

GAHC010277592019



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

Case No. : Review.Pet./194/2019

THE STATE OF ASSAM
REP. BY THE PRINCIPAL SECRETARY, TRANSPORT DEPARTMENT, DISPUR,
GUWAHATI-6.

VERSUS

MD. HAFIZUR RAHMAN AND 3 ORS
S/O- LATE ABDUL SAMAFD ALI, R/O- GANDHIBASTI, P.O. SILPUKHURI, P.S.
CHANDMARI, GUWAHATI, DIST.- KAMRUP(M), ASSAM.

2:DIRECTOR
INLAND WATER TRANSPORT
ASSAM
ULUBARI
GUWAHATI-7.

3:THE DEPUTY SECRETARY TO THE GOVT. OF ASSAM
TRANSPORT DEPARTMENT
DISPUR
GUWAHATI-6.

4:SRI RAM KRISHNA SARMAH
ASSISTANT RIVER SURVEYOR
OFFICE OF THE DIRECTORATE INLAND WATER TRANSPORT
ASSAM
ULUBARI
GUWAHATI-7

Advocate for the Petitioner : MR. Y DOLOI

Advocate for the Respondent : MR. U K NAIR

**BEFORE
HONOURABLE MR. JUSTICE KALYAN RAI SURANA**

JUDGMENT

Date : 11.10.2023

Heard Ms. M.D. Borah, learned standing counsel for the Transport Department, representing the review petitioners. Also heard Mr. M.P. Sarma, learned counsel for the respondent no. 1.

2) This review petition is preferred against the order dated 26.02.2019, passed by this Court in W.P.(C) 6126/2013.

3) In this order, the parties are being referred as per their position in the cause title of this review petition.

4) The status of the parties in this review petition are as follows:-

Sl.	Name of parties	Status in this review petition	Status in the writ petition.
1.	The State of Assam	Petitioner	Respondent no.1
2.	Md. Hafizur Rahman	Respondent no.1	Petitioner
3.	Director, Inland Water Transport, Assam	Proforma respondent no. 2	Respondent no.2
4.	The Deputy Secretary to the Govt. of Assam, Transport Department	Proforma respondent no. 3	Respondent no. 3
5.	Sri Ram Krishna Sarmah	Proforma respondent no. 4	Respondent no. 4

5) By filing the writ petition referred herein before, the respondent no. 1 had ventilated his grievance that he had been denied promotion. Accordingly, he had prayed for a direction upon the review petitioner and the proforma respondent nos. 2 and 3 to promote him to the post of Assistant River Surveyor on merit and prayer was also made for quashing the order dated

18.11.2013, issued by the Transport Department (proforma respondent no.3), thereby promoting the proforma respondent no. 4 to the said post.

6) The writ petition was contested by the review petitioner by filing affidavit-in-opposition. The proforma respondent no. 2 had filed an affidavit-in-opposition under the nomenclature of "additional affidavit-in- opposition". The respondent no. 1 had filed two additional affidavits.

7) Considering the materials available on record and upon hearing the learned counsel for the parties, by the order under review, this Court had held, *inter alia*, as follows:-

"11) It appears from the perusal of Rule 11 that as from the Rule prevailing from 1991 till the subsequent 2012 Draft Rules that Assistant River Surveyor an incumbent must have rendered minimum 8 years of service in the feeder post. The records show that the respondent No.5 had joined service as Inspector (Tech) with effect from 10.10.2017. Accordingly, when the respondent No.4 was first promoted temporarily on 18.11.2013, to officiate in the post of Assistant River Surveyor under Regulation 4(D) of the APSC, (L &F), Regulation 1951, he did not have the qualified years of service as laid down in the Rule 11(4)(1)(a). It appears from the materials on record that there is no dispute, rather, all the parties are ad-idem that the IWT Department of the State had been following the Draft Service Rule of 1991 and thereafter, the Draft Service Rules of 2012, notwithstanding that the same was not notified as a full-fledged rule. Under such circumstances, as the respondent No.4 is found to have been promoted to the post of Assistant River Surveyor without having the requisite years of service, the petitioner having been regularized from 1998, had the requisite qualification to be considered for appointment to the post of Assistant River Surveyor.

