

(2011) 03 GAU CK 0014
In the Gauhati High Court
Case No : Writ Appeal No. 19 of 2010

The Director General, Boarder Roads Organisation and Others **APPELLANT**
Vs
GS - 161752 OVSR **RESPONDENT**

Date of Decision : 18-03-2011

Acts Referred:

Constitution of India, 1950 — Article 148, 309

Citation : (2011) 3 GLT 431

Hon'ble Judges : Madan B. Lokur, C.J.;H. Baruah, J

Bench : Division Bench

Advocate : S.N. Meitei, for the Appellant; A.R. Malhotra, for the Respondent

Final Decision : Dismissed

Judgement

H. Baruah, J.—In challenge is the judgment and Order dated 10.9.2010 passed by the learned Single Judge in W.P.(C) No. 51 of 2009 whereby and whereunder the Respondents therein are directed to revise the pay scale of the Petitioners therein at Rs. 5000-8000 w.e.f. 1.1.1996, which is the revised pay scale for the post of Overseer as recommended by the 6th Central Pay Commission and accepted by the Government of India.

2. The background facts which would be pertinent for this appeal briefly are as follows:

The Respondent herein was initially appointed to the post of Mason on 16.4.1985 after being selected in the selection test held in accordance with the relevant Recruitment Rules. As per the General Reserve Engineer Force (GREF) Group "C" and "D" Recruitment Rules, 1982 the post of Overseer is to be filled up 10% by direct recruitment and the balance 90% by promotion from different posts including Mason, who are matriculate with 3 years regular service in the grade in GREF subject to passing of trade test. After joining in the post the Respondent while in service with the permission of the Appellants passed Matriculation Examination as well Higher Secondary School Leaving Certificate Examination

under the Uttar Pradesh Education Board. The Respondent after completing 3 years regular service also passed the trade test and thereafter promoted to the post of Overseer on 15.6.1990 on being selected by the DPC and since then he has been serving as regular Overseer. In the year 1996, GREF Group "C" and "D" Recruitment Rules, 1982 was partly amended under which the methods of recruitment are 80% by direct recruitment and 20% by promotion. The essential technical qualification for direct recruitment to the post of Overseer is diploma in Engineering. Out of 20% promotion quota, 50% of the vacancy is reserved for promotion to be filled up from amongst other Mason and other Carpenter who have completed 3 years regular service and matriculate subject to passing of trade test. The Recruitment Rules 1996 is still in force and the Respondent is eligible under the rules for appointment by promotion to the post of Overseer since he has satisfied the qualifications for such promotions. Accordingly, the Respondents were promoted to the post of Overseer as early as 15.6.1990 i.e. before the enforcement of the Recruitment Rules of 1996.

3. In the meantime, the report of the 6th Central Pay Commission published and accepted by the Government of India which was to be implemented w.e.f. 1.1.2006 by enacting Central Civil Service (Revised Pay) Rules, 2008 vide Gazette Notification No. G.S.R.622(E) dated 29.08.2008. In para 7.39.22 of the 6th Central Pay Commission the post of Overseer has been upgraded and merged with the promotional post of Superintendent BR Grade II and fixed at Rs. 5000-8000/-. After implementation of the 6th Central Pay Commission by the Appellants, Overseers working in the Border Road Organisation (for short BRO) who are having diploma Engineering had been allowed the pay scale of Rs. 5000-8000/-w.e.f. 1.1.2006 but the Respondent though promoted to the post of Overseer way back on 15.6.1990 has not been allowed to enjoy the scale of pay of Rs. 5000-8000/ w.e.f. 1.1.2006 till date on the ground that he is not having diploma in Engineering. On account of creeping of some confusion regarding pay fixation in respect of Overseer in BRO the Chief Engineer, Project Puspak, C/o 99 APO vide letter No. 12000/6th PC/78/E1C dated 22.09.2008 informed such anomaly to the Director General, BRO, Seema Sadak Bhavan, Ring Road, Delhi Cantt., New Delhi 110010. The Director General, BRO in reply to the letter as indicated above informed the Chief Engineer that the pay of the non-diploma holder Overseer, BR-IIs and E&M-IIs may be fixed in the corresponding pay band/pre-revised scale. On the basis of the letter of the Director General BRO, the Respondent has not been allowed to enjoy the pay scale of Rs. 5000-8000/ as recommended by 6th Central Pay Commission for the post of Overseer and accepted by the Government of India. On the other hand, Under Secretary, Border Roads Development Board, GE-I vide his letter dated 4.5.2009 informed the Joint Director/T&C HQ DGBR, Naraina, New Delhi that the pay of non-diploma holder Superintendent Grade-II (Civil & Electrical/Mechanical) will be fixed in the revised pay structure of Rs. 5200-20200/-(PB-1) along with grade pay of Rs. 2000 and Rs. 2800/-respectively w.e.f. 1.1.2006. The Respondent being denied the revised pay scale at Rs. 5000-8000/ approached this Court by filing W.P.(C)

No. 51 of 2009.

4. The Appellants by filing counter affidavit took stand that the revised pay at the scale of Rs. 5000-8000/ per month recommended by the 6th Central Pay Commission and accepted by the Government of India could not be provided to the Respondent herein he being not diploma holder Overseer, therefore, the recommendation of the 6th Central Pay Commission at the scale of Rs. 5000-8000/per month for the post of Overseer cannot vest any right to the Respondent.

