
(2007) 06 GAU CK 0016

Gauhati High Court (Aizawl Bench)

Case No: None

Sangdingliana and
Others

APPELLANT

Vs

State of Mizoram and
Others

RESPONDENT

Date of Decision: June 26, 2007

Citation: (2009) 3 GLR 141 : (2008) 1 GLT 37

Hon'ble Judges: Mutum B.K. Singh, J

Bench: Single Bench

Judgement

Mutum B.K. Singh, J.

The restropective service regularization and fixation of seniority of the respondent No. 4 in the inter-se seniority list of senior grade of Mizoram Civil Service (in short "MCS") officers, are the main issues under challenge in the present case.

2. That, on completion of probation period and passing of the departmental examination, the services of the petitioners and respondent No. 4 were confirmed to the junior grade of Mizoram Civil Service on different dates during the period from 23.03.1994 to 18.01.1999.

3. That, thereafter, on the recommendation of the Mizoram Public Service Commission (In short "MPSC") the petitioners, except petitioner No. 12, were promoted to the senior grade of MCS, some on regular basis and some on officiating basis but regularized their services with effect from 29.04.1999. The service of the petitioner No. 12 was regularized to the senior grade of MCS with effect from 31.03.2000. The respondent No. 4 was also given officiating promotion to the senior grade of MCS with effect from 29.04.1999. Vide Notification Memo No. A. 32013/2/89-PERS(B), dated 9.12.1999 in spite of the fact that the disciplinary proceeding contemplated against him was culminated in the imposition of penalty "Censure" vide order dated 03.06.1999 bearing No. A. 19014/1/91PERS(CSW). Hence, the service of the respondent No. 4 was not regularized to the senior grade of MCS prior to 20.05.2002.

4. That, a provisional inter-se seniority list of the senior grade MCS officers was published on 07.06.2000 vide Notification Memo No. A. 23022/4/97-P&AR(CSW) in which the respondent No. 4 was placed above the petitioners at Sl. No. 44. However, on objection being filed against the said provisional seniority list, the name of the respondent No. 4 was excluded from the final seniority list of the senior grade MCS officers published vide Notification Memo No. A. 32022/4/97-P&AR(CSW), dated 19.11.2001. The petitioners were placed at Sl. Nos. 43, 44, 45, 46, 48, 49, 50, 52, 53, 54, 55 and 56 respectively in the said final seniority list.

5. That, the respondent No. 4 challenged the said final seniority list dated 19.11.2001 in W.P.(C). No. 52 of 2002(AB) which was disposed of on 04.02.2004 holding that the name of the respondent No. 4 was rightly not included in the final seniority list published for the senior grade MCS officers. However, the Hon'ble Court directed the State Government to consider the case of the respondent No. 4 for regular promotion in accordance with law within a period of three months from placing the said order before the appropriate authority and pass necessary orders. Equipped with the said order of this court, the State-respondents convened a review DPC on 01.06.2004 and recommended the respondent No. 4 for giving regular promotion to the senior grade of MCS against the vacancy available in 2000-2001 and to place his name below one Laikomlova and just above Sri Thangchem Zathang. Accordingly, the respondent No. 4 was given promotion on regular basis to the senior grade of MCS with effect from 20.05.2002 vide Notification Memo No. A32013/7/201 P & AR(CSW), dated 17.06.2004 at Annexure to the writ petition.

6. That, the representation of the respondent No. 4 for rectifying his date of regular promotion with effect from 29.04.1999 was rejected by the Government on the ground that the said promotion order was issued in accordance with law in vogue vide letter No. A.32013/7/201/P & AR (CSW), dated 02.09.2004 at Annexure-18 to the writ petition. However, on 23.03.2005 the respondent No. 2, on the basis of fresh representation submitted by the respondent No. 4, issued another Notification bearing Memo No. A.32013/9/201- P & AR(CSW), whereby regularizing the officiating promotion of the respondent No. 4 to the senior grade of MCS with effect from 29.04.1999 and placing his seniority position above the petitioners. The said order is impugned in this case and the same is at Annexure-19 to the writ petition.

7. That, the respondent Nos. 1 and 2, in their counter affidavit have taken a stand contrary to the Government's earlier view contained in the letter dated 02.09.2004 at Annexure-18 to the writ petition. The respondent Nos. 1 and 2, in para No. 11 of the affidavit-in-opposition, state that the impugned order was issued on the basis of the opinion of the Law and Judicial Department that the Government had committed certain mistakes in giving officiating promotion to the officers which should have been made permanent with no loss of seniority and that the said opinion was endorsed by the learned Advocate General vide his letter dated 03.04.2005. It appears that the State Government acted blindly without application of mind in the matter in question. The respondent No. 4

in his counter affidavit stated that he has been promoted to the senior grade of MCS vide Notification dated 10.12.1999 which was never challenged by any of the petitioners and as such the State Government after obtaining the view of the Law Department and the legal opinion of the learned Advocate General rightly regularized his promotion with effect from 29.04.1999.

