

(2005) 05 GAU CK 0069

In the Gauhati High Court

Case No : Writ Petition (C) No. 76 (SH) of 2004

Y.K.B. Singh

APPELLANT

Vs

State of Meghalaya and Others

RESPONDENT

Date of Decision : 05-05-2005

Acts Referred:

Constitution of India, 1950 — Article 14, 16, 32

Citation : (2005) GLT 46 Supp

Hon'ble Judges : A. Hazarika, J

Bench : Single Bench

Advocate : S.P. Mahanta, D.S. Rathore, A.K. Agarwal and H. Abraham, for the Appellant; A.S. Siddique, for the Respondent

Final Decision : Allowed

Judgement

A. Hazarika, J.—Mandamus has been sought for to regularize the service of the Petitioner with effect from the date of taking over the full charge of the post of Sub-Divisional Officer (PHE) Electrical, Tura i.e. from 1.9.1989 along with all other consequential benefits and on regularisation as claimed, his seniority position should be fixed above Shri Harding Stone Nongkynrih thereby correcting the seniority position as notified vide notification dated 2.7.1999 fixing the inter-se seniority list of the officers of P.H.E. under P.H.E. Department, Government of Meghalaya.

2. In order to determine the facts pleaded and established and the relief sought for, the following facts are reproduced below in seriatim viz.

The Petitioner was appointed to act as Sub-Engineer, Grade I (Electrical) on the recommendation of Meghalaya Public Service Commission vide office order dated 2.7.1979. The said office order would show that his name appeared at SI. No. 1 in order of merit though he joined service on ad hoc basis as Sub-Engineer Grade-I (Electrical) with effect from 5.5.1978. Thereafter he was transferred, posted and allowed to hold full charge of the post of Sub-Divisional Officer

(Electrical), Tura vide order dated 7.8.1989 and he assumed the charge on 1.9.1989.

3. It may be pertinent to mention that the service conditions of the officer of the Public Health Engineering Department was regulated by the office memorandum dated 19.9.1981 in absence of Service Rules. The said office memorandum dated 19.9.1981 provides for Assistant Engineers in column 4 which is quoted hereunder:

4. ASSISTANT ENGINEERS: Appointment to the post of Assistant Engineers shall be made:

(i) 33-1/2% of the vacancies in a year by promotion from amongst the Sub-Engineers, Grade-I and Overseers Grade-I having rendered at least 10 years of continuous service in those grade irrespective of General/Technical qualification in consultation with the Meghalaya Public Service Commission (hereinafter referred to as M.P.S.C.)

(ii) 66-2/3% of the vacancies in a year by direct recruitment through MPSC.

4. The Public Health Engineering Department (hereinafter referred to as PHE), Government of Meghalaya failed to adhere the said office memorandum dated 19.9.1981 in the matter of recruitment of Assistant Engineer/Sub-Divisional Officer (Electrical) visa-vis the quota fixed for the promotees and as a result there was more recruitment by way of direct method than the quota fixed and the quota fixed for promotees had been less and thereby deprived the promotees of their due promotion. During the year 1984-1994 Shri S.K. Sun, Shri Jansan Le Roy Warjri, Shri Harding Stone Nongkynrih, Shri Comfort Marngar, Shri Godwin Lyngdoh, Shri Balanshwa Lyngdoh Lawai and Shri Paul Synnah were appointed by way of direct recruitment method in 1984, 15.11.1988, 15.11.1988, 7.8.1989, 7.8.1989, 23.10.1991 and 1994 respectively which would show that quota fixed for promotees were not taken into consideration for promotion to the said post of Assistant Engineer/Sub-Divisional Officer (Electrical).

5. The record would further show that a gradation list was published dated 21.3.1992, wherein the name of the Petitioner appeared at SI. No. 1 in the list of Sub-Engineers Grade-I, (Elec). The service of the Petitioner was confirmed vide Memo dated 2nd April 1993 with effect from 1.1.1990 in the post of Sub-Engineer, Grade-I and was allowed to cross efficiency bar of the post of Sub-Divisional Officer (PHE) with effect from 1.9.1992 vide memo dated 18.10.1994.

