

(2009) 02 GAU CK 0009
In the Gauhati High Court
Case No : Writ Petition (C) No. 53 (AP) of 2008

Yimiangu and Another

APPELLANT

Vs

State of Arunachal Pradesh and Others

RESPONDENT

Date of Decision : 06-02-2009

Acts Referred:

Constitution of India, 1950 — Article 16, 309

Citation : (2009) 2 GLT 495

Hon'ble Judges : P.K. Musahary, J

Bench : Single Bench

Advocate : K. Ete, N. Ratan, M. Kato, D. Padu, M. Tang, K. Tasso and J. Niri, for the Appellant; R.H. Nabam, C. Baruah and R.K. Dutta, for the Respondent

Final Decision : Allowed

Judgement

P.K. Musahary, J.—This writ petition is directed against the order dated 26.9.2007 whereby 18 Junior Engineers serving as Assistant Engineers on officiating basis have been promoted/regularized as Assistant Engineers without any recommendation of the Departmental Promotion Committee (for short "DPC") and also without following the reservation policy of the State wherein 80% posts are reserved for Arunachal Pradesh Scheduled Tribes ("APST" in short) officials in the matter of promotion from the posts of Group-"C" to Group-"B".

2. To state the facts in brief: The Petitioners are B.E. degree holders i.e. Bachelors in Civil Engineering from recognized universities and both of them were appointed as Junior Engineers in the Department of Hydro Power Development vide order No. SE/APEC-1/ E/S-6 (c)/44/97-98/6155-61 dated 24.11.97. The Petitioner Nos. 1 and 2 were promoted as Assistant Engineers on officiating basis on 21.5.2005 and 31.8.2005 respectively as they completed their required length of service for promotion in the year 2002 as per the Recruitment Rules holding the field. In the meantime, the State of Arunachal Pradesh framed the Recruitment Rules in the year 2005 called as "the

Recruitment to the posts of Assistant Engineer Rules, 2005" (hereinafter referred to as the "RR of 2005" in short) under Article 309 of the Constitution of India and the same was published in the official gazette vide notification No. OM-40/2005 dated 15.12.2005.

3. As per the provisions under Recruitment Rules of 2005, 50% of the total posts are to be filled up by way of direct recruitment and 50% by way of promotion amongst the Junior Engineers of the Department. Further as per Column 12 of the said Recruitment Rules, the promotion shall be made from amongst the Junior Engineers of the Department who have rendered 8 years of regular service for diploma holders and 5 years of regular service for degree holders in the grade and the promotion is to be made by selection on merit. All the private Respondents are diploma holders and on deputation from the Public Works Department and they were absorbed in the Civil Wing of undivided Power Department by an order dated 26.7.1997 and were promoted to the post of Assistant Engineers on officiating basis. The Respondent authorities prepared and published a final seniority list of Junior Engineers in the Department of Hydro Power Development as on 25.6.2005 showing the names of the Petitioner Nos. 1 and 2 at serial Nos. 25 and 30 respectively and the names of the private Respondents at serial No. 4, 5, 6, 7, 8 and 9. All the officiating appointment of 18 Assistant Engineers (Civil) in the Department of Hydro Power Development were regularized vide impugned order dated 26.9.2007 (Annexure-6 to the writ petition) without holding any DPC. The officiating promotion of the Petitioners as Assistant Engineers was not regularized along with the aforesaid 18 Assistant Engineers (Civil), which is the subject matter of this writ petition.

4. Heard Mr. K. Ete, learned Counsel for the Petitioners and Mr. R.H. Nabam, learned Senior Govt. Advocate appearing for the Respondent Nos. 1 to 3. Also heard Mr. C. Baruah, learned Senior Counsel assisted by Mr. R.K. Dutta, learned Counsel for the private Respondent Nos. 4 to 9.

