
(2007) 08 GAU CK 0016
In the Gauhati High Court

State of Tripura and Another

APPELLANT

Vs

Nishit Bidyut Biswas

RESPONDENT

Date of Decision : 20-08-2007

Acts Referred:

Citation : (2007) 4 GLT 927

Hon'ble Judges : Maibam B.K. Singh, J;Biplab Kumar Sharma, J

Bench : Division Bench

Final Decision : Allowed

Judgement

B.K. Sharma, J.—Heard Mr. P. Deb Roy, learned Counsel appearing for the State appellant as well as Mr. A. Lodh, learned Counsel representing the respondent-writ petitioner.

2. By means of this appeal, the appellants have put to challenge the judgment and order dated 11.11.99 passed by the learned Single Judge in the writ petition being Civil Rule No. 605 of 1994, later on re-numbered as Civil Rule No. 118 of 1996 by which a direction was issued to consider the case of the writ petitioner-respondent for promotion to the post of Executive Engineer with effect from 15.12.88 from which date his juniors were so promoted.

3. The respondent herein filed the writ petition in the year 1994 praying for a direction to the appellants herein to promote him as Executive Engineer with effect from 15.12.88. The prayer was made on the ground that the respondents Nos. 3 and 4 who were juniors to him had been promoted with effect from 15.12.88. But on perusal of the writ petition what has transpired is that it was the respondent No. 3 who, in fact, was given retrospective promotion with effect from 15.12.88. But, on the other hand, the respondent No. 4 was given promotion with effect from 22.5.93. In the writ petition, the stand of the petitioner was that there being no adverse material against him and he being senior to those respondents ought to have been promoted at par with the said respondents and consequently, should have been granted promotion with effect

from 15.12.88.

4. The respondents in their counter affidavit denied the contention raised by the petitioner. In the affidavit, it was indicated that as per the relevant rules the post of Executive Engineer is a selection post and since the petitioner failed to clear the prescribed departmental examination, he could not be promoted. Further stand in the affidavit was that since a departmental proceeding was pending against the petitioner from 1986 which eventually came to an end by order dated 18.3.94 imposing the penalty of stoppage of one increment for a period of one year, the petitioner could not be promoted.

5. In the rejoinder affidavit filed by the petitioner, the above aspect of the matter had not been denied, but it was contended that clearing the departmental examination was not a mandatory requirement and that the stoppage of one increment without cumulative effect was no bar for promotion to the higher rank.

6. The learned Single Judge by the impugned judgment and order has held that the imposition of penalty of stoppage of one increment was not enough to deny promotion to the writ petitioner. It has also been held that clearing of the departmental examination is not a mandatory requirement. Referring to the Rules in question, namely, Tripura Engineering Service Rules, 1987 and rule 6(D) thereof, the learned Single Judge has held that the prescription of clearing the departmental Examination in the Note appended to Rule 6(D) of the aforesaid Rules is not a mandatory requirement and that at best the same could be said to be directory. As regards the plea of the respondent-State that since the writ petitioner was under cloud in view of the pendency of the departmental proceeding with eventual imposition of penalty of stoppage of one increment, he could not be promoted, the learned Single judge held that the misconduct attributed to the writ petitioner was not serious enough so as to deny promotion to him.

7. It is on the above grounds, the learned Single Judge has issued a direction to the State appellants to consider the case of the writ petitioner with effect from 15.12.98 (read 15.12.88) from which date the respondent No. 3 was so promoted. The learned Single Judge came to the conclusion that the imposition of penalty of stoppage of one increment by itself may not be a bar for promotion. In this connection, he has referred to rule 11 of the CCS(CCA) Rules. The observation made by the learned Single Judge gives an impression that the Rule 11 itself provides for making an exception for promotion even in case of imposition of penalty. A particular instruction issued by the Government of India under Rule 11 has been indicated in the judgment as Rule 11(28).

