

GAHC010287112019



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

Case No. : WP(C)/8708/2019

GO-002092W RAM MILAN
S/O LT. GHINAHOO YADAV, R/O FLAT NO. A3/529, HIMSAGAR APARTMENT,
BUILDERS AREA, POCKET IV, GREATER NOIDA, DIST. GAUTAM BUDDH
NAGAR, UTTAR PRADESH, PIN-201310, PRESENTLY SERVING AS
SUPERINTENDING ENGINEER (CIVIL) AND POSTED AT HQ CE (P) SEWAK
(GREF), DIMAPUR C/O 99 APO, PIN-931714

VERSUS

UNION OF INDIA AND 5 ORS.
REP. BY SECRETARY TO THE GOVT. OF INDIA, MINISTRY OF DEFENCE,
SOUTH BLOCK, NEW DELHI-110001

2:SECRETARY
DEPTT. OF PERSONNEL AND TRAINING NORTH BLOCK
NEW DELHI

3:CHAIRMAN
UNION PUBLIC SERVICE COMMISSION
SHAHJAHAN ROAD
NEW DELHI

4:THE UNION OF INDIA
REP BY JOINT SECRETARY (BR)
MINISTRY OF DEFENCE BORDER ROADS DEVELOPMENT BOARD (BRDB)
ROOM NO. 198/1
SOUTH BLOCK
NEW DELHI-110011

5:DIRECTOR GENERAL
BORDER ROADS ORGANIZATION

SEEMA SADAK BHAWAN
RING ROAD
DELHI CANTT. NEW DELHI-110010

6:ADDITIONAL DIRECTOR GENERAL BORDER ROADS (EAST)
HQ ADGBR (EAST)
LANKESHWAR
GUWAHATI
PIN-900885
C/O 99 AP

Advocate for the Petitioner : MR TAPAS DAS

Advocate for the Respondent : ASSTT.S.G.I.

BEFORE
HONOURABLE MR. JUSTICE ARUN DEV CHOUDHURY

ORDER

Date : 29-02-2024

1. Heard Mr. T Das, learned counsel for the petitioner. Also heard Mr. RKD Choudhury, learned DSGI.
2. The present writ petition is filed assailing an order dated 28.02.2019 (Annexure – 6) whereby, according to the petitioner some persons junior to the petitioner were promoted. The further prayer in the writ petition is to consider the case of the petitioner for promotion from the post of Superintending Engineer (Civil) to the post of Chief Engineer (Civil) by conducting review DPC for panel year 2018/2019 regular. The other prayer was to grant non functional financial up-gradation to the petitioner with effect from 01.04.2014 with all consequential benefits inasmuch as according to the petitioner, from the said date his juniors were granted non functional up-gradation.
3. At the outset Mr. Das has submitted that so far relating to

the consideration of the case of the petitioner for promotion and conducting of review DPC is a subject matter of WP(C) 6292/2021, which was disposed of by this court with a direction to consider the case of the petitioner and to keep the same under seal cover.

4. Mr. Das further submits that the other prayer of setting aside of the promotion orders made in favour of the juniors are also being abandoned by the petitioner as his case for promotion is directed to be considered .Therefore, in the present writ petition as the petitioner is claiming only non functional up-gradation and grant of such non functional financial up-gradation will not in any way hamper the inter se seniority.

5. The basic grievance of the petitioner is that petitioner became entitled for non functional financial up-gradation and payment of higher scales of pay equivalent to a Chief Engineer of the department. According to the petitioner, the required qualification for grant of such non functional financial up-gradation is the requirement of basic qualification of having service of 4 (four) years of service as Superintending Engineer and out of which two years should be of command posting. According to the petitioner he is having 3½ years of posting as Superintending Engineer.

6. According to the petitioner when the case of his juniors for non functional financial up-gradation were considered and granted on 01.04.2014 the petitioner was having 2 (two) years of posting as Superintending Engineer and 1½ years of posting in command post. Therefore, according to the petitioner he was entitled for consideration for non functional financial up-gradation.