5. On careful consideration of the rival contentions of the parties in their respective pleadings as well as submissions of the respective counsel the learned Single Judge rejected the claim of the Appellants herein in view of appointment of the Respondent prior to enforcement of the Recruitment Rules, 1996 and also in view of the para 7.39.22 of the 6th Central Pay Commission. The learned Single Judge taking the ratio of various decisions came to a finding that by issuing an executive direction, para 7.39.22 of the report of the 6th Central Pay Commission cannot be undone. Admittedly, under the existing Recruitment Rules, 1996 the post of Overseer is to be filled up 80% by direct recruitment and minimum qualification for direct recruitment is diploma in Engineering and remaining 20% are to be filled up by promotion from amongst the Mason and Carpenters who are matriculate and passed the trade test examination with 3 years regular service. In para 7.39.22 of the 6th Central Pay Commission, the Commission recommended that the post of Overseer may be upgraded and merged with other promotional post of Superintendent BR Grade-II and recommended merger of scales of Rs. 5000-8000-Rs.5500-9000 and Rs. 6500-10500 and the post will be placed in the revised pay band of Rs. 8700-34,800/ along with grade pay of Rs. 4200. In the Central Civil Services (Revised Pay) Rules, 2008, under the heading of Ministry of Shipping, Road Transport & High Ways pay scale of Overseer in the Border Road Organisation has been merged with the promotional post of Superintendent BR Grade-II and has been revised to the scale of pay of Rs. 5000-8000. In the recommendation under para 7.39.22 it is nowhere mentioned that the promotee to the post of Overseer having no qualification of diploma in Engineering shall not be allowed to enjoy the revised pay scale of Rs. 5000-8000/.

6. The learned Single Judge, therefore, primarily taking note of the promotion of the Respondent to the post of Overseer long before the enforcement of Recruitment Rules, 1996 and recommendation in para 7.39.22 of the 6th Central Pay Commission held that the refusal on the part of the Appellants to provide the Respondent with the revised pay at Rs. 5000-8000/ would be not tenable and accordingly allowed the writ petition.

7. Mr. S.N. Meitei, learned Counsel for the Appellants while argued the case before us strenuously argued that such revised pay would not be applicable to the Respondent in view of the letter written by the Director General to the Chief Engineer. Mr. Meitei taking resort to the Clause 17 of the Notification dated 29th

August, 2008 issued under Proviso to Article 309 and Clause 5 of Article 148 of the Constitution strenuously submitted that if any question arises relating to the interpretation of any provision to the Rules it shall be referred to the Central Government for decision. From the facts appearing in the face of the record, the manner of promotion of the Respondent, the factum of merger of the post and offering of the scale at Rs. 5000-8000/-under para 7.39.22 of the 6th Central Pay Commission we are unable to concede to the submission advanced by Mr. S.N. Meitiei.

8. Admittedly, Respondent was promoted as Overseer on 15.6.1990 long before the enforcement of the Recruitment Rules, 1996. Under the General Reserve Engineering Force (GREF) Group "C" and "D" Recruitment Rules, 1982 10% of the post is to be filled up by direct recruitment while 90% of the post to be filled up by promotion from different posts including Mason who are matriculate with 3 years regular service in the grade subject to passing of the trade test. The Respondent having had the requisite qualification required under Rules, 1982 was promoted to the post of Overseer on 15.6.1990. However, Rules 1982 having been partly amended the method of recruitment has been changed with additional qualification of having diploma in Engineering. The promotion and the appointment having been made on 15.6.1990 under 1982 Rules, subsequent modification in the Rules and the method for promotion to the post of Overseer would not be applicable to the Respondents. These facts being not denied the Appellants cannot deny the revised scale provided by the 6th Central Pay Commission for the post of Overseer in the scale of Rs. 5000-8000/ on account of having no diploma in Engineering. Since in para 7.39.22 of the 6th Central Pay Commission for the post of Overseers such qualification has not been indicated and the scale at Rs. 5000-8000/-having been provided for the post of Overseer, the Respondent having held the post of Overseer way back 15.6.1990 the Appellants cannot deny such revised scale in view of the executive instruction. The learned Single Judge took much pain to arrive at decision that the Respondent is entitled to have the revised scale at Rs. 5000-8000/. The learned Single Judge while deciding the writ petition took the ratio laid down by the Apex Court in the case of Union of India and Another Vs. Tulsiram Patel and Others, which has been followed by this Court in Heman Bihari Singh v. State of Manipur. Taking recourse to the maxim "Espressum facit cessare tacitum" held that provisions made in para 7.39.22 by the 6th Central Pay Commission such provisions cannot be excluded by virtue of the letter No. 18368/6th CPC/Corr/DGBR/108/T&C dated 3.10.2008.

9. Mr. A.R. Malhotra, learned Counsel appearing for and on behalf of the Respondent stoutly supported the impugned judgment rendered by the learned Single Judge. Mr. A.R. Malhotra argued that no error or illegality has been committed by the learned Single Judge in allowing the petition of the Respondent directing the Appellants herein to provide him with the revised scale as recommended by the 6th Central Pay Commission and accepted by the Government of India. It was argued by him that the Respondent having been

promoted per Recruitment Rules, 1982 to the post of Overseer, subsequent eligibility criteria provided by Recruitment Rules, 1996 would not be applicable to the Respondent. Moreover, the 6th Central Pay Commission has not indicated anything in para 7.39.22. Mr. A.R. Malhotra, therefore, strenuously argued before us that the appeal is liable to be dismissed.

10. In view of the facts appearing in the face of the record, provisions in the Recruitment Rules, 1982 and 1996 and the recommendation of the 6th Central Pay Commission, we are of the considered view that this appeal cannot stand and therefore, liable to be dismissed.

11. In the result, appeal stands dismissed. No costs.