dated 17.10.1997 in respect of Regulations 37(3), amendment dated 20.11.1998 in respect of Regulation 37(3) (a) and the amendment dated 12.11.1999 in respect of Regulation 42 have not

been notified in the Official Gazette. According to Mr. Jindal by virtue of the amendments dated 17.10.1997 (Annexure-38) and 20.11.1998 (Annexure-37) the respondent No. 3 has been brought within the zone of consideration for being considered for promotion. According to Mr. Jindal as the aforesaid amendment are not a part of the 1996 Regulations, in absence of requisite notifications in the Official Gazette, it is the unamended provisions of Section 37 which ought to have been applied by the authority in considering the cases of the petitioner and respondent No. 3 for promotion to the rank of Superintending Engineer. Mr. Jindal by drawing the attention of the Court to the contents of the unamended Regulation 37 submits that by virtue of the said unamended Regulations 37, the zone of consideration for promotion was restricted to candidates equal to the number of vacancies upto 31st December of every year. As the vacancies were admittedly two and one Milan Bora and the writ petitioner was at Sl. 1 and 2 in order of seniority in the feeder post and as the respondent No. 3 was at Sl. No. 4, the Selection Board could not have taken into consideration the case of the Respondent No. 3 on the basis of the unamended Regulation 37. The aforesaid zone of consideration has been increased to three times the number of vacancies plus one and the date for determining the eligibility, i.e., the first day of April of the current year has been fixed by the amendments dated 17.10.1997, 20.11.1998 (Annexures-38 and 36). As the aforesaid extended zone of consideration has no relevance in the instant case as the amendments extending the zone of considerations were not duly notified, it is submitted by Mr. Jindal that the case of respondent No. 3 was erroneously considered and the entire promotion process has been vitiated on that ground.

8. No appearance has been made on behalf of the respondent No. 3.

9. Mr. S.R. Sen, learned Senior Counsel appearing for the Me. SEB has contended that while it is true that the 1996 Regulations do not expressly repeal the 1973 Regulations yet such repeal must be necessarily implied in the facts of the case. Mr. Sen in this regard has drawn my attention to the contents of the affidavit filed on 13.12.2001, particularly to the averments made to the effect that after the 1996 Regulations were published in the Official Gazette on 14.8.1997, the said Regulations have been consistently followed in the Me. SEB in all matters concerning the conditions of service of the employees of the Board. Mr. Sen by referring to the apparently inconsistent provisions of the two regulations contended that after the 1996 Regulations were framed and published, the 1973 Regulations can not have any application. Controverting the arguments of Mr. Jindal on the question relating to protection of vested rights, Mr. Sen has argued that Section 6 of the General Clauses Act, 1897 has no application to the instant case. In the instant case no vested rights in the writ petitioner for being considered for promotion in accordance with the 1973 Regulations can be recognised according to learned counsel for the Me. SEE.

10. Controverting the other arguments advanced by Mr. Jindal, Mr. Sen by placing reliance on the contents of the additional affidavit dated 13.12.2001 has

pointed out that the said Regulations were published in the Official Gazette on 14.8.1997 and the Regulations with its amendments were placed before the State Assembly as required u/s 79(A) of the aforesaid Electricity (Supply) Act, 1948.

Insofar as the subsidiary of Mr. Jindal is concerned, Mr. Sen has argued that there is no dichotomy in the provisions of 1996 Regulations. The period of qualifying service is 3 years and under Regulation 40(2), the service records of all eligible candidates for the previous 5 years is to be considered. The aforesaid period of 5 years may even include a period of service in the feeder post. It has been further argued by Mr. Sen that the grading or marks which are to be granted on the basis of service record is ordinarily a matter for the expert body namely, the Departmental Promotion Committee to consider and the writ Court, in the absence of any materials, would not be inclined to adjudicate the entitlement of prospective candidates to the award of a particular grade or mark.

11. The 1996 Regulations did not expressly repeal 1973 Regulations. The implied repeal of statutory provision or even a subsidiary legislation is not to be readily inferred or assumed. Such a conclusion in the judicial verdict would be permissible only if the provision of the two enactments are so inconsistent with each other that both can not stand together and at the same time. In such a situation the later enactment will prevail.

The 1996 Regulations constitute a definite departure from the 1973 Regulations by prescribing a entirely different criteria of promotion and also the period of qualifying service. In view of the expressed provisions of 1996 Regulations, it can not be said that 1973 Regulations will continue to hold the field so as to govern the promotion in question. The alternative argument of Mr. Jindal to the effect that 1996 Regulations cannot take away the rights earned under 1973 Regulations pre-suppose the existence of any such right vested in the petitioner for consideration for promotion in accordance with the 1973 Regulations. No such right is capable of being recognised. No incumbent in public office can be vested with a right to be considered for promotion under any particular enactment for all time to come. The arguments of Mr. Jindal to the above effect, therefore, have to be negated by this Court.