5. Mr. Ete, learned Counsel for the Petitioners submits that although the private Respondents are senior to the Petitioners in the grade of Assistant Engineer, the Petitioners also become equally eligible and qualified for promotion to the post of Assistant Engineer (Civil) as they completed 5 years regular service as degree holders Junior Engineers in the year 2002 and also have been serving as Assistant Engineer (Civil) on officiating basis since 2005. The Petitioners' case, according to Mr. Ete, should have been considered alongwith the case of private Respondents while regularizing the officiating appointment of private Respondents vide impugned order dated 26.9.2007. The official Respondents, according to Mr. Ete, did not hold any DPC to consider the merit of the eligible candidates including the Petitioners for regularization of officiating appointment as Assistant Engineers (Civil) and as such, the regularization of appointment of private Respondents as Assistant Engineers (Civil) with retrospective effect is dehors the rules and established procedure in the matter of appointment/promotion. He further submits that the Government of Arunachal Pradesh by a

notification dated 1.2.2001 formulated reservation policy for promotion from Group-C to Group-B posts providing reservation on 80:20 ratio which means 80% of the posts for the APST and 20% of the posts for general and the aforesaid impugned order dated 26.9.2007 was issued without implementing the said policy depriving the Petitioners. It is submitted that out of 18 promotional posts of Assistant Engineers (Civil), as per 80:20 reservation policy, the ratio would be 3 for non-APST and 15 for APST but the Respondent authorities must illegally regularized/promoted 10 non-APST as against their entitlement of 3 posts and only 8 APST candidates as against the entitlement of 15 posts and consequently as many as 7 excess non-APST candidates have been promoted depriving as many as 8 APST candidates. Moreover, it is submitted that the Respondent authorities overlooked the earlier recommendation of the DPC on 23.7.2003 whereby as many as 9 Junior Engineers were promoted to the post of Assistant Engineers, wherein one Sri S.L. Choudhury and Irshad Nabi (both Non-APST) were promoted to the post of Assistant Engineer by implementing the aforesaid reservation policy of the Govt. According to Mr. Ete, the impugned order having been passed providing promotion/regularization of 18 Assistant Engineers (Civil) without holding any DPC and without following the aforesaid reservation policy including the 100-point roster, the Respondent authorities have acted illegally and arbitrarily and as such, the impugned order dated 26.9.2007 is Hable to be quashed and set aside. In the said notification dated 1.2.2001, a model 100-point roster for promotion within Group-D and from Group-D to Group-C and within Group-C and from Group-C to Group-B has also been provided.

6. According to Mr. Ete, learned Counsel for the Petitioners, the Supreme Court have been mandating the government/authorities to implement the reservation policy as per roster prescribed for filling up the posts earmarked for reserved category. In this respect, he cites the case of R.K. Sabharwal and others Vs. State of Punjab and others, wherein it is held that:

When a percentage of reservation is fixed in respect of a particular cadre and the roster indicates the reserve points, it has to be taken that the posts shovra at the reserve points are to be filled from amongst the members of the reserve categories and the candidates belonging to the general category are not entitled to be considered for the reserved posts.

He also cites the case of Badrinath Vs. Government of Tamil Nadu and Others, in which, it is held that:

Every officer has a right to be considered for promotion under Article 16 of the Constitution of India to a higher post subject to eligibility, provided he is within the zone of consideration.

7. Per contra Mr. Nabam, learned Sr. Govt. Advocate submits that the present Petitioners No. 1 and 2 were appointed as Junior Engineer (Civil) only on 2.12.1997 and 27.11.1997 respectively, whereas the private Respondents were

