

(2022) 05 GAU CK 0033

In the Gauhati High Court

Case No : Writ Petition (Civil) No. 1173 Of 2022

Tulumoni Devi

APPELLANT

Vs

State Of Assam And 5 Ors

RESPONDENT

Date of Decision : 19-05-2022

Acts Referred:

Constitution Of India, 1950 — Article 14, 16

Citation : (2022) 05 GAU CK 0033

Hon'ble Judges : Achintya Malla Bujor Barua, J

Bench : Single Bench

Advocate : A C Borbora

Final Decision : Allowed

Judgement

1. Heard Mr. A C Borbora, learned senior counsel assisted by Mr. B P Borah, learned counsel for the petitioner. Also heard Mr. B Kaushik, learned counsel for the respondents no. 1, 2, 3, 4 and 6 being the authorities under the Elementary Education Department, Government of Assam and Ms. D D Barman, learned Additional Senior Government Advocate for the respondent no. 5 being the Deputy Commissioner, Nagaon and Mr. B Gogoi, learned counsel for the respondent no. 7 being the Departmental Promotion Committee represented by the Chairman, SCERT as well as Mr. M K Das, learned counsel for the respondent no. 8, Binita Pathak.

2. Both the petitioner Dr. Tulumoni Devi and the respondent no. 8 Binita Pathak were Assistant Professors in the Government Sikhshan Mahavidalaya, Nagaon and both claimed eligibility for being promoted to the cadre of Professor. In the process by the impugned notification dated 28.12.2021 of the Special Commissioner, Elementary Education Department, Government of Assam, the respondent no. 8 Binita Pathak was allowed to officiate as Professor and was posted on promotion at CTE Nagaon. The notification dated 28.12.2021 pertaining to the promotion of the respondent no. 8 Binita Pathak is assailed in this writ petition on the ground that prior to such promotion being meted out to

the respondent no. 8, the petitioner also ought to have been considered for similar promotion.

3. We have taken note that the Institute CTE, Nagaon and the Government Sikhshan Mahavidalaya, Nagaon are one and the same institute and therefore, it has to be construed that the order of promotion given to the respondent no. 8 Binita Pathak was in respect of Government Sikhshan Mahavidalaya, Nagaon.

4. Mr. A C Borbora, learned senior counsel for the petitioner candidly makes a statement that the petitioner is not interested to assail the promotion of the respondent no. 8 but on the other hand, is more interested to establish her own legal right to be considered for promotion at the relevant point of time when the respondent no. 8 was so promoted.

5. It is stated that when the process for promotion to the cadre of Professor in the CTE/IASEs and Government B.Ed. Colleges was initiated, there was a departmental proceeding pending against the petitioner. As because of the pendency of the departmental proceeding, the petitioner was not given a due consideration for such promotion although under the law, the petitioner had a legal right to be so considered.

6. The law in this respect is settled by the Supreme Court in *Union of India and others v. K.V. Jankiraman and others* reported in (1991) 4 SCC 109, wherein it had been held that in the event an employee is subjected to a departmental proceeding but otherwise was entitled to be considered for promotion, such consideration cannot be denied and it is incumbent upon the authorities to give a consideration to the claim for promotion and further the results to be kept in a sealed cover are to be acted upon after completion of the departmental proceeding depending on the manner in which the departmental proceeding was concluded.

7. The aforesaid proposition had again been clarified in paragraphs 12 and 13 in its pronouncement in the *State of M.P. v. J.S. Bansal and another* reported in (1998) 3 SCC 714 which is extracted as below:

"12. Both these memoranda were considered by this Court in *Union of India v. K.V. Jankiraman* [(1991) 4 SCC 109 : 1993 SCC (L&S) 387 : (1993) 23 ATC 322] in which it was laid down that consideration of an employee for promotion, selection grade, crossing of efficiency bar or higher scale of pay cannot be withheld merely on the ground of pendency of any preliminary enquiry or criminal investigation but the "Sealed Cover Procedure" can be resorted to if a charge-sheet has been issued or the departmental proceedings are pending or the employee has been placed under suspension. It was also laid down that if on a consideration of the name of the delinquent employee, the recommendations of the Departmental Promotion Committee were kept in a "Sealed Cover" on account of the pendency of departmental proceedings, the "Sealed Cover" could be opened only in the case of complete exoneration of the employee from all charges and notional promotion could be given to him from the date on which his

juniors were promoted. But if any penalty is imposed on the employee in disciplinary proceedings, the "Sealed Cover" is not required to be acted upon and his case for promotion is to be considered in the usual manner by the next Departmental Promotion Committee.

