

GAHC010091012019



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

Case No. : WP(C)/2747/2019

GS-173215W MASON BHIM PRASAD AND 3 ORS.
99 RCC PROJECT VARTAK, S/O BAHADUR RAM, R/O PROJECT VARTAK,
DIST.-SONITPUR, ASSAM, PRESENTLY SERVING AS MASON AT 99 RCC
PROJECT VARTAK

2: GS-173413F MASON SURESH RAM
129 RCC PROJECT SWASTIK
S/O LT. RAMDIN RAM
R/O LANKESWAR
GUWAHATI
DIST.-KAMRUP (M)
ASSAM
PRESENTLY SERVING AS MASON AT 129 RCC PROJECT SWASTIK.

3: GS 178493N MASON RABISH KUMAR
129 RCC PROJECT SWASTIK
S/O UNKNOWN
R/O LANKESWAR
GUWAHATI
DIST.-KAMRUP(M)
ASSAM
PRESENTLY SERVING AS MASON AT 129 RCC PROJECT SWASTIK

4: GS 176366A MASON S P CHOUDHURY
75 RCC PROJECT DEEPAK
S/O LT. PAMAJI CHOUDHURY
R/O LANKESWAR
GUWAHATI
DIST.-KAMRUP (M)
ASSAM
PRESENTLY SERVING AS MASON AT 129 RCC PROJECT SWASTI

VERSUS

UNION OF INDIA AND 4 ORS.
REP. BY THE SECRETARY TO THE GOVT.OF INDIA, MINISTRY OF
DEFENCE, SOUTH BLOCK, NEW DELHI-110001

2:THE SECRETARY
BORDER ROADS DEVELOPMENT BOARD
B WING
4TH FLOOR
SENA BHAVAN
NEW DELHI-110001

3:THE DIRECTOR GENERAL BORDER ROADS
SEEMA SADAK BHAVAN
RING ROAD
DELHI CANT
NEW DELHI-110001

4:THE CHIEF ENGINEER
PROJECT VARTAK
C/O 99 APO

5:THE HQ ADGBR (EAST)
LANKESWAR
GUWAHATI
PIN-93088

BEFORE
HONOURABLE MR. JUSTICE MICHAEL ZOTHANKHUMA

For the petitioner : Mr. T. Das, Advocate.

For the respondents : Mr. K.K. Parasar,
Central Govt. Counsel

Date of hearing : 23.11.2023

Date of judgment : 30.11.2023

JUDGMENT & ORDER

1. Heard Mr. T. Das, learned counsel for the petitioners and Mr. K.K. Parasar, learned Central Government Counsel, appearing for all the respondents.

2. The petitioners' case is that in terms of the General Reserve Engineer Force Group 'C' and Group 'D' Recruitment Rules, 1982, herein after referred to as the 1982 Rules, a Mason can be promoted to the post of Overseer, if he is a matriculate and has 3 years experience as a Mason, besides passing the trade test. He submits that a selection process was undertaken in the year 2009, for selecting candidates for promotion to the post of Overseer and the DPC had accordingly recommended the petitioners, who were masons, for promotion. However, the Ministry of Road Transport & Highways, Border Roads Development Board thereafter issued a letter dated 13.05.2010, by which it was stated that sanction had been given by the authority for merger and re-designation of certain existing posts, which included the post of Overseer (diploma holder). The Overseer (diploma holder) post was accordingly merged with the post of Superintendent BR-I and Superintendent BR-II (diploma holder) and re-designated as Junior Engineer (Civil) vide the Ministry of Road Transport & Highways, Border Roads Development Board, General Reserve Engineer Force

(Border Roads Organization), Junior Engineer (Civil), Group 'B' Post, Recruitment Rules, herein after referred to as the "2012 Rules", which superseded the "1982 Rules".

3. The petitioners' counsel submits that the recommendation made by the DPC for promotion of the petitioners and others, from the post of Mason to Overseer, was not approved by the respondent authorities vide letter dated 21.12.2013 issued by the Record Officer, General Reserve Engineer Force due to the reason the post of Overseer was no longer in existence, the proposal for merger of posts being approved in the letter dated 13.05.2010.

4. The petitioners' counsel submits that though the petitioners are not diploma holders in engineering, while holding the posts of Masons, the 1982 Rules did not bar a Mason from being promoted to the post of Overseer. It was due to the 2012 Rules that the petitioners could not be promoted as their promotional post had been done away with, though they were considered and selected in terms of the 1982 Rules.

