

(2014) 07 GAU CK 0011

Gauhati High Court

Case No: Writ Petition (Civil) No. 5504 of 2013

Dhenuram Mili

APPELLANT

Vs

State of Assam

RESPONDENT

Date of Decision: July 17, 2014

Citation: (2014) 3 GLD 105 : (2014) 3 GLT 401

Hon'ble Judges: Tinlianthang Vaiphei, J

Bench: Single Bench

Advocate: D.C. Borah, D. Barman and B.M. Lahkar, Advocate for the Appellant; J.I.

Barbhuiya, SC and D.N. Bhattacharya, Advocate for the Respondent

Judgement

Tinlianthang Vaiphei, J.

In this writ petition, the petitioners are seeking direction from this court to restrain the respondent authorities from promoting the Junior Engineers, who are juniors to them, to the post of Assistant Engineer in the normal cadre without first regularising the services of the petitioners in the normal cadre from ex-cadre posts held by them and to comply with the direction given by this Court in its judgment and order dated 14.8.2008 passed in WP (C) No. 4767 of 2007. Before proceeding further, the facts of the case, as pleaded by the petitioners, may be noticed briefly. The petitioners are three years Diploma holders in Engineering and were appointed as Junior Engineers in the Public Health Engineering Department (PHED) on various dates and posted at various places. Their initial dates of joining in the respective posts held by them are as under:

2. The petitioners are governed by a set of Rules called The Assam Public Health Engineering Services Rules, 1996 ("the Rules" for short), which prescribes the norms and procedures about the method of recruitment of Junior Engineer as well as Assistant Engineers. The petitioners have fulfilled all the criteria for promotion to the post of Assistant Engineer. By the letter dated 16.12.1995, the Deputy Secretary to the Government of Assam, PHED requested the Chief Engineer (PHE), Assam (Respondent No. 3) to submit the Annual Confidential Reports (ACRs) of the Junior

Engineers whose names were mentioned therein at least for five years i.e., 1990-91 to 1994-1995 and also informed them that the Selection Board meeting for selecting Junior Engineer (PHE) for promotion to the post of Assistant Engineer would be held in due course. Subsequently, by the letter dated 3.3.1997, the Deputy Secretary promoted 10 (ten) Junior Engineer to the post of Assistant Engineer (PHE) with effect from the date of taking over the charges: the petitioners have no grievance against them. However, as the particulars of the petitioner Nos. 3 and 4 also figured in the said letter dated 16.12.1995 for promotion to the post of Assistant Engineer, they had the legitimate expectation that their cases would also be considered for the post of Assistant Engineer but their expectations were frustrated. The Under Secretary, PHED, Assam subsequently issued Notification dated 12.2.2004 publishing the final inter-se seniority list of the cadre of Junior Engineer (PHE) of the department wherein the names of the petitioners also found a place. Their names figured at Serial Nos. 40, 46, 26, 19, 60, 77, 48 and 42 respectively. In this inter-se seniority list, the incumbents whose particulars were found at Sl. No. 1 to 4 and 13 had already retired from service on superannuation. The case of the petitioners is that even though the ACRs of the petitioners and others were requisitioned in the year 1995 for promotion to the post of Assistant Engineer, only 10 out of 36 candidates were given promotion to the post of Assistant Engineer in the regular cadre in the year 1997. As noticed earlier, on 10.2.2006, the Secretary to the Govt. of Assam, PHED issued a notification promoting Junior Engineer like the petitioners, among others, to officiate in the post of Assistant Engineer (Ex-cadre) in the interest of public service and as per the policy decision taken to extend promotional benefits to the Junior Engineers serving in the same cadre post for more than 20 years or more according to their inter-se seniority positions. It was clarified in the said notification that the post of Assistant Engineer (Ex-cadre) would be personal and the same would be reverted to the original cadre of Junior Engineer on their relinquishment of the post of Assistant Engineer (Ex-cadre). The dates of promotion of the petitioners in the post of Assistant Engineer (Ex-cadre) and the places of their posting are mentioned below:

3. The petitioners are aggrieved by their promotion to the ex cadre post of Assistant Engineer inasmuch as they will be deprived of future promotional and other service benefits and deny them forever of promotion to the post of Assistant Engineer on regular basis. Apart from causing irritants to them, their very position and status by virtue of their promotion as Assistant Engineers (PHE) in the ex-cadre post has been questioned by the Office of the Accountant General (A & E), Assam vide letter dated 6.11.2006 by questioning whether the post of Ex-cadre Assistant Engineer (PHE) conferred gazetted status or not while issuing the pay slip to them. Notwithstanding the hardships faced by them, they were nevertheless expecting that they would be brought back to the normal cadre of Assistant Engineer post in near future when the post of Assistant Engineer would fall vacant in the regular cadre. But, much to their prejudice, the Under Secretary to the Government of Assam, PHED, vide letter

dated 12.10.2006 informed the Chief Engineer, PHED, Assam to take immediate action for submitting the ACRs for last five years in respect of 50 Junior Engineers of PHED preferably from Sl. No. 98 onwards of the inter-se seniority list of J.E. (PHE) published on 14.2.2004 as the same was urgently required in connection with their promotion to the next higher post. According to the petitioners, the Joint Secretary to the Government of Assam, Agriculture Department vide the Notification dated 16.10.2006 regularised 5 Assistant Agricultural Engineers (ex-cadre) in the normal cadre of Assistant Agriculture Engineer who were earlier allowed to hold the ex-cadre post of Assistant Agricultural Engineer vide Govt. notification dated 25.1.2006 in the pay scale prescribed therein. The petitioners are also expecting treatment, more so, when they are the senior most incumbents holding the post of Assistant Engineer (Ex-cadre) in the inter-se seniority list dated 12.2.2004 and their particulars are at Sl. Nos. 19, 26, 40, 42, 46, 48, 60 and 77 respectively whereas the incumbents at Sl. No. 1 to 4 have already retired from service on superannuation. However, the respondent authorities with ulterior motive have sought to promote the incumbents in normal cadre from Sl. No. 98 onwards of the inter-se seniority list. The said request was reiterated by the Under Secretary to the Government of Assam (PHD) in his letter dated 13.6.2007 addressed to the Chief Engineer, PHE, Assam.

4. It is the contention of the petitioner that if the Junior Engineers junior to them are promoted to the post of Assistant Engineer in the normal cadre as mulled over by the respondent authorities, they would get all the service benefits including future promotion to a higher post, which has been denied to the petitioners who are kept stagnant in the present post of Assistant Engineer (Ex-cadre). According to the petitioners, by means of this promotion, these Junior Engineers will always be placed in a more advantageous position than them and, conversely, they will be doomed to remain under these Junior Engineers. Aggrieved by this, one Sri Mukul Talukdar and 7 others of the Assistant Engineer (Ex-cadre) (Sl. No. 5 to 12 of the inter-se seniority list) came before this Court in WP(C) No. 4767 of 2007 and this Court by the judgment and order dated 14.7.2008 allowed the writ petition by directing the respondent authorities to consider their cases for regularisation of their services in the regular cadre of Assistant Engineering before considering the case of their erstwhile juniors in the cadre of Junior Engineer and, if need be, to amend the recruitment rules so that no adverse consequences are caused to the service prospect of those petitioners in the event of promoting the said Junior Engineer who are junior to them. In compliance with the said directions of this Court, the ACRs in respect of 60 Assistant. Engineers (Ex-cadre), PHE for the last five years were requisitioned in which the name of the petitioner Nos. 1, 3, 4 & 8 also figured.

5. Against the said judgment and order dated 14.8.2008, one Sri Prabhash Ch. Das and 5 other Junior Engineers (PHE) Assam preferred an appeal before the Division Bench of this Court. The appeal was, however, dismissed on withdrawal. The said Prabhash Ch. Das and others Junior Engineer (PHE) also instituted WP(C) No.

1981/2009 before this Court against 64 Assistant Engineer (Ex-Cadre) including the present petitioners in connection with their promotion to the post of Assistant Engineer (ex-cadre), but the writ petition was dismissed on withdrawal vide order dated 5.4.2013 by this court.

6. When the petitioners were having legitimate expectation that their cases would be considered for promotion/regularisation in the normal cadre of Assistant Engineer pursuant to the judgment and order dated 14.8.2008, the Deputy Secretary to the Government of Assam, PHE, however, issued impugned letter dated 4.4.2013 whereby the Chief Engineer, PHE, Assam has been requested to furnish Annual Confidential Report for a period of last three years in respect of the Junior Engineers as per the list enclosed. The representation made by the petitioner not to promote those incumbents who were junior to them has not yielded any tangible result. Being aggrieved, the petitioners have now filed this writ petition for appropriate relief.