already given officiating promotion to the post of Assistant Engineers (Civil) with effect from 24.6.1997. The Petitioner Nos. 1 and 2 were given officiating promotion to the post of Assistant Engineers (Civil) only on 21.5.2005 and 31.8.2005 respectively. Prior to 21.9.2000, the 40-point roster was applicable and the 100-point roster came into effect w.e.f. 21.9.2000 as per Govt. Notification dated 21.9.2000. The Govt. decided to regularize the officiating/adhoc service as Assistant Engineer (Civil) with effect from the date they acquired qualifying length of service for promotion to the post of Assistant Engineer (Civil) on the basis of 40-point roster, which was in force till 20.9.2000. Mr. Nabam, therefore, submits that the question of consideration of the Petitioners' case for regularization along with the private Respondents does not arise inasmuch as the Petitioners were allowed to officiate as Assistant Engineers (Civil) only in the year 2005 and their cases could be considered only on the basis of 100-point roster formulated by the Govt. vide aforesaid notification dated 1.2.2001, which provides for 80:20 ratio of promotion in respect of promotion from Group-C to Group-B and within Group-B. According to Mr. Nabam, it is an admitted fact that the Petitioners have completed qualifying length of service for promotion to the next higher grade of Assistant Engineer as per Recruitment Rules in 2005 but all the private Respondents except Respondent No. 9, were diploma holders and on deputation basis and they were absorbed in the Civil Wing of undivided Power Department vide Govt. order dated 26.7.1997. Accordingly, their seniority was fixed only on the basis of absorption order. The said seniority list was challenged by the private Respondent No. 7, Shri J.N. Tripathi in a writ petition, in which, this Court directed the Respondent authorities to re-fix the seniority by counting the past service rendered in parent Department.

8. In compliance with the aforesaid order of the Court, submits Mr. Nabam, the Respondent authorities prepared and published a final seniority list of Junior Engineers (C) under the Department of Hydro Power Development as on 25.6.2005. This final seniority list was never challenged by the Petitioners and as such, the seniority fixed in the aforesaid final seniority list stands accepted by all concerned, including the Petitioners. The Petitioners, as submitted by Mr. Nabam, cannot, at this stage, claim seniority over the private Respondents and they also cannot claim promotion along with those who were allowed to officiate as Assistant Engineers (Civil) long before the Petitioners were appointed as Junior Engineers under 40-point roster, which was in force till 20.9.2000. The further submission of Mr. Nabam is that the Petitioners have been functioning as Assistant Engineers (Civil) with effect from 21.5.2005 and 29.8.2005 as stated earlier with a condition that the promotion is purely on officiating basis and would not bestow upon them any claim for regular appointment as Assistant Engineer (Civil) and the adhoc/officiating services rendered would not be counted for the purpose of seniority in the grade and eligibility for promotion, confirmation etc. unless the promotion is regularized by regular DPC with due regard to the provision of relevant Recruitment Rules and the Petitioners, being well aware of the condition stipulated in the promotion order, cannot claim regular promotion along with

private Respondents. The Petitioners' case, according to Mr. Nabam, may be placed before the next DPC for consideration along with other eligible candidates provided there is no any departmental vigilance case or adverse entry in the service records against them.

9. Mr. C. Baruah, learned Senior Counsel for the private Respondents makes submission in the line of the learned Senior Govt. Advocate. However, based on averments made in the counter affidavit filed by the Respondents No. 5 to 9, he clarified that the officiating promotion to the post of Assistant Engineer (Civil) could not be given effect to the Respondent No. 8 in the year 1997 along with other private Respondents due to pendency of a disciplinary proceeding against him and some juniors to him were promoted on officiating basis in the year 1997. The promotion of Respondent No. 8 was given only in 2002 vide order dated 15.5.2002 i.e. after closure of the departmental proceeding on his being exonerated from the charge and the period of suspension was being treated as on duty. Mr. Baruah, learned Senior Counsel also submits that the cases of the private Respondents were taken up for consideration for filling up the backlog of promotional posts of Assistant Engineer (Civil) which fell vacant since 1997 and the present Petitioners have no right to claim for the post of Assistant Engineer (Civil) in promotional quota which fell vacant in the year 1997 merely because they became eligible when the Respondent authorities took up the matter for regularization of officiating promotion in the said post. In this respect, Mr. Baruah, learned Senior Counsel for the Respondents clarified that this Court by an order dated 6.6.2005 passed in 2003 AnWR 232 (AP) of filed by Shri Jitendra Nath Tripathi, a diploma holder in Civil Engineering, directed the Respondent authorities to consider the case of the Petitioner for promotion to the post of Assistant Engineer in his own line of promotional quota, taking into consideration of all rules and regulations relating to such promotion, including reservation policy. The Respondent authorities, according to Mr. Baniah, learned Senior Counsel, considered the case of the private Respondents along with other similarly situated eligible candidates in compliance with the Court's order dated 6.6.2005 and regularized their officiating promotion as Assistant Engineer (Civil) vide impugned order dated 26.9.2007. He also submits that the promotion on the basis of 80:20 ratio from Group-C to Group-B as per notification No. OM-38/76 (Vol-II) dated 1.2.2001 is not applicable to the present case and more so, because it is specifically provided in Clause-2 of the aforesaid notification that "it will not be applicable in the matter of determination of seniority and also clearance of backlog".