13. Undoubtedly, an employee has a right of being considered for promotion but he cannot claim promotion as of right. Right to be considered for promotion is obviously different and distinct from right of promotion. Even if disciplinary proceedings are initiated against an employee and those proceedings are pending on the date on which names of other employees are considered for promotion to the next higher post, the delinquent employee, if he is similarly circumstanced as other employees and is also eligible, has a right to be considered for promotion to the next higher post along with other employees. His name cannot be omitted from consideration merely because of the pendency of the departmental proceedings. An employee cannot be denied this right at the interlocutory stage of the departmental proceedings as he is still to be found guilty on the basis of the evidence which might be produced against him during those proceedings. Till the charges are established, his right to be considered cannot be defeated as he is not under the cloud of having been found guilty but is only suspected to be guilty. Mere suspicion is not a substitute for proof. Consideration for promotion along with other eligible candidates is done so as to give effect to the fundamental right available even to a delinquent employee under Articles 14 and 16 of the Constitution. Once the name is considered for promotion, the recommendations of the Departmental Promotion Committee are required to be kept in a "Sealed Cover" obviously for the reason that if the employee is ultimately found to be not guilty and the charges set out against him are found as "not established", he may be promoted immediately to the next higher post."

8. A reading of the provisions in paragraph 13 of the pronouncement in J.S. Bansal (supra), makes it discernable that an employee has a right of being considered for promotion but he cannot claim promotion as a matter of right. Further when the departmental proceeding is pending on the date on which the names of other employees were considered for promotion to the next higher post, the delinquent employee, if he is similarly circumstanced as other employees and is also eligible, has a right to be considered for promotion to the next higher post along with other employees and his name cannot be omitted from consideration merely because of the pendency of the departmental proceeding and an employee cannot be denied this right at the interlocutory stage of the departmental proceeding as he is yet to be found guilty on the basis of the evidence which might be produced against him in the proceeding. Therefore, till the charges are established, the right of the employee to be considered for promotion cannot be defeated and a consideration for promotion along with other eligible candidates are to be made. It further provides that once the name is considered for promotion, the recommendation of the Departmental Promotion Committee be kept in a sealed cover.

9. In the instant case, although it may be a situation where the petitioner was subjected to a departmental proceeding when the consideration for promotion to the cadre of Professor in the CTEs was made, the petitioner had a legal right to be considered for such promotion although the results of such consideration may not have been required to be given an effect and ought to have been kept in a sealed cover. The aforesaid procedure having not been adopted and the petitioner being not subjected to a consideration for promotion at the relevant point of time when the other similarly situated employees were so considered, we are of the view that the legal right of the petitioner to be so considered had been violated. Accordingly, the respondents in the SCERT are directed to constitute a Review Departmental Promotion Committee (in short, Review DPC) to consider the claim of the petitioner for promotion as it stood when the other similarly situated employees were so considered which ultimately resulted in the notification dated 28.12.2021 for giving effect to promotion to such other employees. In the event, the Review DPC finds that the petitioner was otherwise eligible and ought to have been promoted, consequential orders be issued for the purpose.

10. We also take note that by the order dated 02.04.2022, the petitioner had been exonerated of all the charges that were made against her in the departmental proceeding that was initiated.

11. From such point of view, had the petitioner been considered for promotion at the relevant point of time and the results thereof been kept in a sealed cover, the same could have been acted in favour of the petitioner but as because it was not so done, the legal right of the petitioner to be considered for promotion had been affected. Accordingly, the Review DPC be constituted within a period of one month from the date of receipt of certified copy of this order and the Review DPC may do the needful within a period of another one month thereafter.

12. As per the consideration by the Review DPC, the consequential orders giving effect to the same be passed by taking note of what is provided hereinabove.

13. Writ petition stands allowed as indicated above.

14. All the earlier interim orders stand merged.