5. The petitioners' counsel submits that the petitioners having been recommended by the DPC for promotion in terms of the 1982 Rules and as they were considered against vacant posts during the applicability of the 1982 Rules, the petitioners should have been promoted to the post of Overseer as per the

1982 Rules. In support of his submission, the petitioners' counsel has relied upon the judgment of the Apex Court in ***Y.V Rangaiah & Others v. J. Sreenivasa Rao & Others***, reported in ***1983 3 SCC 284***.

6. Mr. K.K. Parasar, learned Central Government Counsel, on the other hand, submits that the present writ petition suffers from delay and laches. He also submits that the post of Overseer was merged with the posts of Superintendent BR-I and Superintendent BR-II (diploma holder) and renamed as Junior Engineer (Civil) in terms of the 2012 Rules. Further, masons cannot be promoted to the posts of Junior Engineer (Civil). The existing posts of Overseer became a withering post due to the 2012 Rules, which was to disappear when the existing incumbents left the post due to promotion, retirement etc. As such, there was no vacant post of Overseer to which the petitioners can be accommodated. Further, a mason not having a diploma in Civil Engineering cannot be promoted to the post of Junior Engineer (Civil) as per the 2012 Rules. He further submits that the alleged selection process for promotion to Overseer held by the DPC in terms of the 1982 Rules, does not give an indefeasible right to the petitioner to be appointed to the post of Overseer, which has now been re-designated as Junior Engineer (Civil).

7. Mr. K.K. Parasar submits that as the post of Overseer became a withering

post in view of 2012 Rules, wherein the post of Overseer was merged with two other posts and designated as Junior Engineer (Civil), no promotion can be made to a non-existent post. He further submits that as no promotional prospect was available to the petitioners, they have been given the benefits of the Assured Career Progression/Modified Assured Career Progression (ACP/MACP) Scheme. He submits that in terms of the letter referred to by the petitioners' counsel, i.e. Letter dated 13.05.2010, non-diploma holder Overseers would continue in the same designation, as sanction had been given by the competent authority for merger and re-designation of the post of Superintendent BR-1, Superintendent BR-II (Diploma holder) and Overseer (Diploma Holder) as Junior Engineer (Civil). They were to continue with the designation of Overseer, till they were wasted out or acquired diploma or equivalent or higher qualification, which would have allowed them to be considered for further promotion.

8. Mr. K.K. Parasar, learned Central Government Counsel also submits that DPC proceedings held in the year 2009, for promotion of Mason to Overseer, in which the petitioners had participated, had not been approved by the Director General of Border Roads, Head Quarter, vide letter No.12611/DPC/DGBR/34/EG2 dated 20.11.2009, which has been reflected in paragraph 3 of the letter dated

21.12.2013 issued by Senior Record Officer and which has been annexed as Annexure-3 to the writ petition. He further submits that the petitioners have been given the benefits of ACP/MACP scheme as follows;-

Petitioner Nos.1 & 2 have availed the benefit of the first ACP scheme in the year 2002, second MACP in the year 2010 and third MACP in the year 2020.

Petitioner No.3 has been given the benefit of the first ACP scheme in the year 2008, the second MACP in the year 2016 and he will be getting the benefit of the third MACP on 29.08.2026.

Petitioner No.4 has been given the benefit of the first ACP scheme in the year 2016, second MACP in the year 2014 and he will be getting the third MACP on 23.12.2024.

Mr. Parasar thus prays that the present writ petition should be dismissed, as it is devoid of merit.

9. I have heard the learned counsels for the parties. As can be seen from the documents available on record, the post of Overseer can be filled up by promotion from the feeder post of Mason, in terms of the 1982 Rules. The petitioners were considered for promotion in the year 2009 for the post of Overseer. There is nothing to show that they were selected by the DPC of

promotion. Be that as it may, the letter dated 21.12.2013 issued by the Senior Record Officer, General Reserve Engineer Force, Dighi Camp, Pune, reflects the fact that the DPC conducted for the post of Overseer in 2009 was not approved by HQ DGBR, vide letter No.12611/DPC/DGBR/34/EG2 dated 20.11.2009. The Notification No.G.S.R 622(E) dated 29.08.2008 published in the Gazette of India dated 29.08.2008, regarding the revised pay structure to be followed in certain posts in Ministries, Departments and Union Territories, shows that for the Border Roads Organisation, Ministry of Shipping, Road Transport & Highways, the post of Overseer was to be merged with the promotional post of Superintendent BR Grade-II.

10. It is clear that the merger of the post of Overseer with Superintendent BR Grade-I and Superintendent BR Grade-II has been made only w.e.f. the promulgation of the 2012 Rules and not prior to that. As such, in terms of the law laid down by the Supreme Court in the case of ***Y.V Rangaiah & Others v. J. Sreenivasa Rao & Others***, reported in ***1983 3 SCC 284***, the petitioners who had been considered for promotion to the vacant posts of Overseer in terms of the 1982 Rules, would have to be appointed to the said posts in terms of the 1982 Rules, inasmuch as, the two Judges Bench of the Supreme Court in ***Y.V. Rangaiah*** (*supra*) held that post which falls vacant prior to the

amendment of the Rules, would have to be filled up in terms of the old rules and not by the new rules.