7. The writ petition is opposed by the respondent authorities by filing an affidavit-in-opposition through the Chief Engineer, PHE, Assam. According to the answering respondents, Rule 11(3) of the Assam Public Health Service Rules, 1996 prescribes a quota of 30% of the total cadre strength of permanent and temporary Assistant Engineers to be filled up by promotion from amongst the Junior Engineers having the requisite qualifications as laid down by the aforesaid Rules. When said quota of 30% of the cadre strength of the Assistant Engineer got saturated by promotion from Junior Engineer without any vacancy for filling up from the Junior Engineers, a large number of Junior Engineers are stagnating in the same post for more than 20 years, the Service Association of the Diploma Engineers took up the matter with the Government to find a solution for promotion of the Diploma Engineers. A meeting was accordingly held on 5.9.1994 under the chairmanship of the Chief Secretary of the Government of Assam and the same was attended by the members of the Service Association i.e., Assam Diploma Engineers Service Association, the Commissioner and Special Secretary to the Government of Assam, Public Works Department, Secretary to the Government of Assam, Public Health Engineering Department, Secretary to the Government of Assam, Irrigation Department and the Under Secretary to the Government of Assam, Flood Control Department. In the meeting it was decided to create 100 posts of Assistant Engineer (Ex-cadre) to accommodate Junior Engineer, who have completed 20 years as Junior Engineer, by promotion to the post of Assistant Engineer (Ex-cadre). Pursuant to this decision, the Secretary to the Government of Assam, Public Health Engineering Department issued the Notification dated 10.2.2006 promoting 100 Junior Engineers including the petitioners to the post of Assistant Engineers (Ex-cadre) in the Public Health Engineering Department. It was also stated therein that these promotions were made on selection according to the inter-se seniority. The Notification, however, made it clear that the post of Assistant Engineer (Ex-cadre) would be personal to promotees and the same would be reverted to the original cadre of

Junior Engineer on their relinquishment of the posts held by them. All the petitioners accepted the terms and condition of the Notification dated 10.2.2006 and has joined their places of posting without any objection whatsoever. The answering respondents state that the clarification sought for by the Accountant General, Assam has been suitably taken care of by making clear in his letter that the Assistant Engineer (Ex-cadre) is a Gazetted post and the pay slips may be issued accordingly. According to the answering respondents, the claim of the petitioners for seniority over the existing Engineers is not at all feasible and that the existing Rules under which the promotions are contemplated are not applicable to the petitioners. Therefore, requisitioning the ACRs of the Junior Engineers for filling up the post of Assistant Engineers cannot be said to be arbitrary, unfair and step-motherly treatment. This is so in view of the fact that the existing Service Rules have not been amended to enable the promotion of the Assistant Engineer (Ex-cadre) or their further promotion or their taking back too the normal cadre of Assistant Engineer. It is the contention of the answering respondent that the persons occupying the post of Assistant Engineers (Ex-cadre) cannot claim seniority over persons in the cadre of the Junior Engineer and, as such, the petitioners have no right for consideration for further promotion or for their regularisation in the normal cadre of Assistant Engineer as per the existing Service Rule.

8. An additional affidavit is also filed by the Chief Engineer, PHE, Assam (Respondent No. 3) wherein it is pointed out by him that the grievance of the petitioners have already been redressed by the Government by passing an order dated 26.7.2013 informing them that their promotion to the next higher cadre would be considered in due course in the light of the judgment and order of this Court, but the petitioners conveniently suppressed these material facts. The answering respondent points out that the State-respondents in terms of the notification dated 10.1.2014 promoted 65 Junior Engineers including the respondent No. 4 to 13 to the posts of Assistant Engineer on regular basis according to their seniority in the gradation list dated 14.9.2012. However, due to the stay order passed by this court in Misc. Case No. 252 of 2014, their promotions have been kept in abeyance. It is asserted by the answering respondent that the petitioners are getting all the monetary benefits extended to these 65 promotees. It is reiterated by him that for facilitating the promotion of the petitioners to the post of Assistant Engineer or the next higher post, the existing rules shall have to be amended since as of now such promotion of regularisation is not permissible under the extant Rules, for which their cases would be considered in due course in the light of the said judgment dated 14.8.2004 of this Court. It is, however, pointed out by the Deputy Secretary to the Government of Assam, PHED in his affidavit dated 29.5.2014 that the next promotion due to the petitioners will be to the posts of Assistant Executive Engineer whereas these Junior Engineers are promoted to the lower posts of Assistant Engineer. The writ petition is also contested by the respondent No. 4 to 11 by filing their joint affidavit-in-opposition. On perusing the affidavit filed by them, I am of the view that

their contentions therein are in pari materia with the view taken by the Chief Engineer as well as the Secretary, Government of Assam, PHE in their respective affidavits-in-oppositions and I do not, therefore, think it necessary to reproduce them for the sake of brevity.