12) Considering the fact that the respondent No.4 had been granted promotion and having served the Department till his superannuation and considering the prayer made by the petitioner herein, this Court had not inclined to interfere with the

impugned order No.TWT.43/2007/329-D dated 18.11.2013 by which the respondent No.4, namely, Sri Ram Krishna Sarmah was promoted to officiate in the post of Assistant River Surveyor. However, on finding that the petitioner was deprived of his promotion by not considering his candidature to hold the post of Assistant River Surveyor, this Court is inclined to partially allow this writ petition by directing the respondent to give effect to the promotion to the petitioner, namely, Md. Hafizur Rahman to the post of Assistant River Surveyor with effect from 18.11.2013, the date on which the respondent No.4 was granted officiating promotion. Accordingly, the petitioner shall not be entitled to financial benefits accrued on and from 18.11.2013. However, for all other purpose of service, the petitioner would be considered to be officiating in the post of Assistant River Surveyor with effect from 18.11.2013.

13) Accordingly, the petitioner will be deemed to be promoted to the post of Assistant River Surveyor with effect from 18.11.2013 i.e. the date of promotion for the respondent No.4 but he will not be entitled to any back wages for the post of Assistant River Surveyor with effect from 18.11.2013 till the date of retirement of the respondent No.4. The petitioner would be only entitled to notional fixation of pay with effect from 18.11.2013 against the post of Assistant River Surveyor and salary will be drawn against the post of Assistant River Surveyor from the date of subsequent to the date of superannuation of the respondent No.4.

14) Accordingly, the IWT Department authorities are directed to pass appropriate orders to grant benefit of this order to the petitioner.

15) With the aforesaid directions made above, the writ petition stands partly allowed.

16) A copy of the Draft Assam Inland Water Transport Service Rules, 1991 as provided by the learned Senior counsel for the petitioner is kept as a part of the record."

Submissions of the learned counsel for the review petitioner:

8) It was submitted that in passing the impugned judgment under

review, an error apparent on the face of the record in appreciating the factual matrix had crept in, which vitiated the said judgment.

9) In the said context, it was submitted that the respondent no. 1 was working as “work-charged Junior Engineer” from 1991 in the establishment of the Directorate of Inland Water Transport, Sadilapur Construction site. Thereafter, vide order dated 24.12.1998, he was transferred to River Conservancy Branch, where he is still working.

10) It was submitted that the pleaded case of the respondent no. 1 in the writ petition was that he was having educational qualification of 10+2 with 3 (three) year’s Diploma course and was thus, eligible to be appointed as a Junior Engineer. In the year 2001, he had acquired the qualification of Degree in Arts by pursuing a 3 (three) year degree course. Thereafter, vide order dated 29.07.2004, his service as Junior Engineer was regularized by creating a post personal to the respondent no.1 w.e.f. 17.06.2004 and therefore, there was no further scope for promotion.

11) It was further pleaded that pursuant to notification dated 18.11.2013, the Deputy Secretary to the Govt. of Assam, Transport Department (proforma respondent no. 3) had promoted the proforma respondent no. 4 to the post of Assistant River Surveyor under Regulation 4(D) of the Assam Public Service Commission (Limitation and Function) Regulation, 1951 [“APSC (L&F) Regulation” for short].

12) It was submitted that in the order under review, this Court had committed error apparent on the face of record by not considering the prescription under the draft Assam IWT Service Rules, 2012, which requires that promotion to the post of Assistant River Surveyor can be made from the cadre

of Inspector (Technical) on seniority- cum- merit basis, provided that the incumbent must have the qualification of 10+2 pass and minimum of 5 (five) year's service in the said cadre. Accordingly, it was submitted that the respondent no. 1 did not meet the prescribed criteria for promotion as there was no provision for promotion of Work Charged Junior Engineer to the cadre/post of Assistant River Surveyor.

13) It was further submitted that the Inland Water Transport Department has a gradation/ seniority list for "Junior Engineers (Regularised from Work Charged)", which is an ex cadre post, and that there is a separate gradation/ seniority list for "Junior Engineer".

14) It was also submitted that this Court had failed to appreciate that the service of Md. Hifzur Rahman (respondent no.1) was regularized to a personal post and therefore, an *ex cadre* post. Hence, the respondent no. 1 was not entitled for any further promotion till his service is encadred in the feeder post. Moreover, it was not the case of the respondent no. 1 that he was promoted to the post of Assistant River Surveyor, but by order no. DWT-50/2017/54-B dated 06.12.2018, he was merely given an additional charge of Assistant River Surveyor, IWT.

15) In support of her submissions, reliance is placed on the case of (i) *Dilip Talukdar & Ors. V. State of Assam & Ors., 2017 (2) GLT 135: (2017) 3 GLR 376*, (ii) *Motiur Rahman Laskar v. State of Assam & Ors., W.P.(C) 4254/2014, decided on 16.03.2015*, which has been followed by this Court in the case of *Harendra Chandra Lahkar v. The State of Assam & Ors., W.P.(C) 8985/2019, decided on 05.10.2021*, and *Kuladhar Talukdar & Ors. v. The State of Assam & Ors., W.P.(C) 9451/2019, decided on 18.05.2021*.

