

(2012) 01 GAU CK 0052

Gauhati High Court (Imphal Bench)

Case No: Writ Appeal No. 81 of 2000

Konthoujam Pak Singh

APPELLANT

Vs

State of Manipur & Ors.

RESPONDENT

Date of Decision: Jan. 31, 2012

Citation: (2012) 1 GLT 431

Hon'ble Judges: U.B.Saha, J and S.C.Das, J

Bench: Division Bench

Advocate: Mr. Mr. N. Mahendra, Advocate appeared for the Respondent: Mr. Th. Ibohol, GA, Advocates appearing for Parties

Judgement

U.B. Saha J.

1. In this appeal, the appellant has challenged the judgment dated 5th June, 2000 passed by the learned Single Judge in Civil Rule No. 383 of 1995 whereby and whereunder the learned Single Judge partly allowed the prayer of the petitioner stating, *inter alia*, that the respondents shall convene a meeting of the Departmental Promotion Committee (hereinafter referred to as "DPC" for short) as early as possible for considering the case of the petitioner and other eligible Section Officers for promotion to the rank of Assistant Engineer (Civil) in Public Works Department in accordance with the Recruitment Rules.

2. Heard Mr. N Mahendra, learned counsel for the petitioner as well as Mr. TH Ibohol, learned GA for the respondent Nos. 1 and 2. None appears for the remaining respondents.

3. Brief facts needed to be discussed are as follows:

The appellantpetitioner was initially appointed as a casual Section Officer in the Public Works Department (PWD), Manipur by order dated 04.03.1983 of the Chief Engineer, PWD, Manipur. Thereafter, he was again appointed as Workcharged Section Officer GradeI by order dated 24.03.1984 issued by the Chief Engineer, PWD,

Manipur. On 23.05.1985 his services were regularized as Section Officer Civil (GradeI). Thereafter, on 05.03.1992 he was sent on deputation to the Director General of Security as Assistant Engineer. While the appellantpetitioner was on deputation, the Manipur Public Service Commission (MPSC) held a meeting on 04.06.1993 for considering the promotion to the post of Assistant Engineer in the PWD. On recommendation made by the DPC, the respondent Nos. 5 to 35, in the writ petition were promoted to the post of Assistant Engineer. Since the appellantpetitioner was not promoted to the post of Assistant Engineer, he had filed the writ petition being Civil Rule 383 of 1998 (sic. 1995).

4. In the writ petition, the main ground taken by the appellantpetitioner was that he was not considered for promotion to the post of Assistant Engineer in the Public Works Department but the Section Officers junior to him were considered for promotion and more so, though there were only 12 Nos. of vacancies, 34 posts were filled up by way of promoting the respondent Nos. 5 to 35 which was not permissible under law.

5. The respondent Nos. 1 and 2 filed their respective counter affidavits denying the allegations made by the appellantpetitioner and stated therein that the case of the petitioner was also considered for promotion along with the other eligible candidates by the DPC which met on 04.06.1993. Upon consideration of the case of the eligible candidates for promotion, the DPC recommended 28 candidates on merit cum seniority basis for promotion to the said post of Assistant Engineer (Civil), but did not recommend the name of the petitioner for promotion to the said post of Assistant Engineer (Civil) as he was not found suitable. The respondent State specifically stated in its counter affidavit that at the relevant time of holding the meetings of the DPC, 34 nos. of vacancies of Assistant Engineer (Civil) were available.

6. The learned Single Judge of this Court after hearing the learned counsel for the parties disposed of the writ petition with the direction as stated supra.

7. Being aggrieved by the said decision of the learned Single Judge, the appellantpetitioner has preferred the instant appeal.

8. Mr. Mahendra while assailing the judgment of the learned Single Judge would contend that though the learned Single Judge partly allowed the writ petition but failed to consider the fact, *inter alia*, that there were only 12 vacancies and the DPC recommended 34 Section Officers (GradeI) for promotion to the post of Assistant Engineer (Civil). Thus, the orders of promotion dated 07.06.1993, 19.06.1993, 12.11.1993 and 21.12.1994 (Annexure A13 to A16 of the writ petition), by which the respondent No. 5 to 35 were promoted to the post of Assistant Engineer (Civil), are wholly illegal and without jurisdiction and are liable to be quashed.