6. The Departmental Promotion Committee took up the cases of all the eligible candidates belonging to the cadre of Civil/Electrical/Mechanical Sub-Engineers, Grade-I and recommended for promotion to the post of Assistant Engineer/Sub-Divisional Officer (TC)/ Sub-Divisional Officer (Electrical), PHE/Sub-Divisional Officer (Mechanical), PHE. Accordingly the notification was issued on 10.7.1995 by the Deputy Secretary to the Government of Meghalaya, Department of PHE wherein the Petitioner's name appeared as a lone candidate from the electrical

cadre along with Civil and Mechanical Sub-Engineers, Grade-I, who were promoted under Regulation 4(d) of the M.P.S.C. (Limitation of Functions) Regulations, 1972 to officiate as Sub- Divisional Officer (Electrical). In the bottom of the said notification, it was clearly spelt out that the regular promotion of the Petitioner was made effective from the date of issue of notification dated 10.7.1995 and others will effect from the date of their taking over charge.

7. The promotion being made effective from 10.7.1995, the Petitioner has filed representations on 27.10.1995, 10.12.1996, 22.1.1997, 24.4.2000 and on 27.10.2003 requesting the authorities to consider his case and regularize his service in the post of Sub- Divisional Officer (Electrical) from the date when he took over the full charge as mentioned hereinabove i.e. with effect from 1.9.1989. On receipt of the representation the Under Secretary to the Government of Meghalaya, PHE Department, vide order dated 21.12.1995 requested the Department to furnish the detailed information and accordingly the Chief Engineer, PHE furnished the original application as asked for.

8. In the meantime a notification dated 26.11.1996 was issued by the PHE fixing the inter-se seniority of the officers serving under the Department wherein the name of the Petitioner appeared at SI. No. 77 and an objection was filed on 22.1.1997 claiming his seniority over SI. No. 52 and requested to correct the seniority taking his regularization of service with effect from 1.9.1989. However, the Department considered his representation dated 27.10.1995 vide communication dated 6th August, 1997, holding that the date of the regularization of his promotion relates to the date of notification dated 10.7.1995 which was made on the recommendation of Departmental Promotion Committee (hereinafter referred to as DPC)

9. Thereafter another notification dated 2.7.1999 was issued by the Department finally determining the inter-se- seniority of the officers of the PHE Departments wherein the name of the Petitioner appeared at SI. No. 46 which culminated in his filing another representation dated 24.4.2000 detailing the facts of his case and requested to consider his case taking the promotion with effect from 1.9.1989 and refix his seniority accordingly. The Government took up the matter with the Chief Engineer, PHE vide communication dated 28.4.2000, the relevant portion of which is reproduced below:

...I am directed to refer to the representation dated 24.4.2000 submitted by Shri Y.K.B. Singh, Sub-Divisional Officer (PHE), Electrical Sub- Division, Shillong (copy already forwarded to you) and to request you to let this department know whether Shri Y.K.B. Singh, Sub-Divisional Officer (PHE), Electrical was due for promotion on regular basis on recommendation of the Departmental Promotion Committee with effect from a. 9.1989 since it appears that no Departmental Promotion Committee meeting was held during the calendar years from 1989 to 1994 for the purpose of selection of persons for promotion to the post of Assistant Engineers from the quota of Sub-Engineers, Grade-I (Electrical). The gradation lists/seniority lists of Sub-Engineers, Grade-I (Civil)/ (Electrical)/

(Mechanical) as on 1.1.1989 may be furnished to this department for further necessary action.

