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THE GAUHATI HIGH COURT
(HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND ARUNACHAL PRADESH)

Case No. : WP(C)/4415/2012

BALINDRA PRAN KAKATI
S/O LATE DINANATH KAKATI F.C. ROAD, UZANBAZAR, GUWAHATI.

VERSUS

THE STATE OF ASSAM AND ORS
REP. BY THE CHIEF SECRETARY TO THE GOVT. OF ASSAM, DISPUR,
GUWAHATI- 781006.

2:THE PRINCIPAL SECRETARY TO THE GOVT OF ASSAM
PERSONNEL A DEPARTMENT
DISPUR
GUWAHATI-781006.

3:SELECTION BOARD CONSTITUTED FOR
SELECTION OF ACS OFFICERS FROM SENIOR GRADE-II
TO SENIOR GRADE-I
REP. BY ITS CHAIRMAN

Advocate for the Petitioner : MR.D DEKA
Advocate for the Respondent : GA, ASSAM

BEFORE
HONOURABLE MR. JUSTICE SANJAY KUMAR MEDHI

Date of hearing : 24.08.2023

Date of judgment : 29.08.2023

JUDGMENT & ORDER

The extraordinary jurisdiction conferred upon this Court by Article 226 of the Constitution of India has been sought to be invoked by means of this writ petition. The issue relates to a claim for promotion of the petitioner, which, according to him was entitled to and therefore to give the effect of such promotion. At the outset, it may however be mentioned that the petitioner had retired from his services on 31.10.2011.

2. Before coming to the issue which has fallen for consideration, it would be convenient if the facts of the case are narrated in brief.

3. The petitioner was appointed in the year 1981 as an ACS officer Class II. He had retired from service on 31.10.2011 on attaining the age of superannuation and at that point of time, he was holding the post of Joint Secretary to the Government of Assam, Department of Secretariat Administration. The grievance of the petitioner pertains to the aspect of promotion from the rank of Senior Grade II to Senior Grade I of the ACS for the year 2011. It is the specific case of the petitioner that there was failure on the part of the respondent authorities to undertake the exercise for promotion which mandates an assessment of the vacancies in the coming year and such assessment is to be made by the end of the previous year. It is contended that though the petitioner was within the zone of consideration, no such exercise was undertaken, as a result of which, before the exercise of promotion could be undertaken, the petitioner had retired from his service.

4. I have heard Shri I. Chowdhury, learned Senior Counsel assisted by Shri S. Biswakarma, learned counsel for the petitioner whereas the State respondents are represented by Shri C.S. Hazarika, the learned State Counsel.

5. The learned Senior Counsel for the petitioner has referred to Rule 12 of the

Assam Civil Service Rules, 1998 (hereinafter called the Rules), which pertains to the general procedure of promotion. Under Rule 12 (1), there is a requirement for making an assessment of the likely number of vacancies to be filled up by promotion in the next year in each cadre and such assessment is required to be made before the end of each year. He submits that in the Gradation List published in the year 2002, whereas the petitioner was placed against Sl. No. 242, one Mohammed Parvez Shah was at Sl. No. 244. The learned Senior Counsel has also referred to Rule 12 (4) which lays down the criteria for promotion, which is "merit with due regard to seniority". Attention of this Court has also been drawn to Rule 12 (2) as per which, a list of officers four times the number of actual vacancies in order of seniority are required to be considered for such promotions. It is submitted that for the year 2011, the number of vacancies were 23. However, the promotional exercise was delayed and the promotions were ultimately given in the year 2012 by which time, the petitioner had retired from service on 31.10.2011. Ultimately, the promotions were made, vide order dated 04.08.2012 which, amongst others, contain the name of Shri Parvez Shah at Sl. No. 12. It is the contention of the petitioner that when a person junior to the petitioner in the Gradation List was considered and thereafter promoted to the post of Senior Grade I of the ACS, the petitioner could not have been denied of such consideration in accordance with the Rules.

6. The learned Senior Counsel has also submitted that there has been instances of delay on earlier occasion also. By drawing attention of this Court to the minutes of meeting of the Selection Board held on 08.09.2011, the learned Senior Counsel has submitted that in the said meeting, promotion of the vacancies for the year 2010 was also considered and accordingly, retrospective promotion was given from 01.06.2010 to 3 persons, namely Shri Krishna Ram Mili, Shri Munibur Rahman and Shri Hemanta Kr. Baidya, who are at Sl. Nos. 7, 15 and 17. It is submitted that all the said incumbents had earlier retired from service and were given the benefit of such promotions. The petitioner has in fact also annexed the order of promotion dated

29.12.2011 in respect of the aforesaid three numbers of incumbents.

7. The learned Senior Counsel has also referred to the affidavit in reply filed by the petitioner on 13.09.2013 with which an Office Memorandum dated 25.08.2010 has been annexed. The said Office Memorandum is published by the Government of India which relates to a Court case which was initially decided by the Hon'ble Punjab and Haryana High Court and ultimately by the Hon'ble Supreme Court. The said Office Memorandum lays down that in the event, an exercise of promotion could not be done in a particular year, the benefit of the same should not be denied to persons who might have retired in the meantime.

8. The learned Senior Counsel for the petitioner has also relied upon the case of ***Union of India and Ors. Vs. NR Banerjee and Ors.*** reported in ***(1997) 9 SCC 287***. In the said case, the Hon'ble Supreme Court has held that if the Rules prescribe preparation of a panel well in advance to fill up the vacancies, the same should be done in accordance with the Rules.