9. He further submits that the DPC meeting which was held on 23.06.1993 did not consider the case of the petitioner for promotion to the post of Assistant Engineer

(Civil). His further contention before us is that the promotion of Pashi Tangkhul to the post of Executive Engineer on ad hoc basis and the post fallen vacant due to retirement of K. Chura Singh cannot be considered as vacant posts. His further argument is that in the year 1993, out of 123 sanctioned posts, 111 posts were already manned and only 12 posts were vacant and the respondentState was authorized only to fill up those vacancies and not more than that.

10. Mr. Ibohal while resisting the contention of Mr. Mahendra and supporting the judgment of the learned Single Judge would contend that promotion is not a right of an employee. Only consideration for promotion to a particular post is a fundamental right and once a person has been considered for promotion to the next higher post and found not suitable for promotion, he has no right to approach the writ court to get promotion to the next higher post. He further contended that how many vacancies are to be filled up by way of promotion is a matter to be decided by the employer Government and not by an employee like the petitioner.

11. In the instant case, the Government has come with a specific plea that at the relevant time 34 vacancies of Assistant Engineer (Civil) were available and the appellantpetitioner was also considered against those vacancies along with other eligible candidates though he was on deputation. Therefore, he cannot question the promotion of others who were found suitable on merit cum seniority basis and promoted to the post of Assistant Engineer (Civil) against the vacancies available at the relevant time.

12. Mr. Ibohol while resisting the contention of Mr. Mahendra so far as narrated in the additional affidavit would also contend that it is very easy to make bald allegations against the employer but very difficult to prove the same. He further contended that by way of the impugned order, no right of the appellantpetitioner has been taken away by the respondents, rather before passing the impugned order, his case was admittedly considered for promotion to the higher post and the learned Single Judge has allowed the prayer of the petitioner for consideration of his case by the next DPC for filling up the future vacancies. Thus, the writ appeal has no merit and the same is liable to be dismissed.

13. We have given our anxious thought to the submission of the learned counsel for the parties and also considered the judgment impugned in this writ appeal.

14. In the impugned judgment, the learned Single Judge considered the grievances of the petitioner in details which is evident from paragraph 6 of the impugned judgment wherein it is stated inter alia, that:

"Mr. K Jagat Singh, learned counsel for the petitioner, next submitted relying on paragraph3 of the Additional Affidavit filed on behalf of the petitioner on 29.02.2000 that 19 promotional vacancies were not in existence as on 30.06.1990. He further contended that the State respondents were not in a position to give detail particulars of these 19 vacancies and that the State respondents have shown these

vacancies in order to promote their near and dear persons against the rule and that cases for promotion should have been considered only for vacancies which actually existed. In view of the said submission made by Mr. Jagat, learned counsel for the petitioner, this Court passed order on 03.05.2000 directing the State respondents to produce records of the Works Departments showing details of the vacancies for the year 1990 and pursuant to the said order, Mr. Rajeswar Singh, learned counsel for the respondents, has produced relevant records. On perusal of the relevant records, it appears that initially on 26.03.1992, the Chief Engineer, PWD, Manipur wrote to the Joint Secretary (Works), Government of Manipur, giving year wise vacancies with dates and in the said letter dated 23.06.1992, the number of vacancies for the year 1983 was shown as 4, for the year 1989 shown as 5 and for the year 1990 shown as 13. But subsequently, the Under Secretary to the Government of Manipur, Works Department, sent a letter dated 16.10.1992 to the Secretary, Manipur Public Service Commission, Imphal giving year wise break up of vacancies in the Annexure to the said letter and it has been clearly stated therein that the promotional vacancies as on 30.06.1990 were 19. Thus, as per the requisition sent by the Department to the Manipur Public Service Commission 19 vacancies as on 30.06.1990 were to be filled up. The Departmental Promotion Committee, therefore, considered and recommended the names of the officers for filling up those 19 vacancies as on 30.06.1990 on promotion. The petitioner has also been considered for promotion to the said 19 vacancies as on 30.06.1990 but has not been recommended and instead those who were found more meritorious have been recommended for promotion. Under Articles 14 and 16 of the Constitution, the petitioner has a right to equal opportunity in matters of public employment. Once the petitioner was considered for such promotion, the Court cannot hold that the petitioner's said right to equal opportunity in matters of public employment was in any way affected."