9. Though a number of contentions have been raised by the learned counsel appearing for the rival parties, I hardly think it necessary to burden this judgment with those contentions and citations following the statements made by the Deputy Secretary, PHED in the said affidavit dated 29.5.2014. At this stage, it may be recalled that this Court on 22.5.2014 had passed the following order:

"22.5.2014

After hearing Mr. D.C. Borah, the learned counsel for the petitioners and Mr. J. Bhorbhuyia, the learned Standing Counsel for PHED, and after going through the series of affidavits filed by both the parties, I am still unable to understand as to whether the petitioners are to be promoted from the post of Junior Engineer to the post of Assistant Engineer (Ex-cadre) or from the post of Assistant Engineer (Ex-cadre) to the post of the Assistant Executive Engineer.

The state-respondents are directed to file an additional affidavit to make their position crystal clear on this issue.

The matter is heard-in-part. List it again on 02.06.2014.

A copy of this order be furnished to the learned Standing Counsel."

10. The Deputy Secretary, PHED accordingly filed the additional affidavit dated 29.5.2014 stating there that the promotions of the petitioners are to the post of Assistant Executive Engineer. Since the stance now taken by the respondent authorities has assumed enormous importance, the relevant portions of paragraph 4 reflecting the same are reproduced below:

".....Be it stated here that the deponent has filed the instant affidavit as per the order of the Hon'ble Court dated 22.5.2014 passed in the instant writ petition indicating the facts that the writ petitioners, who are working at present as Assistant Engineer (Ex-cadre) with all monetary benefits with official status since the date of their respective joining and their next promotion likely to be/due are Assistant Executive Engineers in respect of the writ petitioners and those who have the requisite qualifications as per the law and instant promotees i.e. private respondents are from the Junior engineer to Assistant Engineer and their promotion has no relevancy with the future promotion/apprehension of the writ petitioners to which the government vide letter dated 26.7.2013 clarified the stand, which are reproduced as follows:

".....

Memo. No. PHED-369/2013/15 Dated Dispur, the 26th July, 2013

.....Your prayer for promotion to the next higher cadre shall be considered in due course in the light of the judgment and order of the Hon"ble Gauhati High Court dated 14.8.2008. As you are already enjoying all benefits and status of Assistant Engineer there should not be apprehension on this subject.

This has the approval of Hon"ble Minister PHE Department, Assam."

As such, it is found and seen that the next promotion (Assistant Executive Engineers) of the writ petitioners will be considered by the government in due course of time; over and above promotion of 65 numbers of Junior Engineers are to the post of Assistant Engineers and next promotion due to the writ petitioners will be to the post of Assistant Executive Engineers."

11. On careful reading of the affidavit of the Deputy Secretary, PHED, Assam, it is unmistakable that the promotion granted to the 65 Junior Engineers are to the regular posts of Assistant Engineers, whereas the promotions being contemplated for the petitioners are to the posts of Assistant Executive Engineer, which is undoubtedly a post higher than the posts against which the private respondents have been promoted, namely, Assistant Engineer. At this stage, the decision of this Court dated 14.8.2008 in WP(C) No. 4767 of 2007, which has now attained finality, may be recalled The following are the relevant paragraphs: (paras 6, 7 and 8)

"6. It will be iniquitous for the Junior Engineers who are admittedly junior to the petitioners, if promoted to the post of Assistant Engineer (normal cadre) and thereafter, they are again considered for promotion to the cadre of Assistant Executive Engineer without considering the case of the petitioners merely because, for no fault of their own, they were provided with promotion to the post of Assistant Engineer (Ex-cadre). In the matter of promotion to the post of Assistant Engineer (normal cadre) same will have to be considered as per the seniority position. It cannot be a case that after pushing out the petitioners to the ex-cadre posts of Assistant Engineer, their erstwhile juniors in the cadre of Junior Engineers would be promoted to the regular cadre of Assistant Engineer and thereafter would also be considered for further promotion to the deprivation of the petitioners.