10. Mr. Baruah, learned Senior Counsel further submits that the posts of Assistant Engineer (Civil) were lying vacant against promotional quota in the Department since 1997 and those posts were required to be filled up under the old reservation policy i.e. 40-point roster which was in force till 20.9.2000 inasmuch as the new 100-point roster came into force only from 21.9.2000. The settled position of law, according to Mr. Baruah, is that the posts which are lying vacant prior to the amendment of rules should be filled up under the old rules

and not by the new rules. In support of his submission, he relies on the case of Y.V. Rangaiah and Others Vs. J. Sreenivasa Rao and Others, and also Union of India and others Vs. N.R. Banerjee and others, The Respondent authorities, therefore, submits Mr. Baruah, committed no illegality in promoting/regularizing the appointment of the private Respondents under the provision of old reservation policy and as such, no interference with the impugned order is called for and if any interference is made by this Court it would unsettle many settled positions of many Assistant Engineers (Civil) who have already got promotion from the post of Junior Engineers to Assistant Engineer (Civil) which would affect the efficiency in the administration.

11. An affidavit-in-reply has been filed by the Petitioners refuting the averments made by the private Respondents in their affidavit-in-opposition. In the reply affidavit, the Petitioners have contended that the services of 18 officiating Assistant Engineers (Civil) were regularized dehors the Recruitment Rules and without holding the DPC in terms of the Recruitment Rules and purportedly on the basis of 40-point model roster which has already been replaced by 100-point model roster vide office memorandum dated 21.9.2000 which has been modified partially vide notification dated 1.2.2001. It was incumbent upon the Respondent authorities to place the Petitioners' case also before the DPC for consideration of their promotion to the post of Assistant Engineer (Civil) along with the cases of aforesaid 18 Assistant Engineers (Civil) as far back as in 2002. Mr. Ete, learned Counsel for the Petitioners therefore, submits that the impugned order dated 26.9.2007 appointing/regularizing the private Respondents as Assistant Engineers (Civil) is liable to be quashed and set aside directing the Respondent authorities to hold DPC in accordance with the Recruitment Rules of 2005 and place the case of the Petitioners also before it for consideration along with other similarly situated persons.

12. On careful perusal and consideration of the pleadings of the parties, I find the following indisputable positions:

- (i) The private Respondents were allowed for officiating promotion to the post of Assistant Engineer (Civil) in 1997 and at that time the Petitioners were working as Junior Engineers only;
- (ii) The Petitioners completed their qualifying length of service i.e. 5 years, being degree holders, for promotion to the post of Assistant Engineer (Civil) in the year 2002 and they were accordingly promoted to Assistant Engineer (Civil) on 21.5.2005 and 31.8.2005 respectively
- (iii) The Petitioners are juniors in the cadre of Assistant Engineer (Civil);
- (iv) The regularization of adhoc/officiating appointment of 18 Assistant Engineers (Civil) including the private Respondents was made vide impugned order dated 26.9.2007 under the provisions of RR of 2005 and the Govt. Notification providing 40-point roster;

(v) The 100-point roster and the 80:20 ratio adopted by the Govt. came into force from 21.9.2000;

(vi) The post of Assistant Engineer (Civil) fell vacant in the year 1997 against which, the private Respondents, who were on deputation from PWD, were permanently absorbed in the Department of Hydro Power Development;

(vii) The services of private Respondents along with others were regularized vide impugned order dated 26.9.2007; and

(viii) This regularization has been made without holding DPC.