7. The learned counsel for the petitioner relying on an office memorandum dated 25.03.1996 issued by the DOPT further contends that the said OM prescribes that where junior who have completed their qualifying/eligibility services are being considered for promotion their seniors would also be considered provided they are not short of requisite qualifying eligibility service by more than ½ years.

8. Mr. Das contends that admittedly his juniors were considered on 01.04.2014 and on 19.03.2013, the petitioner had command posting of 1 year 6 months, whereas the minimum requirement of command posting is two years and therefore the petitioner had more than ½ of the required qualification and therefore his case ought to have been considered by the selection committee.

9. The further case of the petitioner is that though the petitioner was arrested by the CBI on 20.03.2013, however, the cognizance was taken by the learned trial court in the case on 03.12.2018. Therefore, there was no bar for the selection committee on the date when his juniors were considered for the non functional financial up-gradation, to consider the case of the petitioner. In this connection Mr. Das relies on the Office Memorandum dated 14.09.1992 read with Office Memorandum dated 02.11.2012 issued by the DOPT to contend that as per said OM the prosecution for a criminal charge is deemed to be instituted on the date the Magistrate takes cognizance of the complaint or report filed by police officer and according to him the cognizance was taken in the month of December 2018, and on the due date of consideration of the case of the petitioner, there was no cognizance and therefore there was no

bar to consider his case for non functional financial up-gradation.

10. Accordingly, Mr. Das submits that the petitioner is having a right for consideration for non functional financial up-gradation, however, such right has been violated by the respondent authorities and his case is not even considered till date though he had filed a representation before the competent authority on 28.03.2019. Accordingly, he submits that a direction should be issued to the competent authority to consider the case of the petitioner for non functional financial up gradation as per the extant norms and regulations.

11. Mr. RKD Choudhury learned counsel representing the Union of India submits that the Union of India has filed an affidavit denying the contentions raised by the petitioner, however, Mr. Dev Choudhury submits that the case of the petitioner was not placed for consideration and therefore, there is no specific order either accepting or denying his contention.

12. It is true that the respondents have denied the right of the petitioner by way of an affidavit, however, admittedly the case of the petitioner has not been placed before the selection committee for grant of non functional financial up-gradation.

13. That being the position this court cannot play the role of the DPC as a selection to determine whether the petitioner is entitled for such non functional financial up-gradation in the given facts of the case inasmuch as in a given case, where a decision has already been made by the authority after consideration, this court can very well

look into such decision and/or decision making process in exercise of its power of judicial review, however, this court is neither an appellate authority or a selection committee to determine the entitlement of the petitioner inasmuch as such exercise is to be carried out by a selection committee prescribed under the extant norms.

14. That being the position, this court is of the view that the petitioner is having a right to get his case considered for non functional financial up-gradation inasmuch as it is well settled that the consideration for promotion is a valuable right .That being the position and as prayed by the petitioner the writ petition stands disposed of directing the respondent authorities to consider the case of the petitioner for non functional up-gradation in terms of the extant norms and consider his claim and pass a reasoned order in this regard.

15. Such exercise is to be carried out within a period of 8 (eight) weeks from the date of receipt of a certified copy of this order to be produced by the petitioner before the respondent No.1.

16. At this stage Mr. RKD Choudhury, learned counsel contends that even if it is assumed that the petitioner's case is considered, however, in view of the criminal proceeding and in terms of the office memorandum consideration of the case of the petitioner for non functional financial up-gradation is required to be kept under seal cover till the criminal trial is over. However, this court will not observe anything in this regard, whatever is necessary shall be done by the respondent authorities in terms of the extant norms and office memorandum issued by the DOPT in this regard in as much as

according to the petitioner his right follows from the OM issued by the DOPT.

17. A liberty is granted to the petitioner to file a fresh representation incorporating all his grievances if so advised, otherwise the authority shall consider the representation of the petitioner filed on 28.03.2019.

18. Accordingly, the writ petition stands disposed of.

JUDGE

Comparing Assistant