However, a three Judges Bench of the Supreme Court in the case of "**State of Himachal Pradesh and others vs. Raj Kumar and others**", reported in **Civil Appeal No.9746/2011**, has held that the law laid down in the case *of Y.V. Rangaiah* (supra) does not reflect the correct proposition of law governing the services under the Union and States and Part-XIV of the Constitution of India.

11. The three Judges Bench of the Supreme Court in *Raj Kumar* (supra) overruled the judgment passed in the case of *Y.V. Rangaiah* (supra), by stating that the law laid down in *Y.V. Rangaiah* (supra) did not reflect the correct proposition of law. The three Judges Bench held that there is no universal application that vacancies must be necessarily filled up on the basis of the law existing on the date when the vacancies arose and there is no obligation for the government to make appointment as per the old rules. It further held that when there is no statutory duty cast upon the State to consider appointments to the vacancies that occurred prior to the amendment, the State cannot be directed to consider the same.

12. Coming to the facts of this case, the DPC had sat to consider candidates

for promotion of Masons, in terms of the 1982 Rules for the post of Overseer. As such, the selection process that had been initiated for filling up the post of Overseer in terms of the 1982 Rules, should have continued to its logical conclusion. However, as can be seen from the documents on record, promotion to Overseer had not been approved by HQ DGBR, vide letter dated 17.12.2008 and the proceedings of the DPC in 2009 for promotion to the post of Overseer was not approved, vide letter dated 20.11.2009. Both these letters are reflected in the letter dated 21.12.2013 issued by the Senior Record Officer, General Reserve Engineer Force. In the case of ***State of Kerala vs. M. K. Kunhikannan Nambiar Manjeri Manikoth, Naduvil (Dead) and Others***, reported in ***(1996) 1 SCC 435***, the Supreme Court has held that all official decisions are presumed to be valid until the same is set aside or otherwise held to be invalid by a Court. However, there is no challenge to the above letters. In any event, the approval for the DPC held in the 2009 not having been given vide letter dated 20.11.2009, the filing of this writ petition after 10 (ten) years is hit by delay and laches.

13. In the case of ***Deepak Agarwal and Another vs. State of Uttar Pradesh and Others***, reported in ***(2011) 6 SCC 725***, the Supreme Court has held that it is the Rule which is prevalent at the time when the consideration

takes place for promotion, which should be applicable. A candidate has the right to be considered in the light of the existing Rules, which implies the Rule in force on the date the consideration took place. It also held that there is no obligation for the Government to make appointments as per the old Rules, in the event restructuring of the cadre is intended, for efficient working of the unit. In the present case, there has been restructuring of the cadre by merger for 3 posts and re-designating the same as Junior Engineer (Civil). In the case of **Dr. K. Ramulu vs. Dr. S. Suryaprakash & Another**, reported in **(1997) 3 SCC 59**, the Supreme Court reiterated the ratio laid down in **Union of India & Others vs. K.V. Vijeesh**, reported in **(1996) 3 SCC 139**, where it was stated that for the reasons germane to the decision, the Government is entitled to take a decision not to fill up the existing vacancies on the relevant date. As such, though the selection process could have been completed in terms of 1982 Rules, the fact remains that the HQ, DGBR and the Government had taken a conscious decision to restructure the organization prior to the DPC of 2009. Despite the above, the DPC had sat to consider promotion of Mason to Overseer in 2009, for which approval was not given by the HQ DGBR.

14. Considering the fact that the post of Overseer is no longer in existence, as it is a withering post, which might have disappeared/will disappear with the

retirement or promotion etc. of the existing incumbents, this Court does not find any ground to exercise its discretion in the present case. Also, there is no indefeasible right for promotion of a person, even though, the petitioners might have been selected for promotion.

15. In the present case, there is no document to show that the petitioners had been selected by the DPC held in the year 2009 for promotion to the post of Overseer. Further, the petitioners having enjoyed all the benefits of ACP/MACP Schemes due to their stagnation in the post of Mason, this Court is of the view that there is no scope for granting promotion to the petitioners due to the peculiar facts and circumstances of this case. Consequently, in view of the reasons stated above, besides no challenge has been made to the letter dated 20.11.2019 and keeping in view the delay and laches in filing the present writ petition, this writ petition is dismissed.

JUDGE

Comparing Assistant