

(2012) 07 GAU CK 0023
In the Gauhati High Court
Case No : W.P (C) No. 1635 of 2009

Sri Jogen Chandra Thakuria	Vs	APPELLANT
The State of Assam and Others		RESPONDENT

Date of Decision : 23-07-2012

Acts Referred:

Constitution of India, 1950 — Article 226

Citation : (2013) LabIC 116

Hon'ble Judges : Ujjal Bhuyan, J

Bench : Single Bench

Advocate : A.J. Sarma and Mr. P.D. Nair, for the Appellant; B.J. Ghosh, GA, Assam and Mr. P.K. Roy, for the Respondent

Judgement

Ujjal Bhuyan

1. By this application under article 226 of the Constitution of India, petitioner challenges the recommendation of the Departmental Promotion Committee dated 11-02-2009 recommending promotion of respondent No. 7 to the post of Research Assistant and that of respondent Nos. 8 and 9 to the post of Sub-Inspector of Statistics in the Directorate of Dairy Development, Government of Assam. Further challenge made is to the legality and correctness of the consequential promotion orders dated 20-02-2009. Petitioner also seeks a direction for his promotion to the post of Research Assistant or to the post of Sub-Inspector of Statistics in the said Directorate. Case of the petitioner is that he joined in the post of Field Assistant (Statistics) in the Directorate of Dairy Development, Government of Assam following his appointment to the said post vide the appointment order dated 28-01-1986 issued by the Director of Dairy Development, Assam (respondent No. 5). Subsequently, his service was regularised vide the order dated 19-05-1987. Petitioner was thereafter promoted to the next higher post of Computer (Statistics) on 15-07-1991 and since then he is serving in the said post. Be it stated that the petitioner is a graduate in Arts (B.A.) with Economics as one of the subjects. Petitioner has undergone various

training programmes and courses for which he has been awarded a number of certificates and diplomas.

2. The Department of Dairy Development was initially a part of the Animal Husbandry and Veterinary Department. Subsequently, it was carved out as a separate department.

3. The service conditions of the employees in the Statistical wing of the Dairy Development Department, Government of Assam are governed by the Assam Statistical Service under Dairy Development Department Service (Recruitment and Promotion) Order, 1996 ("1996 Service Order" hereafter). As per order 4(3) of the 1996 service order, ninety percent of the posts of Inspector of Statistics/Research Assistant are required to be filled up by promotion from the post of Sub-Inspector of Statistics. The qualification prescribed is that the candidates should have completed five years of continuous service and must possess a Bachelor Degree with Mathematics, Economics or Statistics as one of the subjects. The selection is to be made on the basis of merit-cum-seniority.

4. Similarly, as per order 4(4), ninety percent of the posts of Sub-Inspector of Statistics is required to be filled up by promotion from the cadre of Computer/Field man/Field organizer. Those who are matriculates in the feeder cadre, they must complete seven years of continuous service. In case of candidates who are pre-university pass, the requirement is five years of continuous service. For graduates, the requirement is three years of continuous service.

5. Inspector of Statistics/Research Assistant is a cadre-III post in the Assam Statistical Service, Dairy Development Department. Sub-Inspector of Statistics is a cadre- IV post under the said service.

6. As per order 6, for selection to the cadres III and IV posts, there should be a selection committee comprising of the following-

- (1) Director of Dairy Development Department, Assam Chairman
- (2) Joint Director, Dairy Development Department, Assam Member
- (3) Research Officer (Statistics), Dairy Development Department, Assam Member

7. Order 7 provides that the zone of consideration will be four times the number of vacancies and the number of selected candidates will be approximately double the number of vacancies. The selection is to be made on the basis of merit, experience and seniority.

8. Power of relaxation of any of the orders in case of undue hardship because of the operation of such order is vested with the Governor.

9. In the year 2004, a Selection Committee was constituted for promotion of candidates to the various posts in the Statistical wing of the Directorate of Dairy Development. The Selection Committee in its meeting held on 23-07-2004 took

up the matter of promotion to the post of Inspector of Statistics / Research Assistant. The cases of respondent No. 7 and another candidate were considered but it was found that both the candidates did not fulfill the prescribed qualification and, therefore, no recommendation was made. The Selection Committee also took up the matter relating to promotion to the post of Sub-Inspector of Statistics but found that the gradation list of the candidates in the feeder cadre was not in order. It was decided to consider promotion to the post of Sub-Inspector of Statistics after a proper gradation list was published.