10. In reply to the particulars asked for by the department, the Chief Engineer, PHE vide communication dated 19.5.2000 conveyed the reply which is quoted herein below:

...with reference to the above, this is to inform you that Shri Y.K.B. Singh was due for promotion to the post of SDO/AE, Electrical after completion of 10 years of continuous service as Sub-Engineer Grade-I (Electrical) on 5.5.1988 as per quota of promotion from Sub-Engineer Grade-I.

In this connection a seniority list of Sub-Engineer Grade-I is enclosed herewith.

11. However, the representation dated 24.4.2000 was turned down by the department holding that the date of notification dated 10.7.1995 regularizing the service under Regulation 4(d) of the MPSC (LOF) Regulation, 1972 is the date based on the recommendation of the DPC and subsequently approved by M.P.S.C. and therefore the department regrets its inability to accept the date of regularisation with effect from 1.9.1989 and hence this writ petition.

12. Heard the learned Counsel for the Petitioner and the Government Advocate at length. None appeared on behalf of the Private Respondents in spite of serving of notice upon them. While advancing the argument on behalf of the Petitioner Shri S.P. Mahanta, Advocate has placed the averments made in the writ petition alongwith its annexures and the affidavit-in-opposition filed by the Government and has drawn the attention of the Court to the office memorandum dated 19.9.1981 wherein it was provided that 33 1/3% of the vacancies are required to be filled up in a year by promotion from amongst the Sub-Engineers, Grade-I and Overseers, Grade-1 having rendered at least 10 years of continuous service in those grades irrespective of General/Technical qualification in consultation with M.P.S.C. There is no scope for not adhering to the said rules in absence of Service Rule. The Meghalaya P.H.E. Service Rules, 1996 came into existence with effect from 3.3.1998 i.e., the date of publication of the Meghalaya P.H.E. Service Rules. Prior to the Service Rules, 1996 the office memorandum was made effective regulating the service conditions of the employees of the PHE. Therefore the quota fixed for the promotees has not been followed. Whereas there were direct recruitment in excess of the quota during the period from 1984-1994 resulting in deprivation of promotees for consideration of promotion within the quota so fixed and on this ground alone the writ petition deserves to be allowed.

13. In support of this contention, Mr. Mahanta has drawn the attention of this Court to the Annexure-XVIII of the writ petition wherein the Under Secretary to the Government of Meghalaya, Department of P.H.E. conveyed a communication dated 28.4.2000 asking for details whether the writ Petitioner was eligible for promotion as on 1.9.1989 and the specific reply of the Chief Engineer, P.H.E. to the effect that the Petitioner was eligible for promotion on 5.5.1988. But the department did not deal with the matter as provided in the Office Memorandum

dated 19.9.1981, rather casually rejecting the same holding that the date of regularisation is the date of notification dated 10.7.1995 and he is not entitled to claim regularisation with effect from 1.9.1989.

14. In regard to the said contention it was clearly averred in paragraph 23 of the writ petition to which there is no reply/denial of the same paragraph in the affidavit-in- opposition. The facts pleaded and established would entitle the claim of the Petitioner to consider his case for promotion with effect from 1.9.1989, a situation which the Respondent Government has failed to take stock of. Therefore the learned Counsel appearing on behalf of the Petitioner has prayed that the writ petition may be allowed directing the authority to regularize the service of the Petitioner with effect from 1.9.1989.

15. The learned Counsel for the Petitioner further has drawn the attention of this Court to the seniority list dated 2.7.1999 wherein the Petitioner's name appears at SI. No. 46 and the officers who joined after taking full charge of the post of S.D.O. (Electrical) by the Petitioner and who, worked under the Petitioner were placed higher in seniority than the Petitioner and instances were shown in the case of Shri H.S. Nongkynrih who was placed at SI. No. 12 of the list and thus the discrimination writ large in fixing the inter-se- seniority of the employees of the P.H.E. which violates Articles 14 and 16 of the Constitution of India.