8. On a bare perusal of the said instruction, it would be seen that discretion is with the appropriate authority. On the other hand, there are instructions under the same Rule which clearly indicate that in case of pendency of departmental proceeding and till expiry of the period of penalty, one may not be promoted. On both counts, i.e. not having passed the departmental examination and the

disciplinary proceeding being in existence from 1986 to 1994 with eventual imposition of penalty of stoppage of one increment, the petitioner was not entitled to get promotion. Moreover, the post being the selection post, no mandamus could have been issued to consider the case of the petitioner at par with the private respondents irrespective of pendency of the departmental proceeding and imposition of penalty thereof and also irrespective of the fact whether the petitioner was eligible for promotion or not.

9. We have considered the submissions made by the learned Counsel for the petitioner and the materials available on record. Although the learned Counsel for the respondent-writ petitioner has admitted that as per requirement of the Note appended to Rule 6(D) of the Rules, an Assistant Engineer to be eligible for promotion as Executive Engineer should have passed the departmental examination, but the same is not mandatory. As was before the learned Single Judge, before us also, it is the submission of the learned Counsel for the respondent-writ petitioner that had it been the intention of the Legislature to make clearing the departmental examination to be mandatory, such a condition would have been incorporated in the main rule i.e. Rule 6(D) and not by way of a Note appended thereto. We are unable to accept the submission made by the learned Counsel for the respondent-writ petitioner.

10. Rule 6(D) clearly provides that recruitment to the post of Executive Engineer shall be made by promotion from amongst the Assistant Engineers on the basis of "selection". The requisite length of service to be eligible for promotion has also been indicated in the Rule with distribution of vacancies to be filled up by degree holders and diploma holders. Roster points have also been indicated in the Rule. In the Note appended thereto, it has been prescribed that the Assistant Engineer should have passed the departmental examination prescribed for Assistant Engineer.

11. The Note appended to the Rule 6(D) being an integral part, cannot be said to be directory and not mandatory. As per requirement of the said Note appended to the Rule 6(D) of the Rules, the petitioner having not cleared the departmental examination either in 1988 or in 1993 at the time when his juniors were promoted, there was no question of consideration of his case for promotion. Similarly, since he was under cloud, for there being a departmental proceeding pending since 1986, his case could not be considered. The departmental proceeding came to an end with the imposition of penalty of stoppage of one increment by order dated 18.3.94. Thus, till 18.3.94, the petitioner was under cloud and the penalty of stoppage of one increment remained in operation for one year thereafter.

12. Learned Counsel for the respondent-writ petitioner has submitted that in the mean time, the petitioner has cleared the departmental examination on 4.10.93. On the other hand, the learned State Counsel has brought to our notice that the vigilance has given its clearance to the case of the petitioner on 15.9.94.

13. If the petitioner on the basis of the fact that he has cleared the departmental examination and that the period of penalty is also over, is now entitled to get promotion upon consideration of all other relevant factors, the appellant-State shall do the needful in this regard. However, the direction as has been issued by the learned Single Judge to consider the case of the writ petitioner with retrospective effect i.e. from 15.12.88, in our considered view, in the circumstances is not sustainable. The petitioner having not had the eligibility to be considered for promotion cannot claim such promotion. Similarly, in view of the pendency of the departmental proceeding and eventual imposition of penalty, the petitioner's case even if had been kept in sealed cover, upon imposition of penalty of stoppage of one increment would have been rendered infructuous.

14. For the foregoing reasons, we are inclined to accept this appeal by way of setting aside and quashing the impugned judgment and order passed by the learned Single Judge in Civil Rule No. 605 of 1994 re-numbered as C.R. No. 118 of 1996. However, it is made clear that the appellant-State shall consider the case of the petitioner for his prospective promotion applying the yardstick and parameters applicable to such case of promotion.

With the aforesaid observations and directions, this writ appeal is allowed. No costs.