10. Thereafter, the defects in the gradation list was sorted out and a provisional gradation list in the cadres of Sub-Inspector of Statistics and Computer/Field man/Field organizer was published on 12-08-2004. The said gradation list thereafter attained finality.

11. Petitioner claims to be the seniormost person in the cadre of Computer/Field man/Field organizer, who is a graduate having Mathematics/Economics/Statistics as one of the subjects. According to him, there is no one above him either in the cadre of Computer / Field man / Field organizer or in the cadre of Sub-Inspector of Statistics who have the aforesaid requisite qualification.

12. In view of the non-availability of qualified candidates for promotion to the post of Inspector of Statistics / Research Assistant from the feeder cadre of Sub-Inspector of Statistics, respondent No. 5 submitted a proposal to the Commissioner and Secretary to the Government of Assam, Animal Husbandry and Veterinary Department on 13-08-2004 for relaxation of order 4(3) of the 1996 service order. The proposal was that in the event of non-availability of suitable candidates in the cadre of Sub-Inspector of Statistics for promotion to the cadre of Inspector of Statistics / Research Assistant, the candidature of the incumbents in the cadre of Computer / Field man/Field organizer having 8 years of continuous service and having Bachelors degree with either Economics, Mathematics or Statistics as one of the subjects may be taken into consideration.

13. A draft amendment was made to the 1996 service order in terms of the proposal noted above. The concerned Departments have agreed to the proposed amendment, which also received the approval of the Assam Public Service Commission (APSC). According to the petitioner, the draft amendment is at the final stage of acceptance of the competent authority.

14. A Selection Committee was again constituted to select and recommend candidates for promotion to various posts in the Directorate of Dairy Development. The Selection Committee in its meeting held on 11-02-2009 considered, amongst others, promotion to one post of Research Assistant and two posts of Sub-Inspector of Statistics. The Selection Committee recommended respondent No. 7 for promotion to the post of Research Assistant and also recommended respondent Nos. 8 and 9 for promotion to the post of Sub-Inspector of Statistics.

15. Following the above recommendation, respondent No. 5 issued separate

orders dated 20-02-2009 promoting respondent No. 7 to the post of Research Assistant and respondent Nos. 8 and 9 to the post of Sub-Inspector of Statistics.

16. Petitioner submitted a representation dated 02-03-2009 before the respondent No. 5 to consider his promotion to the post of Research Assistant. As there was no response, petitioner has moved this Court by way of the present writ petition.

17. A counter affidavit has been filed by the respondent No. 5. Respondent No. 5 has stated that there is another executive order called the Assam Statistical Service under Animal Husbandry and Veterinary Service (Recruitment and Promotion) Orders, 1990 ("the 1990 service order" hereafter), which is still in force for Statistical service of both the Animal Husbandry and Veterinary Department and the Dairy Development Department. It is contended that Dairy Development Department is a sister department of the Animal Husbandry and Veterinary Department and since the Statistical wing of Animal Husbandry and Veterinary Department is a major wing which also includes Dairy (Statistics), so the above orders are also applied in the case of Statistical wing of the Dairy Development Department. It is contended that in the 1990 service order there is no requirement of having Bachelors degree with Mathematics/Economics/Statistics as one of the subjects for promotion to the post of Inspector of Statistics/Research Assistant. Further stand taken is that the draft amendment to the 1996 service order has not yet been approved by the Government. Respondent No. 5 has contended that the petitioner is junior to respondents 7, 8 and 9 and his claim for promotion from the cadre of Computer to Inspector of Statistics / Research Assistant is untenable. Promotion of respondent No. 7 is sought to be justified on the ground that he is the seniormost Sub-Inspector of Statistics as per the final gradation list and he is eligible by virtue of the 1990 service order. Likewise, promotion of respondents 8 and 9 is justified on the ground that they are placed much above the petitioner in the final gradation list. It is also stated that the posts of Research Assistant or Sub-Inspector of Statistics do not require specialized knowledge of the three subjects, namely, Mathematics / Economics / Statistics.

18. Respondent No. 7 on the one hand and respondent Nos. 8 and 9 on the other hand have filed separate counter affidavits.