8. That, no promotion order was passed by the State Government on 10.12.1999 as alleged by the respondent No. 4. However, indisputedly the respondent No. 4 was given officiating promotion to the senior grade MCS officers in 1999 but pursuant to the direction of this Court dated 04.02.2004 passed in W.P. (C) No. 52 of 2002 and on the recommendation of the review DPC convened on 01.06.2001, the respondent No. 4 has been given promotion to senior grade of MCS on regular basis with effect from 20.05.2002, i.e. the date, other officers recommended by the MPSC were promoted to the senior grade of MCS. The regular promotion order of the respondent No. 4 was notified on 17.06.2004 by the government of Mizoram, Department of Personal & Administrative Reforms (Civil Service Wings) and in view of the said order the earlier officiating promotion order of the respondent No. 4 automatically ceases. The alleged impugned order dated 23.03.2005 has not been issued either in supersession or in partial modification of the respondent's No. 4 regular promotion order dated 17.06.2004 at Annexure-17 of the writ petition. On a bare reading of the impugned order, it appears that the said order was issued not in consultation with the MPSC and without giving any opportunity of being heard to the officers affected by the said order. In view of the earlier order dated 17.06.2004 at Annexure-17, the impugned order cannot stand in judicial scrutiny. It is well settled principle of law that the seniority is to be counted from the date of entry in service on regular basis and not from the date of entry in the grade on officiating basis or otherwise.

9. That, it is an admitted fact that the respondent No. 4 was facing a departmental inquiry when the MPSC was considering about the suitability of promotion of junior grade MCS Officers to senior grade of MCS and as per the guidelines to be followed by the DPC, the findings of the DPC in respect of the officers against whom the disciplinary proceeding was pending, were to be put under sealed cover. There is also no quarrel that the said departmental inquiry was culminated in imposition of penalty "Censure". As per the Government of India's instruction regarding promotion of employees on whom penalty has been imposed vide G.I. MHA, DP&AR. OM No. 22011/2/78-Estt.(A) dated 16.02.1979 which has been adopted by the Government of Mizoram, it is clear that if any penalty is imposed on a Government servant as a result of disciplinary proceeding, the findings of the sealed cover shall not be acted upon and the case of such officers for promotion may be considered by the next DPC in the normal course and having regard to the penalty imposed on such occasion. In [Union of India Vs. K.V. Jankiraman, etc. etc.](#), the Hon'ble Apex Court held that the findings of the DPC in respect of suitability of the officers against whom disciplinary proceedings is pending shall be kept in a sealed cover and to be opened after the completion of the disciplinary proceedings or/court proceedings. If on the

conclusion of the disciplinary proceedings or/court proceedings, the officer concerned is completely exonerated, the sealed cover is to be opened, recommendations of the DPC are to be acted upon and if any penalty is composed on the officer as a result of the disciplinary proceedings or/the is found guilty in the proceedings against him the findings of the sealed cover shall not be acted upon, and the case of the officer for promotion shall be considered in the usual course or/usual manner by the next DPC in the normal course. In [State of M.P. and Another Vs. I.A. Qureshi,](#) the Hon"ble Apex Court held that the disciplinary proceedings ended with imposing minor penalty with "Censure" the proceedings which have been kept in sealed cover cannot be acted upon and the case of such officers will be considered by the next DPC for promotion on prospective basis if there is any vacancy.

10. That, from the ratio of the above decisions of the Hon"ble Apex Court as well as the Government of India"s instruction regarding the promotion of employees on whom penalty has been imposed, it is crystal clear that the State Government has wrongly and illegally given the officiating promotion to the respondent No. 4 to the senior grade of MCS. The State Government, in para No. 4 of the affidavit-in-opposition dated 07.08.2002 submitted in connection with the earlier writ petition No. W.P. (C) 52 of 2002 filed by the respondent No. 4 (Annexure-20 to the writ petition), stated that the opening of the sealed cover by the MPSC in respect of the petitioner (present respondent No. 4) and others and the officiating promotion given thereon by the State-respondents were contrary to the law laid down by the Hon"ble Apex Court and the consolidated instruction contained in paragraph No. 17.6.2. of Swamy"s Complete Manual on Establishment and Administration. Consequently, such recommendation and the officiating promotion order made thereon were void ab initio, inoperative and unenforceable and as such no right was accrued upon the petitioner (present respondent No. 4) thereby. In paragraph No. 7 of the same affidavit-in-opposition the State-respondents further stated that the promotion of the present respondent No. 4 to the senior grade from the date on which the present petitioners were given promotion to the senior grade, was null and void, inoperative and the present respondent No. 4 had no right for continuance in the said post by virtue of such illegal promotion.