16) Accordingly, it was submitted that the correct state of facts were not appreciated in its correct perspective, which is a good ground to review the impugned judgment and as such, no appeal has been preferred against the said judgment and order.

Submissions by the learned counsel for the respondent no.1:

17) Per contra, the learned counsel for the respondent no. 1 had submitted that merely because the service of the respondent no. 1 was regularized in a non-sanctioned post, it would not disentitle him to all service benefit, which included further promotion to the next higher post. Accordingly, it was submitted that the impugned judgment did not warrant any interference. In support of his submission, the learned counsel for the respondent no. 1 had placed reliance on the case of *Nihal Singh & Ors. v. State of Punjab & Ors.*, 2013 Legal Eagle (SC) 588: (2013) 14 SCC 65.

18) Moreover, it was submitted that if the petitioner was aggrieved by the impugned judgment, the petitioner may prefer an appeal, if so advised.

Discussions and decision:

19) Considered the materials on record and also considered the submissions made by the learned standing counsel for the petitioner and the learned counsel for the respondent no. 1.

20) In this case, the learned standing counsel for the respondent no. 1 had made four-fold submissions, viz., (i) the respondent no.1 did not possess the requisite qualification for the post of Assistant River Surveyor, (ii) There was a separate gradation list for Junior Engineer (W/R); (iii) The service of respondent no. 1 was regularized to a personal post, which is an *ex cadre* post; and (iv) The petitioner was never promoted to the post of Assistant River

Surveyor, but he was given to hold an additional charge of the said post, which did not entitle him to be promoted to the said post. It is thus disputed at the Bar that the aforesaid four points were not considered by this Court in the impugned judgment.

21) The first question which falls for consideration is whether it was permissible for the Court to review its judgment/ order, on the ground that facts were not correctly appreciated.

22) In a quest for the answer, the Court has considered the case of *Surendra Kumar Vakil & Ors. v. Chief Executive Officer, M.P. & Ors., AIR 2004 SC 3088*. In the said decision, the Supreme Court of India had held that a point has been heard and decided which cannot form a ground for review even assuming that the view taken in the judgment under review is erroneous. However, in the case of *Eastern Coalfields v. Joscon, (2003) 12 SCC 339*, while considering the submissions that the learned Judge did not consider the argument of the learned counsel for the appellant, the Supreme Court of India had held if the appellant was aggrieved against the statement of fact contained in the judgment, it was open to him to file a review. In the case of *Green View Tea and Industries v. Collector & Anr., Golaghat, (2004) 4 SCC 122*, the Supreme Court of India had held that the said observation would mean when all material evidence had not been considered, it constituted error apparent on the face of record for review of the order and further referred to its earlier decision in the case of *S. Nagaraj & Ors. v. State of Karnataka & Ors., (1993) Supp (4) SCC 595*, where it was observed that “*It is the duty of the Court to rectify, revise and re-call its orders as and when it is brought to its notice that certain of its orders were passed on a wrong or mistaken assumption of facts and that implementation of those orders would have serious consequences*”. In the

case of *Dhanani Shoes Ltd. V. State of Assam & Ors., 2008 (3) GLT 361*, this Court had held that power of review is wide enough to include misconception of fact or in law by a Court and could also include misunderstanding the nature of undertaking given by an Advocate.

23) Thus, as the learned standing counsel for the petitioner had been able to demonstrate that the four points, referred to herein before, had not been considered in the judgment and order under review, in light of the herein before referred case of *Eastern Coalfields (supra)* and *Green View Tea and Industries (supra)*, the Court is of the considered opinion that power of review can be exercised in this case.

24) At this stage, a bit of pleadings made in the writ proceeding is required to be referred to:-

- a. It would be pertinent to mention that in the amended writ petition, the respondent no. 1 had pleaded that the respondent no. 4, who was the then Inspector (Tech), was given *ad hoc* promotion to the post of Assistant River Surveyor vide notification dated 18.11.2013 for a period of one year or till regularization, whichever is earlier.
- b. It was projected in the amended writ petition that by order dated 09.10.2013, notice of motion including notice on the prayer for interim relief was issued and that the Court had not been informed about the order dated 18.11.2013, when the writ petition was taken up on 20.11.2013.
- c. In para-12 of the amended writ petition, it was also pleaded to the effect that the para-7 of the counter-affidavit, a statement had been made that the respondent no. 4 had been promoted to the post of

Assistant River Surveyor by the Departmental Promotion Committee held on 11.07.2013 without giving any further particulars.