19. In his counter affidavit, respondent No. 7 has questioned the locus standi of the petitioner to challenge his promotion as petitioner does not belong to the feeder cadre of Sub-Inspector of Statistics. It is contended that the petitioner is not an aggrieved person. Respondent No. 7 has also stated that under the 1990 service order, for promotion to the post of Inspector of Statistics / Research Assistant, there is no requirement of being a graduate with Mathematics / Economics / Statistics as one of the subjects. Further contention is that the 1996 service order did not supercede or repeal the earlier 1990 service order. The assertion of the petitioner that he is a graduate with Economics as one of the subjects is denied. He has supported the recommendation of the Selection

Committee.

20. Respondent Nos. 8 and 9 in their joint counter affidavit have also adopted similar stance. Additionally they have contended that they are much senior to the petitioner and are placed above him in the gradation list. Persons below them but above the petitioner are not aggrieved to their promotion as they have not challenged the same.

21. Petitioner has filed separate rejoinder affidavits to the counter affidavits filed by the above respondents. Petitioner has vehemently contended that the service rules applicable to the Statistical Wing of the Directorate of Dairy Development is the 1996 service order and not the 1990 service order. Service rules of a different department cannot be followed by another department when that department already has service rules of its own, he contends. Petitioner has further stated that the selection committee was not properly constituted and therefore the proceedings of the selection committee meeting held on 11-02-2009 would be null and void. Petitioner has reiterated that respondent No. 7 is an ineligible person as he does not have the requisite qualification.

22. Heard Mr. P.D. Nair, learned Counsel for the petitioner. Also heard Mr. B.J. Ghosh, learned Government advocate for the State respondents and Mr. P.K. Roy, learned Counsel for respondents 7, 8 and 9.

23. Learned Counsel for the petitioner submits that the selection committee was not properly constituted in as much as Research Officer (Statistics) was not present. There is thus violation of order 6 of the 1996 service order, which has vitiated the recommendation of respondents 7, 8 and 9. He also submits that the minutes of the selection committee meeting was signed by only the Chairman and the Member Secretary. He contends that respondent No. 7 is not a graduate with Economics, Statistics or Mathematics as one of the subjects, thus rendering him ineligible for promotion to the post of Inspector of Statistics / Research Assistant. His further submission is that the case of the petitioner was not considered for promotion either to the post of Inspector of Statistics / Research Assistant or to the post of Sub-Inspector of Statistics. According to the learned Counsel, petitioner became eligible for promotion to the post of Inspector of Statistics / Research Assistant on the strength of the draft amendment. In support of his submissions, he has referred to and relied upon the following decisions:-

(1) J. Ranga Swamy Vs. Government of Andhra Pradesh and Others,

(2) Abraham Jacob and Others Vs. Union of India,

(3) P.U. Joshi and Others Vs. The Accountant General, Ahmedabad and Others,

24. Mr. Ghosh, learned State Counsel in his brief submission contended that the 1990 service order is also applicable to the Dairy Development Department. The 1990 service order has not been repealed or superceded and the same is still in force. As per the 1990 service order, there is no requirement of being a

graduate, not to speak of being a graduate with Economics, Statistics or Mathematics as one of the subjects for promotion to the post of Inspector of Statistics / Research Assistant from the feeder cadre of Sub-Inspector of Statistics. He submits that even a matriculate candidate can be so promoted provided he has the requisite years of service. He has produced the relevant departmental record for consideration of the Court.

25. Mr. P.K. Roy, learned Counsel for the respondents 7, 8 and 9 submits that as per the gradation list, all the above respondents are senior to the petitioner and they have been placed above him in the gradation list. Regarding the challenge to the promotion of respondent No. 7, learned Counsel submits that the petitioner does not belong to the feeder cadre of Sub-Inspector of Statistics. In fact, he is serving as Computer, which is the feeder cadre for the post of Sub-Inspector of Statistics. Therefore, petitioner cannot get promotion to the post of Inspector of Statistics / Research Assistant. As such, he cannot challenge the promotion of respondent No. 7. He also submits that there is no infirmity in the promotion of respondents 8 and 9, considering their seniority. There are a number of persons below the respondents but above the petitioner in the gradation list but they have not challenged the promotion of respondents 7, 8 and 9. He also submits that the selection committee is a necessary party but it has not been made a party in the writ proceeding. On this ground alone the writ petition should be dismissed, contends Mr. Roy.

26. The submissions made have been considered.

27. Before proceeding further, the two contentions, one advanced by the respondents regarding applicability of the 1990 service order and the other by the petitioner regarding applicability of the draft amendment to the 1996 service order need to be addressed.