16. The counsel appearing for the Petitioner argued that the promotion of the Petitioner made on the recommendation by the DPC must be reckoned with effect from the date of his continuous officiation in the promotional post i.e. 1.9.1989 and direct recruits should be given seniority with effect from the date on which M.P.S.C. recommended their names for appointment. In the instant case the Petitioner was allowed to continue to hold the full charge of S.D.O. (Electrical) with effect from 1.9.1989 without being reverted or challenged and therefore his service shall be deemed to have been regularized with effect from 1.9.1989.

17. On the other hand, Mr. A.S. Siddiqui, learned Counsel appearing for the State Respondents raised the question of delay contending inter alia that admittedly the Petitioner's service was regularized with effect from 10.7.1995 and the final seniority list published on 2.7.1999 and his representation was rejected finally on 14.8.2000, but the Petitioner had approached this Court only on 23.3.2004 and on this ground alone the petition deserves to be dismissed.

18. The counsel appearing for the state Respondents has further submitted that the seniority list once made final and been accepted, the Court may not unsettle the settled position at the belated stage and the Petitioner has no right to claim the regularisation with retrospective effect and the learned state Vj counsel has to this effect referred to the memorandum dated 4.9.2003 annexed with the affidavit-in-opposition wherein it has been clearly spelt out that full charge arrangement cannot be treated as regular promotion even in cases where full charge arrangement is immediately followed by regular promotion to the higher

cadre/post. Regular promotion would be made effective from the date he takes over the charge after the promotion orders have been issued on the basis of recommendation of the DPC. Therefore his service has been rightly regularized with effect from 10.7.1995 and prayed for dismissal of the writ petition.

19.1 have considered the rival contentions that were raised before this Court by the parties. this Court takes up the question of delay first which was the main contention raised by the Government advocate on behalf of the Respondent state, in as much as, Mr. A.S. Siddique, learned Counsel appearing on behalf of the Respondent Nos. 1 to 5 vehemently argued that the instant petition is liable to be dismissed on the ground of delay itself.

20. Mr. Mahanta appearing on behalf of the writ Petitioner has referred the following decisions on the point of delay:

(1) Ramchandra Shankar Deodhar and Others Vs. The State of Maharashtra and Others,

(2) P.C. Sethi and Others Vs. Union of India (UOI) and Others,

(3) T. Aruna and Others Vs. The Secretary, Andhra Pradesh Public Service Commission and Others,

(4) 1997 (2) GLT 213, M/s. Apollo Machinery Mart and Ors. v. State of Assam and Ors.

(5) 1998 (4) GLT 416, Dhirendra Chandra Roy v. Union of India and Anr.

(6) 2002 (1) GLT 251, Permanent S. Syiem and Ors. v. David Hammer Marwein and Ors.

(7) 2004 (2) GLR 546, Dr. M. Laitphlang and Ors. v. State of Meghalaya and Ors.

In the first case reported in Ramchandra Shankar Deodhar and Others Vs. The State of Maharashtra and Others, the Apex Court at para 9 held as follows:

There was a delay of more than ten or twelve years in filing the petition since the accrual of the cause of the complaint, and this delay, contended the respondents, was sufficient to disentitle the petitioners to any relief in the petition under Article 32 of the Constitution. We do not think this contention should prevail with us. In the first place it must be remembered that the rule which says that the Court may not enquire into belated and stale claims is not a rule of law, but a rule of practice based on sound and proper exercise of discretion, and there is no inviolable rule that whenever there is delay, the Court must necessarily refuse to entertain the petition. Each case must depend on its own facts. The question as pointed out by Tilokchand and Motichand and Others Vs. H.B. Munshi and Another, "is one of discretion for this Court to follow from case to case. There is no lower limit and there is no upper limit.... It will all depend on what the breach of the Fundamental Right and the remedy claimed are and how the delay arose.