25) It is seen from the record that by order dated 20.11.2013, this Court had passed an interim order to the effect that till the next date, the post of Assistant River Surveyor should not be filled up. The said interim order was not extended thereafter.

26) In this review petition, the stand of the petitioner is that the respondent no. 1 and respondent no. 4 are not similarly situated by virtue of Rule 5(7)(c) and Rule 6 of the Assam Inland Water Transport Service Rules, 2012. It is not in dispute that the said Rule is still in draft form as it has not been notified in the official Gazette. The relevant provisions are quoted below:-

“5. Method of recruitment.-

(1) * * *

(7) (c) Recruitment to the cadre of Asstt. River Surveyor shall be made by promotion from the cadre of Inspector (Conservancy) on seniority cum merit basis having minimum qualification of 10+2 pass & 5 years experience in the cadre.

6. The qualification and experience of officers (cadres) for direct recruitment are as follows:

*(1) **Assistant Engineer:-***

(1) B.E. (Civil/Mechanical/Marine Engineering) degree from a Govt. Recognized University Institution or 3 (three) years Diploma in Civil/ Civil/ Mechanical/ Marine Engineering from a Govt. recognized Institute with 8 (eight) years experience in Inland Water Transport as Junior Engineer.

OR

A candidate must have passed the A&B of the Associate Membership Examination of the Institution of Engineers (India) and possessing a certificate to that effect from the Institution of Engineers (India).

*2) **Junior Engineer:-***

3 years Diploma in Civil/Mechanical/ Marine/ Electrical Engineering from a recognized Institute.

*3) **Asstt Commercial Officer:-***

Degree in Commerce/Arts with Economics/Science from any Govt. recognized University."

27) Therefore, from the Draft Rules of 2012, it is seen that while the post of Junior Engineer is the feeder cadre for promotion to the post of Assistant Engineer, the post of Inspector (Conservancy) is the feeder cadre to the post of Assistant River Surveyor.

28) As per the affidavit-in-opposition filed by the respondent no.4, he had joined in the post of Tracer vide order dated 28.07.1982, and his service was regularized vide order dated 27.07.1988. Thereafter, vide order under memo dated 30.11.1992, his service was re-distributed as Field Assistant (Conservancy). In the Inter-se-seniority list of Inspector/ Field Assistant/ Tracer of the Directorate of IWT, which was published by the Transport Department, Government of Assam on 19.04.2007, the name of the respondent no.4 appeared at serial no. 7, whereas the name of the respondent no. 1 did not find place therein. Thereafter, a provisional gradation list of the post of Inspector (Tech) of Directorate of IWT was published by the Transport Department, Government of Assam on 14.08.2012, wherein the name of the respondent no. 4 is at serial no. 3, but the name of the respondent no. 1 does not find place therein. Thereafter, another provisional gradation list of the post of Assistant River Surveyor in the Directorate of IWT was published by the Transport Department, Government of Assam on 17.12.2015, wherein the name of the respondent no. 4 appears as the only candidate at serial no. 1.

29) In contrast, the respondent no. 1 had annexed the copy of notification dated 29.07.2004 (Annexure-3), by which the Government had regularized the service of the 39 persons including the respondent no. 1 as "work-charged Junior Engineer", which was a post personal to the incumbents

named therein and it was also mentioned in clause 4 of the said notification that their inter-se-seniority will be fixed in due course.

30) It is for the first time in this review petition that the review petitioner had annexed a copy of the provisional gradation list of Junior Engineer (W/R) under the Directorate of IWT, which was published by the Transport Department, Govt. of Assam on 07.08.2012, wherein the name of the respondent no. 1 appears at serial no. 15. The learned standing counsel for the petitioner had submitted that the abbreviation 'W/R' stands for "Regularised Work-Charged". The petitioner had also filed an additional affidavit on 22.11.2022 to bring on record the final gradation list of Regularised Work-Charged Junior Engineers under the Directorate of IWT, which was published by the Transport Department, Government of Assam vide notification no. TWT.43/2012/120 dated 23.07.2018, after considering claims and objections to the provisional gradation list published on 17.12.2015. In the final gradation list published on 23.07.2018, the name of the petitioner appears at serial no. 13. It may be mentioned that the name of respondent no. 4 does not find place either in the provisional gradation list or in the final gradation list of Regularised Work-Charged Junior Engineers.