28. It is an admitted position that the Dairy Development Department of the Government of Assam is a separate department having been carved out from the Animal Husbandry and Veterinary Department. In the 1990 service order, "service" has been defined to mean Assam Statistical Service under Animal Husbandry and Veterinary Department and "member" has been defined to mean a member of Assam Statistical Service under Animal Husbandry and Veterinary Department. In the introduction, it is clearly stated that the 1990 service order has been made to regulate the recruitment and promotion of statistical personnel of Animal Husbandry and Veterinary Department. After the Dairy Development Department became a separate department, the 1996 service order was framed to regulate the recruitment and promotion of statistical personnel of Dairy Development Department. It was notified and published in the Assam Gazette on 05-11-1996. Under the 1996 service order, "service" has been defined to mean Assam Statistical Service under Dairy Development Department and "member" has been defined to mean a member of Assam Statistical Service under Dairy Development Department.

29. It is thus clear that the two departments mentioned above have two different sets of service rules, the Animal Husbandry and Veterinary Department has the 1990 service order whereas the Dairy Development Department has the 1996 service order. Though the Statistical Wing of the two departments may have similar features, yet they belong to different departments and will be governed by their respective service orders. Therefore, the question of supercession or repeal of the 1990 service order by the 1996 service order does not arise. As the Dairy Development Department is a separate department and the statistical wing under the Dairy Development Department has its won service rules, viz., the 1996 service order, the question of applying the 1990 service order to the statistical personnel of Dairy Development Department does not arise. As such, the submission made by the learned State Counsel that the 1990 service order is also applicable to the Dairy Development Department, being a "sister department" cannot be accepted and is hereby rejected.

30. Coming to the contention advanced on behalf of the petitioner that the draft amendment to the 1996 service order can be applied to consider the case of the petitioner for promotion to the post of Inspector of Statistics / Research Assistant, as already noticed, petitioner is serving as Computer which is the feeder cadre for promotion to the post of Sub-Inspector of Statistics, which inturn is the feeder cadre for promotion to the post of Inspector of Statistics / Research Assistant. As per order 4(3) of the 1996 service order, ninety percent of the posts of Inspector of Statistics / Research Assistant are to be filled up by promotion from amongst the Sub-Inspector of Statistics who have completed not less than 5 years of continuous service and possesses a Bachelors Degree with Mathematics, Statistics or Economics as one of the subjects.

31. As the above condition was coming in the way of promotion to the post of Inspector of Statistics / Research Assistant and as the said post was lying vacant for a long time, the departmental authority proposed amendment of the said order 4(3) in the following terms :-

In the event of non-availability of suitable candidates in the cadre of Sub-Inspector of Statistics for promotion to the cadre of Inspector of Statistics / Research Assistant, the candidature of incumbents in the cadre of Computer/Field man/Field organizer who have completed eight years of continuous service on the first day of the year in which the selection for promotion is made having Bachelor Degree with one of the subjects Economics, Mathematics and Statistics may be taken into consideration.

32. Admittedly, the above proposed amendment is still at the draft stage. It has not yet received the final approval of the Government and is yet to be notified in the State Gazette.

33. There is no dispute to the proposition that draft rules can be applied in the absence of statutory rules. However, in the present case, the department has a set of service rules inforce, that is, the 1996 service order, though, it is an

executive order in the form of administrative instruction. When the 1996 service order including order 4(3) thereof is holding the field, the question of making the draft rule containing the proposed amendment of order 4(3) applicable does not arise.

34. In the case of Abraham Jacob (supra), the Hon''ble Supreme Court has reiterated the above proposition that it is too well settled that the service conditions of employees in the absence of a statutory rule could be governed by administrative instructions. Again in the case of P.U. Joshi (supra), the Hon''ble Supreme Court has held that there is no right in any employee of the State to claim that rules governing conditions of his service should be forever the same as the one when he entered service. A Government servant has no right to challenge the authority of the State to amend, alter and bring into force new rules relating to even an existing service. There is no dispute to the above legal propositions. However, in the factual context of the present case, those decisions are not applicable. As order 4(3) of the 1996 service order has not been amended till date and as the 1996 service order is holding the field, the question of applicability of the draft rule containing the proposed amendment of order 4(3) does not arise. The above submission made on behalf of the petitioner therefore cannot be accepted and is thus rejected.