7. In view of the above, the writ petition is allowed directing the respondents to consider the case of the petitioners in the following manner:-

(1) If the promotion of the Junior Engineers to the regular cadre of Assistant Engineer, as has been proposed by the impugned notifications, has got nothing to do with the promotion prospects of the petitioners to the next higher grade of Assistant Executive Engineer, same shall be made known by passing an order.

(2) If the proposed promotion of the Junior Engineers to the regular cadre of Assistant Engineer has the effect of bypassing the petitioners, who are senior to them, the respondents shall first consider the case of the petitioners for promotion/adjustment in the regular cadre of Assistant Engineer before considering

the case of the erstwhile juniors in the cadre of Junior Engineer.

(3) If need be, the respondents shall also think of brining the amendment to the recruitment rules. In other words, there must not be any adverse consequence to the service prospects of the petitioners in the event of promoting the Junior Engineers to the regular cadre of Assistant Engineers, who are admittedly junior to the petitioners in the cadre of Junior Engineers.

(8) With the above directions, the writ petition is allowed to the extent indicated above."

12. Much water has flown down River Brahmaputra since 14.8.2008, yet, till now, the respondent authorities have not brought about amendment of the service rules to enable the petitioners to get promotion to the higher posts of Assistant Executive Engineer. Assurances after assurance made by them do not help the case of the petitioners at all. The first hurdle to be crossed by the respondent authorities to enable the promotion of the petitioners to the next higher post of Assistant Executive Engineer is, by way of amendment of the extant rules, either to encadre their ex-cadre post to the normal cadre of Assistant Engineer or to treat the post of Assistant Engineer (ex-cadre) as Assistant Engineer in the regular cadre by means of legal fiction and count their past services in the ex-cadre posts held by them as the qualifying service for promotion to the post of Assistant Executive Engineer. Instead of undertaking such exercise, the respondent authorities are busy promoting the private respondents and other Junior Engineers, who are junior to the petitioners, to the posts of Assistant Engineer on regular basis. If this process is allowed to continue, a time will come when these Juniors Engineers would steal a march over the petitioners, which will be inconsistent with, or contrary to the directions of this Court contained in the said judgment and order dated 14.8.2008. Technically speaking, the promotion of Junior Engineers like the private respondents to the regular posts of Assistant Engineer cannot affect the petitioners inasmuch as the latter belong to a different cadre. But then, considering the fact that there are no promotional avenues for the petitioners holding ex-cadre posts and whereas there are promotional avenues for Junior Engineers like the private respondents, the day is not too far when these Junior Engineers, or, at least, some of them, would become Assistant Executive Engineer when the petitioners are still struggling for regularisation of the ex-cadre posts held by them in the regular cadre of Assistant Engineers. Such prospect is no longer imaginary but real. However, based on the latest affidavit filed by the State-respondents through the Deputy Secretary, PHED, this writ petition can be disposed of with some directions. Consequently, this writ petition is disposed with the following directions:

(1) The respondent authorities are directed to suitably amend the service rules to ensure the promotion of the petitioners to the posts of Assistant Executive Engineer, PHED in the regular cadre without any further delay.

(2) Once the extant rules are amended, the petitioners shall be considered for promotion to the posts of Assistant Executive Engineer by counting their past services for the purpose of qualifying service for such promotion.

(3) If, on the other hand, the extant Rules are not amended to facilitate the promotion of the petitioners to the posts of Assistant Executive Engineer, they shall be regularised against the posts of Assistant Engineer in the normal cadre against which the private respondents are now being promoted. In that event, their past services in the posts of Assistant Engineer (ex-cadre) shall be counted for the purpose of qualifying service for promotion to the posts of Assistant Executive Engineer.

(4) Until and unless the petitioners are promoted to the posts of Assistant Executive Engineer as held out by the respondent authorities or the services of the petitioners regularised in the post of Assistant Engineer in the manner indicated earlier, the posts of Assistant Engineer in the normal cadre against which private respondents are now being promoted (which happened to be aborted by the stay order of this Court) shall not be filled up.

(5) If suitable amendments are not made as directed earlier, it shall, however, be open to the respondent authorities to regularise the services of the petitioners and then and then only promote the private respondents to the posts of Assistant Engineer.

(6) It is made clear that the respondent authorities, while promoting the private respondents to the posts of Assistant Engineer in the contingencies contemplated above, shall ensure that the seniority of the petitioners over the private respondents is always maintained.