13. On the aforesaid admitted position, it is necessary to examine the provisions of RR of 2005. In Column-5 of the Schedule attached to the Rules, it is provided that recruitment of Assistant Engineer should be made by selection on merit. The promotion is to be made from amongst the Junior Engineers of the Department who have 8 years of regular service for diploma holders and 5 years of regular service for degree holders in the grade. Irrespective of seniority in the cadre of Junior Engineer, promotion to the post of Assistant Engineer shall be considered in order of seniority of completion of respective qualifying services as per Column-12 of the said Schedule.

14. The crux of the matter is that whether the regularization of adhoc/officiating promotion of 18 Assistant Engineers (Civil) including the private Respondents vide impugned order dated 26.9.2007 is sustainable under the law inasmuch as the same has been done without holding DPC to promote them from the post of Junior Engineers to Assistant Engineers (Civil). The RR of 2005 specifically provides for selection on merit by a validly constituted committee by the Govt. under Column-13 of the Schedule attached to the Recruitment Rules of 2005. The admitted position is that no DPC was held for consideration of promotion of all the eligible Junior Engineers who have completed their respective qualifying services in the grade. The impugned regularization was ordered by the Respondent authorities in respect of the Junior Engineers who were on deputation from PWD and absorbed permanently in the Power Department with effect from 24.6.1997 vide order dated 26.6.1997. No document has been shown by the private Respondents and the Respondent authorities allowing officiating/adhoc appointment/promotion to the private Respondents as Assistant Engineers (Civil) in the year 1997, except the submissions that they were appointed/promoted as Assistant Engineers (Civil) on officiating basis. Be that as it may, even if it is accepted that the private Respondents were allowed officiating promotion to Assistant Engineers (Civil) in 1997, the fact remains that the Respondent authorities did not hold any DPC for regularization of their adhoc/officiating appointment/promotion as Assistant Engineers (Civil) under RR of 2005. Since the aforesaid Rules provide that the promotion should be made by selection on merit by holding DPC from amongst the Junior Engineers who have rendered minimum length of service in the case of 5 years for degree holders and 8 years in the case of diploma holders, there is no escape for the Respondent

authorities from placing the Petitioners' case before the DPC for promotion to the post of Assistant Engineer (Civil) along with the private Respondents and other similarly situated eligible Junior Engineers. The plea taken by the Respondent authorities that the question of consideration of the Petitioners case does not arise as the private Respondents were promoted against the vacancies lying vacant in the year 1997 does not sound to be in consonance with the provisions of RR of 2005 on the face of admitted fact that the Petitioners acquired the right of being considered for promotion in 2002. Nothing has been shown or pleaded by the Respondents that there were any other Rules in force governing the appointment/promotion of Assistant Engineers (Civil) prior to RR of 2005.

15. The next point for consideration is the application of reservation policy in the present case. It is an admitted position that prior to 21.9.2000, 40-point roster was applicable and the posts of Assistant Engineer (Civil) fell vacant in the year 1997. The aforesaid 40-point roster was rendered inapplicable as soon the 100-point roster was notified and made effective from 21.9.2000. The 100-point roster is meant for filling up the quota reserved for APST candidates and since it is in force, it has to be implemented along with the RR of 2005. For the purpose of governing the recruitment of Assistant Engineer under RR of 2005, the 40-point roster was rendered inoperative and obsolete but in the matter of filling up the posts of Assistant Engineer (Civil) lying vacant since 1997, it would be still applicable till coming into force of RR of 2005, if there was no other service rules prior to the existing RR of 2005. In such case, the Respondent authorities would have taken the benefit of judgment in *Y.V. Rangaiah (supra)* in which, it is held that:

the vacancies which occurred prior to the amended rules would be governed by the old rules and not by the amended rules.