35. Coming to the gradation list of the statistical wing of the Dairy Development Department (Annexure-7 to the writ petition), it is seen that it is a combined gradation list of all the personnel of the statistical wing. Respondent No. 7 is at serial No. 1 whereas respondent Nos. 8 and 9 are at serial Nos. 3 and 4. Petitioner is placed much below them at serial No. 9.

36. Regarding the challenge to the promotion of respondent No. 7 to the post of Inspector of Statistics / Research Assistant, the eligibility requirement as per order 4(3) is that the candidate must belong to the feeder cadre of Sub-Inspector of Statistics and must be a graduate with Economics, Statistics and Mathematics as one of the subjects. Petitioner does not belong to the feeder cadre of Sub-Inspector of Statistics. As a matter of fact, he is serving as Computer which is the feeder cadre for promotion to the post of Sub-Inspector of Statistics. It is thus clear that the petitioner is not eligible for promotion to the post of Inspector of Statistics / Research Assistant. Petitioner has relied on the decision in the case of J. Rangaswamy (supra) to contend that on the qualification as it stands today, respondent No. 7 is not eligible to hold the post of Inspector of Statistics / Research Assistant. At this stage, it may be relevant to see as to how the selection committee considered the case of respondent No. 7. The relevant portion of the minutes of the selection committee meeting is as follows :-

For promotion to the said post 4 number of candidates are required in the zone of consideration. But from the gradation list we are having only 2 persons available in the feeder category (1) Shri Ratnewsvar Kalita and (2) Shri Nayan Ch. Kalita. Since this is a single post, 100 point roster is not applicable. A

proposal had also been submitted to the Govt. for relaxation of the service conditions of the Executive Order so that candidate can be promoted in absence of requisite degree with specific subject i.e. Mathematics, Economics and Statistics. The Committee took note of the fact that Shri Ratneswar Kalita is the only graduate in the feeder category and also he has served in the department for more than 35 years and almost 25 years in the present post, is the seniormost in the feeder category and is at the verge of retirement from service after about 2 years. Considering all these aspects the Committee recommends the name of Shri Ratneswar Kalita for promotion to the post of Research Assistant. The Committee also decides to recommend the name of Shri Ratneswar Kalita for regularization under 4d of APSC.

Though this Court is not inclined to scrutinize the promotion of respondent No. 7 at the instance of an ineligible candidate, yet the State may look into this aspect of the matter and may consider exercising the power of relaxation as it appears to be a case of causing undue hardship by application of Order 4(3).

37. In so far promotion of Respondents 8 and 9 to the post of Sub-Inspector of Statistics is concerned, the selection committee considered the cases of eight candidates who were in the zone of consideration, including the petitioner. Going by their seniority position in the gradation list, the selection committee recommended Respondents 8 and 9 for promotion. However, there is no discussion at all regarding the merit of each of the candidates falling within the zone of consideration, including that of the petitioner when the criteria for selection is merit-cum-seniority. It appears that the selection committee mechanically followed the seniority position of the Respondents 8 and 9 and made the recommendation. In such circumstances, this Court is of the view that the exercise is required to be redone. Therefore, the recommendation of Respondents 8 and 9 vis-?-vis the other candidates falling within the zone of consideration should be reconsidered keeping in view that the criteria for selection is merit-cum-seniority. Till the said exercise is carried out, the promotion of Respondents 8 and 9 should be treated as temporary and would be dependant on the outcome of the fresh consideration, which shall be done within a period of two months from the date of receipt of a certified copy of this order.

38. Coming to the contention of the petitioner that there was no proper constitution of the selection committee in terms of order 6 inasmuch as the Research Officer was not present, the respondent No. 5 in his counter affidavit has stated that both the post of Joint Director, Dairy Development and Research Officer (Statistics), Dairy Development are lying vacant. Therefore, the Director had taken the decision to include Deputy Director of the Department in the selection committee. However it is seen that other officials were also present in the selection committee meeting as members. From the record it is seen that the minutes of the selection committee was signed by the Chairman and the member secretary. As has already been discussed above, the 1996 service order is an executive order in the form of administrative instructions. Infraction of such a

provision, particularly as the one mentioned above, would not be such so as to render the selection committee proceedings itself a nullity. In any case, as per the explanation furnished by the Respondent No. 5, as the post of Joint Director and Research Officer are lying vacant, the Director had invited other officials as members of the selection committee. Therefore, there was substantial compliance of order 6.

39. For the aforesaid reasons, the writ petition is partly allowed to the extent indicated above. The record produced by Mr. B.J. Ghosh, learned State Counsel is returned back. No cost.