12. The arguments advanced by Mr. Jindal to the effect that 1996 Regulations have not been published in the Official Gazette or placed before the State Assembly and, therefore, do not have any legal force stand belied by the contents of the affidavit dated 13.12.2001 filed by the Me. SEB which would go to show that 1996 Regulations was published in the Official Gazette on 14.8.1997 and along with all amendments was placed before the State Assembly on 11.6.1999.

Having dealt with the aforesaid submissions of Mr. Jindal, this Court has now to engage its attention to the main contentious issue between the parties namely, whether the amendments to Regulations 37 and 40(2) of the 1996 Regulations

made by Office Memorandum dated 20.11.1998, 12.11.1999 and 17.10.1997 have been duly notified as required u/s 79 of the Electricity (Supply) Act, 1948 and if so what is the legal effect thereof. The additional affidavit filed on behalf of Me. SEB on 13.12.2001 does not indicate the amendments in question (Annexures-36, 37 and 38) have been published in the Official Gazette. The particulars of the Gazette notifications, if any, have not been mentioned. Mr. Sen in course of the oral argument has also not insisted that the said amendments have been published in the Official Gazette. In view of the above, this Court, therefore, has no alternative but to understand that amendments to the 1996 Regulations dated 17.10.1997, 20.11.1998 and 12.11.1999 (Annexures 36, 37 and 38) have not been published in the Official Gazette as required u/s 79 of the Electricity (Supply) Act, 1948. The answer to the question as to what would be the legal effect of the aforesaid amendments not being duly notified, does not pose a serious problem. Judicial opinion is inclined to hold due and proper publication of any Govt. notification as necessary even in absence of such an expressed requirement under the Statute. If, however, the Statute itself prescribes a particular mode and manner requiring such publication, the same must be scrupulously followed.

13. Section 79 empowers the Board to frame regulations in respect of matters enumerated in Section 79, by notification in the Official Gazette. Unless the regulations sought to be framed by the Board covering any of the matters specified in Section 79 of the Electricity (Supply) Act, 1948 are published in the Official Gazette, such regulations can not have any legal effect. Regulations dealing with matters pertaining to public office must be notified and made known and cannot be kept in the drawers of the concerned authority to be resurrected only when convenient. It is probably to remedy such a situation that the Statute has prescribed a definite mode and manner of publication and keeping in view the wholesome object behind the enactment, judicial opinion has interpreted the said provisions as requiring strict adherence. The amendments to the existing Regulations framed u/s 79(c) of the Electricity (Supply) Act, 1948 before taking a legal character as a part of an existing Regulations must, therefore, be duly notified. The Judgment of this Court in the case of Padma Dhar Deka and Ors. v. Assam State Electricity Board and Ors. reported in (2000) 2 GLR 247 relied upon by Mr. Jindal upholds the existing law. This Court has noticed that the aforesaid reported Judgment has been approved by the Division Bench of this Court by Judgment and Order dated 9.1.2001 in the Writ Appeal No. 149/2000 and other connected cases. Consequently, it is held that the amendments dated 17.10.1997, 20.11.1999 and 12.11.1999 (Annexures 36, 37 and 38) not being duly notified do not have any legal force.

14. It has already been noticed in the earlier part of this Judgment that Section 37 has originally limited the one of consideration of eligible officers to the number of vacancies available as on 31st December of the year. The amendments dated 17.10.1997 and 20.11.1998 (Annexures 38 and 36) have expanded the aforesaid zone of consideration to 3 times the number of vacancies

plus one and the cut off date has been fixed on 1st April of the year, The seniority position of eligible officers is evident from the records placed by Mr. Sen, learned Sr. Counsel for the Me. SEB. One Milan Bora and the writ petitioner are at Sl. 1 and 2 and respondent No. 3 is at Sl, No. 4 of the list of eligible Executive Engineers. Under Regulations 37, the respondent No. 3, therefore, could not have come within the zone of consideration. It is on the said basis that the case of the respondent No, 3 has been considered and found to be of better merit than the writ petitioner thereby paving the way for his promotion by order dated 22.8.2000.

15. In view of the provision of Regulation 37 as it stood, prior to the amendment, which would govern the instant process of promotion, the respondent No. 3 could not have been brought within the zone of consideration and his case could not have been considered. The impugned promotion process including the promotion order dated 22.8.2000, therefore, stands vitiated. The promotion of respondent No. 3, therefore, will have to be set aside and quashed by this Court. Consequently, the said promotion order dated 22.8.2000 shall stand quashed. It will now be necessary for the authorities of the Me. SEB to re-do the entire process by application of the correct law.

The writ petition stands allowed.