In the present case, as there is no service Rule prior to 2005, no question of amendment of service Rules would arise. So also no question of governing the un-amended or old rules in the matter of appointment/promotion to the posts which were lying vacant since 1997 would arise. Since there is only one rule i.e. RR of 2005 to govern the appointment/promotion of Assistant Engineer (Civil), the Respondent authorities are cast with legal duty to fill up the vacancies of 1997 under the provisions of Recruitment Rules of 2005. In my considered view, the *Y.V. Rangaiah (supra)*'s case is not applicable to the present case.

16. Even assuming that there was a service Rule prior to the existing of RR of 2005, the law would not allow the Respondent authorities to regularize the officiating/adhoc appointment of the private Respondents as Assistant Engineers (Civil) without being selected by DPC/Committee duly constituted by the Govt. The regularization of the private Respondents' officiating promotion as Assistant Engineers (Civil) has been made in clear violation of the accepted/established procedure of promotion and it cannot be said to be legal or sustainable under the Service Law. In *Union of India v. N.R. Banerjee (supra)*, it is held that:

the DPC is required to sit every year, regularly on or before 1st April or 1st May of the year to fill up the vacancies likely to arise in the year for being filled up. The required material should be collected in advance and merit list finalized by the appointing authorities and placed before the DPC for consideration. The requirement can be dispensed with only after a certificate is issued by the authority that there are no vacancies to be filled up by promotion, or that no officers are due for confirmation, during the year in question.

This case is of no help to the private Respondents although it has been cited by the learned Senior Counsel representing them inasmuch as it is stated in Para 12 of the affidavit-in-opposition filed by the Respondent authorities that:

the Petitioners' case may be placed before the DPC if there is no any departmental vigilance case contemplated/pending against them and the ACR of both the Petitioners are found in order.

17. It is not discernible why only the cases of Petitioners should be placed before the DPC and why the cases of the private Respondents should not be placed before the DPC, on the face of the admitted position that officiating/adhoc promotion/appointment of the private Respondents along with others was not placed before and recommended by DPC. The corollary demands placing of the private Respondents' cases before the DPC to rectify the irregularity in the matter of regularization of adhoc/officiating appointment/promotion of Assistant Engineers (Civil) and also placing of the Petitioners cases along with the private Respondents before the DPC for consideration of regularization of their officiating/adhoc appointment/promotion to the posts of Assistant Engineer (Civil) as they were also promoted as Assistant Engineers (Civil) on officiating basis in 2005. The exercise for rectification un-doubtedly should be made under the provisions of RR of 2005 and 100-point roster in force from 21.9.2000 to consider the regularization of both the Petitioners and the private Respondents along with other eligible candidates.

18. On the basis of discussions made above, I find that the Petitioners have been able to make out a case for setting aside and quashing the impugned order dated 26.9.2007 (Annexure-6 to the writ petition) and direct the Respondent authorities to rectify/modify the regularization/promotion of 18 Assistant Engineers (Civil) including the private Respondents. The impugned order dated 26.9.2007 (Annexure-6) is accordingly quashed and set aside and the Respondent authorities are directed to hold DPC and place the cases of the aforesaid 18 Assistant Engineers (Civil) including the private Respondents along with Petitioners under the provisions of RR of 2005, 80:20 reservation policy and 100-point roster adopted by the Govt. as a measure of rectification/modification of the regularization/promotion order dated 26.9.2007, preferably within a period of 3 (three) months from the date of receipt of a certified copy of this judgment and order from the Petitioners.

19. Needless to say that the positions of 18 Assistant Engineers (Civil) including

the private Respondents whose adhoc/officiating promotion/appointment were regularized vide impugned order dated 26.9.2007 (Annexure-6 to the writ petition) shall not be disturbed until final decision is taken by the Appointing authority on the basis of recommendation/selection to be made by the DPC.

20. The writ petition stands allowed to the extent indicated above. However, there shall be no order as to costs.