15. We are in full agreement with the above observation of the learned Single Judge. The learned Single Judge in his judgment also stated, that as to how many vacancies are to be filled up by way of promotion is a matter to be decided by the Government and not by the petitioneremployee, as the government has the right to decide the number of vacancies which are required to be filled up by promotion and so long the petitioner has been considered for promotion to such vacancies, he cannot question the promotion of others who were found suitable and promoted to the vacancies on the ground that details of such vacancies have not been furnished by the Government to the Departmental Promotion Committee. Once a person is considered for promotion, he cannot take the plea of inequality and arbitrariness and unless there is inequality and arbitrariness, Article 14 and Article 16 of the Constitution would not be attracted.

16. In Union of India & Ors. Vs. Durga Das & Ors., (1978) 2 SLR 108, the Apex Court while setting aside the judgment of the Himachal Bench of the Delhi High Court, dated 6th December, 1968 by which a batch of writ petitions filed by the respondentemployees was allowed and the selection made by the Government was

quashed, noted that:

"The Departmental Promotion Committee, therefore, appears to have proceeded purely on the basis of merit and ability while selecting the candidates for the post of Superintendent, which admittedly was a selection post. It has not been shown to us nor proved to our satisfaction that the cases of the petitioners before the High Court were not considered. In fact, the chart shown that their cases were fully considered but in view of their confidential rolls, they were not considered fit for selection. In the circumstances, therefore, there was absolutely no justification for the High Court to interfere in the writ petitions and quash the selection made by the Departmental Promotion committee."

17. Like the petitioners of the aforesaid case of Durga Das and Ors., in the instant case also, the case of the appellantpetitioner was considered by the DPC along with other eligible candidates and considering the merit cum seniority, the private respondents were promoted and the petitioner was not found suitable for promotion.

18. In Union of India Vs. Mohan lal Kapoor, (1973) 2 SCC 836, His Lordship Mathew J has said,:

"[F]or inclusion in the list, merit and suitability in all respects should be the governing consideration and that seniority should play only a secondary role. It is only when merit and suitability are roughly equal that seniority will be a determining factor, or, if it is not fairly possible to make an assessment inter se of the merit and suitability of two eligible candidates and come to a firm conclusion, seniority would tilt the scale."

19. Therefore, it can be said that the principle of "merit cum seniority" lays greater emphasis on merit and ability and seniority plays a less significant role. Seniority is to be given weight only when merit and ability are approximately equal. (See Bhagawandas Tiwari & Ors Vs. Dewas Shajapur Kshetriya Gramin Bank & Ors., (2006) 12 SCC 574). In the instant case, the DPC recommended the names of respondent Nos. 5 to 35 applying the principle of merit cum seniority. Thus, the DPC did not commit any error while recommending the names of those private respondents.

20. We have also noticed that the petitionerappellant though made party to the persons who were promoted to the post of Assistant Engineer (Civil), in the writ petition, as respondent Nos 5 to 35, but he did not make party all the respondents in the writ appeal, except the respondents 1,2,4 and the respondents 33 to 35 only. A writ appeal is a continuation of the writ proceeding. Thus, the petitionerappellant has to make party all the respondents in the writ appeal, which he did not make in the instant appeal, for which also he is not entitled to any relief sought for against those respondents.

21. In view of the above, according to us, the respondent State did not commit any wrong in promoting the private respondents to the post of Assistant Engineer (Civil). Learned Single Judge rightly held that once the petitioner was considered for promotion, the Court cannot hold that the petitioner's said right to equal opportunity in matters of public employment was in any way affected.

22. By this time, it is settled position that creation and abolition of posts always lies with the employer, not with the employee. Right of an employee is only to be considered for promotion to the next higher post subject to his eligibility and not to get his promotion. In the instant case, admittedly, the case of the petitioner was considered for promotion along with others and after the DPC meeting held on 04.06.1993 and 23.06.1993, no further DPC meeting was held for promotion to the post of Assistant Engineer (Civil). By this time, a large number of vacancies must have already arisen in the rank of Assistant Engineer (Civil) and the panel recommended by the DPC is also said to have been exhausted and the learned Single Judge rightly directed the respondents for convening a DPC meeting to consider the case of the petitioner along with other eligible candidates for promotion to the next higher post, i.e. the post of Assistant Engineer (Civil) in the PWD. Thus, according to us, the learned Single Judge did not commit any error while deciding the issue in the writ petition and, as such, no interference is called for.

23. The writ appeal, accordingly, stands dismissed. No order as to costs.