9. The learned Senior Counsel submits that since the petitioner had already retired from service on 31.10.2011, the writ petition was filed only for the purpose of claiming financial benefits and proper fitment in the pension.

10. *Per contra*, Shri Hazarika, the learned State Counsel has submitted that the projection made by the petitioner and the interpretation of Rule 12 are not correct. The learned State Counsel submits that as per Rule 12, promotions are to be made and that Rule has been followed in the present case. It is further submitted that by the time the promotions were made, the petitioner had already retired from his services and therefore he is not entitled for any consideration.

11. The learned State Counsel has also referred to the affidavit-in-opposition filed by the respondent no. 2 on 10.01.2013. By drawing the attention of the Court to the averments made in paragraph 7 of the said affidavit, it is submitted that the vacancies for the years 2008, 2009 and 2010 could not be filled up on time as there was no

meeting of the Selection Board in view of the pendency of a case in the Hon'ble Supreme Court. It has further been stated in the said paragraph that the Selection Board had decided to give retrospective promotions to the three incumbents who have been specifically named by the petitioner in the writ petition.

12. The rival submissions made by the learned counsel for the parties have been duly considered and the materials placed before this Court have been carefully examined.

13. From the records, it is not in dispute that for the year 2011 there were 23 numbers of vacancies. It is further not in dispute that the meeting of the Selection Board was held only on 08.09.2011. In the said meeting, the Selection Board had also considered the promotions for the vacancies of the year 2010 and in the said process had given the benefit of such promotions to 3 numbers of incumbents at Sl. Nos. 7, 15 and 17, who had all retired before the said date of the meeting. The order of promotion dated 29.12.2011 in fact contains the names of the aforesaid three incumbents wherein it has been stated that the promotions have been given effect from 01.06.2010.

14. The Rules governing the field envisages that by the end of the previous year, the assessment of the vacancies are to be made which would occur in the next year. In the instant case, such assessment ought to have been made by the end of 2010 for the vacancies arising in the year 2011. The said promotions were considered by the Selection Board in its meeting dated 08.09.2011 on which date, the petitioner was still in service. The delay on the part of the authorities in making the assessment of the vacancies by the end of the previous year cannot be a reason by which prejudice can be caused to an incumbent, who is otherwise eligible for consideration for promotion.

15. For ready reference, the relevant portions of the Rules are extracted hereinbelow-

“12. General Procedure of promotion.-

(1) Before the end of each year the Appointing Authority shall make an assessment of the likely number of vacancies to be filled by promotion in the next year in each cadre.

(2) The Appointing Authority shall then furnish to the Board to the following documents and information with regard to as many officers in order of seniority as are eligible for promotion-subject to maximum of four times the number of actual vacancies:-

- a) information about the number of vacancies;*
- b) list of officers in order of seniority, eligible for promotion (separate list for promotion to different cadres shall be furnished), indicating the cadre to which the case of promotion is to be considered;*
- c) character rolls and personal files of the officers listed;*
- d) details about reservation including carry forward vacancies as admissible under the Act and the Rules referred to in Rule 16;*
- e) any other documents and information as may be considered necessary by the Board.*

(3) ...

(4) The selection shall be made on the basis of merit with due regard to seniority."

16. In the instant case, it is not in dispute that the total vacancies for the year 2011 were 23 numbers. It is also not in dispute that in the Gradation List, an Officer by the name of Parvez Shah who was below the petitioner in the list was considered and duly promoted. As recorded above, Rule 12 (2) further envisages that officers four times the number of actual vacancies are to be considered. Neither the materials placed before this Court nor the affidavit-in-opposition of the Department discloses that there was a consideration of the case of the petitioner for promotion.

17. This Court has also noticed that in paragraph 7 of the affidavit-in-opposition of the respondents, it has been stated that three incumbents, who had retired prior to holding of the meeting on 08.09.2011, were given the benefit of promotion with retrospective effect from 01.06.2010, as those incumbents were to be considered for the vacancies of the year 2010. If that is the express stand taken in the affidavit by the respondent authorities, it is even more necessary for the said respondents to take a similar and consistent stand so far as the petitioner is concerned.

18. In the case of **NR Banerjee (supra)** relied upon by the petitioner, it has been clearly laid down that if the annual panel could not be prepared for any justifiable reasons, year wise panel of all the eligible candidates within the zone of consideration for filling up the vacancies each year should be prepared and appointment be made in accordance therewith. This Court also finds force in the contention of the petitioner regarding the applicability of the spirit of the office memorandum dated 25.08.2010 of the Government of India.

19. In view of the aforesaid facts and circumstances, this Court is of the unhesitant opinion that a case for interference is made out in the instant writ petition. It is accordingly directed that the case of the petitioner be considered for promotion to the rank of Senior Grade I ACS by convening a review DPC for the vacancies arising in the year 2011. The aforesaid direction is however subject to the condition that the same only pertains to a consideration of the case of the petitioner for such promotion, wherein the criteria laid down in Rule 12, namely "merit with due regard to seniority" is required to be followed meticulously. Such review DPC is to be convened within a period of 60 days from today and in the event the petitioner is found to be eligible for promotion to any of the vacancies of the year 2011, he would be entitled to all the notional benefits, including a proper fitment in the pensionary benefits which are being received by the petitioner and such benefits are to be worked out by treating the petitioner to have retired from the promotional post in Grade I ACS.



20. The petition accordingly stands allowed in terms of the directions made above.
21. No order as to cost.

JUDGE

Comparing Assistant