31) Thus, the petitioner has been successful in demonstrating that the respondent no. 1 i.e. the writ petitioner and the respondent no. 4 are differently situated as per the Draft Assam Inland Water Transport Service Rules, 2012.

32) The learned counsel for the respondent no. 1 had placed reliance on the case of *Nihal Singh (supra)*. In the said case, the appellants were appointed as Special Police Officer. On facts, it was held by the Supreme Court of India that their initial appointment was not an irregular appointment and therefore, direction had been issued to the State Government to absorb the

appellants in service of the State. On facts, the present case in hand is distinguishable because it is not the case of the respondent no. 1 in the writ petition that he had been appointed by following due process of law relating to appointment in the Government and therefore, the ratio laid down in the case of *Nihal Singh (supra)*, cannot be applied in the distinguishable facts of the present case.

33) In this case, the respondent no. 1 had not filed the writ petition with clean hands and he had suppressed material facts that the Government had notified two separate gradation lists for (a) Assistant River Surveyor in the Directorate of IWT; and for (b) Regularised Work-Charged Junior Engineers. Thus, when the service of the respondent no.1 (i.e. the writ petitioner) was regularized in the post of Regularised Work-Charged Junior Engineer, which was made personal to him, he did not have any legitimate claim for being promoted to the post of Assistant River Surveyor in the Directorate of IWT, for which post of Inspector (Conservancy) was the feeder cadre.

34) The Division Bench of this Court, in the case of *Dilip Talukdar (supra)*, had held that the posts in which the petitioners were regularized was never added to the notified cadre in the department and thus, it was held that temporary creation of post cannot automatically add to the cadre strength of the department and claim for promotion from a person holding an *ex cadre* post, is not legally tenable. Para 11 and 12 of the said decision is extracted below:-

11. *On the basis of above reasoning, the prayer for promotion made by the ex-cadre incumbents holding posts on personal basis, was found to be untenable and accordingly the cases came to be dismissed, under the common judgment dated 16.3.2015.*

12. *We have seen the reasons recorded by the learned Judge for the impugned*

verdict and find that the posts against which the writ petitioners were regularized were never added to the notified cadre in the department. Yet no plea was advanced for en-cadrement of the posts held by the affected parties. The promotion in the department can be considered only from the eligible employees in the feeder cadre and the writ petitioner being outside of the cadre, cannot have any enforceable right to claim promotion, particularly when, the regularization order itself stipulates that they are regularized in posts personal to them. Such temporary creation of post cannot automatically add to the cadre strength of the department and claim for promotion from a person holding an ex-cadre post, is not legally tenable. Therefore we see no basis to take a different view in the matter than the one taken by the learned Single Judge, in dismissing the cases.

35) In this case, the respondent no. 1 had miserably failed to show that Regularised Work-Charged Junior Engineer is the feeder cadre to the post of Assistant River Surveyor. Moreover, the respondent no. 1 had also failed to show that the post of Regularised Work-Charged Junior Engineer, a personal post to which the respondent no.1 was appointed was en-cadred in the Directorate of IWT by the Government of Assam.

36) Thus, the Court has no hesitation to hold that the pleaded facts were incorrectly appreciated when the writ petition was decided by the order impugned in this review application. Moreover, the respondent no. 1 had suppressed material facts in the writ petition that the Government had notified two separate gradation lists for (a) Assistant River Surveyor in the Directorate of IWT; and for (b) Regularised Work-Charged Junior Engineers. The said fact had a direct bearing in the case. Suppression of material facts otherwise amounts to playing fraud with the Court and therefore, the Court would have an inherent power to revisit the impugned order which has been fraudulently obtained by suppression of material facts even in a collateral proceeding. Therefore, not only this review petition would be maintainable, but the review petitioner has been able to make out a case for review of the order dated 26.02.2019, passed by

this Court in W.P.(C) 6126/2013.

37) In light of the discussions above, the Court is of the considered opinion that this is a fit and proper case to recall the said impugned order dated 26.02.2019, passed by this Court in W.P.(C) 6126/2013. The Court is inclined to hold that the respondent no.1, i.e. the writ petitioner is not entitled to be promoted to the post of Assistant River Surveyor with effect from 18.11.2013 till the date of his retirement. Resultantly, the respondent no. 1 would also not be entitled to any consequential benefit in respect of the promotional post of Assistant River Surveyor with effect from 18.11.2013.

38) Consequently, the writ petition is liable to be dismissed, which we accordingly dismiss.

39) Under the circumstances, the parties are left to bear their own cost.

JUDGE

Comparing Assistant