In the case reported in P.C. Sethi and Others Vs. Union of India (UOI) and Others, at Para 20, the Apex court held in the following terms;

The learned Counsel for the Respondents strenuously contended that the petition may be dismissed on account of delay and laches. In view of the entire circumstances of the case and the hopes held out by the Government from time to time we are not prepared to accede to this submission.

The same view was reiterated by the Apex Court in the case reported in T. Aruna and Others Vs. The Secretary, Andhra Pradesh Public Service Commission and Others, The relevant para 11 is reproduced below:

The Counsel for the Appellants urged that some of the Appellants who were given promotion to the cadre of Senior Superintendents long back and subsequently to still higher cadres are to be reverted to lower category in view of the directions contained in the impugned judgment. It was submitted that promotions effected long back should not be disturbed as they were not challenged. Admittedly, the Commission was not following any rule and the promotions were effected based on a policy. No seniority list was either published. The affected parties got the opportunity to challenge these promotions only when a seniority list was published in 1996. Under the above circumstances, the reasons for delay, if any, cannot be put at the door of the Respondents who were seriously affected by the way in which promotions were being done.

In 1997 (2) GLT 213 it was held that;

...Delay and laches is a matter of procedure and it does not provide with a weapon in the hand of the adversary or the opposite party to seek dismissal of the petition on this ground. If at all it is put, it must be raised at the earliest stage of motion or admission. In this view of the matter, so far as it relates to dismissal of the petition on the ground of inordinate delay, cannot be sustained.

In the case reported in 1998 (4) GLT 416 it was held that delay cannot be a bar where the government has been holding out hopes to the Petitioner from time to time. The Court further held that;

In this case the Court first issued notice of motion calling upon the Respondents to show cause as to why a writ should not be issued and then after hearing the learned Counsel for the Petitioner and the Respondents, this Court issued a Rule and now at the hearing stage I would not throw out this petition on the ground of delay in the facts and circumstances of this case as stated above.

Division Bench of this High Court in 2002 (1) GLT 251 at para 5 held that:

It may be observed here that before the learned Single Judge as well as before us, the Appellants (Private Respondent before the learned Single Judge) had also raised the plea of laches which did not find favour with the learned Single Judge. We are also of the view that since it related to question of seniority and the writ Petitioner had been making representation after representation and ultimately on

the basis of those seniority, when last promotion was made to the rank of Superintendent, he again made representation and finding no response, he filed the present writ petition. Consequently, the plea of laches on behalf of the Appellants is hereby overruled.

In the last case reported in 2004 (2) GLR 546, this Court observed as follows:

In the present set of appeals, if the technicality of law that on account of delay, the grievances of the Petitioners should not be considered at all is allowed to prevail, it would degenerate the efficiency of the person belonging to the Specialist Stream under the Meghalaya Health Service. Such technicality can, therefore, not impose impediments on the powers of this Court to issue necessary directions.

21. this Court has occasioned to go through a decision of a case reported in Collector, Land Acquisition, Anantnag and Another Vs. Mst. Katiji and Others, wherein the Apex Court has held that refusing to condone the delay can result in a meritorious matter being thrown out at the very threshold and cause of justice would be defeated. As against this when delay is condoned the highest that can happen is that, cause would be decided on merits after hearing the parties. It is heartening to quote para 6 of the said judgment which is quoted hereinbelow:

It must be grasped that judiciary is respected not on account of its power to legalize injustice on technical grounds but because it is capable of removing injustice and is expected to do so.

22. Another basic fact that has been lost sight of in the case in hand is that representation dated 27.10.2003 submitted by the Petitioner has been rejected on 17.11.2003 holding that there is no scope for the department to review the matter and the writ petition has been filed on 23.3.2004 within four months and no ground of delay or laches were taken in the affidavit-in- opposition and hence the argument advanced beyond the pleadings cannot be accepted and hence this Court is of the view that there is no delay and/or laches on the part of the Petitioner in approaching the Court seeking the relief as stated hereinabove, more so, when the private Respondent have not entered appearance and contested the case in spite of the notice served on them.