11. That, from the above affidavit-in-opposition filed by State Government in connection with the earlier case, it is evident that the State Government admitted that the officiating promotion given to the present respondent No. 4 was illegal, untenable and the respondent No. 4 did not acquire any right to continue in the said post by virtue of such illegal promotion. Surprisingly, the State Government in its counter affidavit filed in the instant case stated that the State Government, on the recommendation of the respondent No. 3, haphazardly promoted the respondent No. 4 on officiating basis in terms of the recommendation of the respondent No. 3 as the department concerned at the relevant time was not aware about the above intimation issued by the Government of India, Department of Personal and Training relating to the promotion of the person, on whom the penalty has been imposed. And that, the State Government acting upon the advice of

the Law Department and the learned Advocate General issued the impugned Notification dated 23.03.1995 thereby regularizing this., officiating promotion of the respondent No. 4 with effect from 29.04.1999 so as to give him seniority in the grade above the petitioners. The only reason shown by the State Government to justify the issuance of the impugned order is that the Government has issued the impugned order on the advice of the Law Department and the learned Advocate General. The Government, of course, was of the view that the officiating promotion given to the respondent No. 4 was illegal and void ab initio but on the contrary to its earlier view, issued the impugned order, thereby regularizing such illegal order acting on the advice of the Law and Judicial Department and the learned Advocate General of the State Government, without application of mind.

12. This Court is of the considered view that the State Government has committed a glaring error in law in issuing the impugned order dated 23.3.2005. It may not be out of place to say that the unawareness of the correct proposition of law cannot be a ground at all to legalize the act done or purported to have been done contrary to Rules and in violation of law, even on the advice of any authority under the sky. Thus, the stand of the State Government that the respondent No. 4 was given officiating promotion to senior grade of MCS as the concerned Department was not aware about the correct proposition of law at the relevant time and that the impugned order was issued on the advice; of the Law and Judicial Department and the Advocate General of the in State, can't be accepted at all.

13. That, it is also clear from the recommendation of the review DPC held on 01.06.2004 that the respondent No. 4 has been recommended for regular promotion to senior grade of MCS against the vacancy year 2000-2001. It means the service of the respondent No. 4 could not have given regularization for any reason whatsoever to the senior grade of MCS with effect from 29.04.1999. The question of regularization of the said officiating promotion of the respondent the said officiating promotion of the respondent No. 4 to the senior grade of MCS does not arise in the instant case as the respondent No. 4 has been given regular promotion to the said grade with effect from 20.05.2002 vide-Notification dated 17.04.2004 issued by the Government of Mizoram, Department of Personal and Administrative Reforms (Civil Service Wing). The position being as such, the impugned order is nothing better than the one, which is untenable in law.

14. That, the final seniority list of the senior grade MCS officers was already published on 19.11.2001 and the exclusion of the name of the respondent No. 4 from the said final seniority list was upheld by this Court vide judgment and order dated 04.02.2004 passed in W.P. (C) No. 52 of 2002. Under the above backdrop, the seniority position of senior grade MCS officers whose names are in the said final seniority list should not be disturbed without due process of law.

15. It is true that the fixation and re-fixation of seniority positions of the employees are within the domain of the State Government but such fixation and re-fixation of the seniority position should not be done arbitrarily, whimsically and behind the back and

knowledge of the other employees if their seniority positions are affected or likely to be affected by such fixation and re-fixation of the seniority position. In the case in hand, the seniority positions of the senior grade MCS officers including the petitioners have been affected by the impugned order which was issued without affording reasonable opportunity of being heard to them. Hence, this Court is of the view that the impugned order was issued in violation of the principle of Natural Justice and such action of the State Government amounts to infraction of legal rights of the petitioners. On this count alone the impugned order cannot stand in judicial scrutiny.

16. That, having regard to the above decisions of the Hon"ble Apex Court and for the reasons discussed hereinabove, this court is of the firm view that the State Government has committed error in law in issuing the impugned Notification bearing No. A. 32013/9/2001-P&AR(CSW), dated 23.03.2005 and consequently, the impugned Notification is accordingly set aside. In the result, this writ petition stands disposed of. No costs.