23. Admittedly the Petitioner was eligible for consideration of promotion on completion of 10 years of uninterrupted service against a substantive post and he was allowed to hold full charge of S.D.O. (Electrical), Tura with effect from 1.9.1989 and the Petitioner was promoted on regular basis to the post of S.D.O (Electrical) on the recommendation of DPC with effect from 10.7.1995 and the petitioner's grievance is that his promotion ought to have been given effect from 1.9.1989 when he was eligible for promotion and a vacancy was available from such promotional appointment and in fact the petitioner had been fit as S.D.O. (Electrical) uninterruptedly since 1989 until regularisation of his promotion on 10.7.1995 made under Regulation 4(d) of the M.P.S.C. (LOF), 1972.

24. The argument advanced by the learned Counsel representing the State Respondents in regard to the office Memorandum dated 4.9.2003 cannot be made applicable in the instant case, since he was eligible for consideration of promotion to the post of S.D.O. (Electrical)/Assistant Engineer (Electrical) on 1.9.1989 and in fact, the Petitioner was duly promoted with effect from 10.7.1995 without taking into consideration his eligibility for the promotional post. The office Memorandum dated 4.9.2003 cannot take away the right accrued under the office Memorandum dated 19.9.1981 and therefore the argument advanced by the learned state counsel is fallacious and cannot be accepted in the facts and circumstances of the case.

25. From the facts stated hereinabove there is no escape from the conclusion that when the Respondent-authorities promoted the Petitioner on the recommendation of the DPC to the post of S.D.O. (Electrical), Tura with effect from 10.7.1995, his promotion ought to have been relate back to the date when he was eligible for promotion, because vacancy for granting him such promotion was available and he was in fact holding the substantive post though on officiating basis.

In support of his submission, learned Counsel appearing on behalf of the Petitioner has referred to the decision in B.S. Yadav v. State of Haryana reported in (1987) Supp SCC 524 , Narender Chadha and Others Vs. Union of India and Others, , The Direct Recruit Class-II Engineering Officers" Association and others Vs. State of Maharashtra and others, , Ram Pal Malik Vs. State of Haryana and Others, , Rudra Kumar Sain and Others Vs. Union of India and Others, , Meyom Karge v. State of Arunachal Pradesh reported in (2004) 1 GLR 460.

26. A Division Bench of this Court while considering the cases of promotion of the persons belonging to the Specialist Stream under the Meghalaya Health Service, at para 55 reported in (2004) 2 GLR 546 Dr. M. Laitphlang and Ors. v. State of Meghalaya and Ors., observed as follows:

To be considered for promotion, when a person becomes so eligible, is his fundamental right and denial of such a right, if discriminatory, cannot be permitted by a Writ Court. In the case of Delhi Jal Board Vs. Mahinder Singh, the Apex Court held, "The right to be considered by DPC is a fundamental right guaranteed under Article 16 of the Constitution of India, provided a person is eligible and is within the zone of consideration." In the case at hand, the State Respondents have completely failed to show as to why promotion could not be accorded to the writ Petitioners, when the writ Petitioner became eligible for promotion on the year 1995-1996.

27. Considering the matter in its entirety, this Court holds that the Respondent Authorities have completely failed to show anyjusti- fication for not granting promotion to the Petitioner with effect from the date when he became qualified and eligible for such promotion i.e. with effect from 1.9.1989.

28. In the result, and for the reasons stated hereinabove, the writ petition is

allowed and the Respondent- authorities are directed to pass necessary order/ orders making the Petitioner's promotion to the post of S.D.O. (Electrical)/ Assistant Engineer (Electrical) with effect from 1.9.1989 and on such promotion being made, all consequential benefits including the seniority should be refixed within a period of 60 (sixty) days from the date of receipt of the certified copy of the order.

29. With the above observation and directions, this writ petition shall stand disposal of. However, the parties shall bear their respective costs.