

Court No. - 4

Case :- WRIT - A No. - 3649 of 2024

Petitioner :- Hameedullah

Respondent :- Chief Secy., Govt. Of U.P. / Chairman Selection Committee 101, B Block, Lok Bhawan, Lko. And Others

Counsel for Petitioner :- Abhinav Trivedi, Prashant Kumar Singh

Counsel for Respondent :- C.S.C., Avinash Singh Vishen

Hon'ble Rajesh Singh Chauhan, J.

1. Heard Sri Abhinav Trivedi, learned counsel for the petitioner assisted by Sri Prashant Kumar Singh, Sri Prashant Singh Atal, learned C.S.C.-I assisted by Sri Sandeep Sharma, learned Standing Counsel for the State.

2. By means of this petition the petitioner has prayed following relief :

"i. Issue a writ order or direction in the nature of Mandamus thereby directing the Opposite parties (Particularly Opposite Party No. 3) to convene a Meeting of Departmental Promotion Committee at the earliest i.e. prior to the date of occurrence of vacancy on the post of Engineer-in-Chief (Mechanical) i.e. 01.07.2024 with all consequential benefits.

ii. Issue a writ order or direction in the nature of Mandamus thereby directing the opposite parties to consider the petitioner's claim for promotion from the post of Chief Engineer, Level II (Mechanical) to the post of Engineer-in-Chief (Mechanical) within the stipulated time as this Hon'ble Court may graciously be pleased to fix i.e. prior to 01.07.2024.

iii. Issue a writ order or direction in the nature of Mandamus thereby directing the Opposite Parties to give ad-hoc /officiating charge of Engineer-in-Chief (Mechanical) to the petitioner with effect from 01.07.2024 till regular promotions are made on the post of Engineer-in-Chief (Mechanical)."

3. The brief facts of the case are that the petitioner applied for the post of Assistant Engineer (Mechanical) pursuant to the advertisement issued in the year 1985, and the last date to accept the application form was 16.12.1985. Thereafter, he was appointed on the post in question i.e Assistant Engineer (Mechanical) in the Irrigation Department through U.P Public Service Commission on 18.3.1991.

4. Thereafter, the petitioner was promoted on the post of Executive Engineer (Mechanical) on 24.7.2012, on the post of Superintending Engineer (Mechanical) on 19.7.2021 and lastly on the post of Chief Engineer (Level-II)(Mechanical Branch) on 29.12.2023.

5. The proviso to Rule 5 (v)(b) of The U.P. Service of Engineers (Irrigation Department)(Group 'A') Rules, 1990 (hereinafter referred to as Rules 1990 in short) categorically provides for filling the post of Engineer-in-Chief (Mechanical) by promotion from amongst Chief Engineer, Level-II of Mechanical Branch if Chief Engineer- Level is not available. There was only one sanctioned post of Engineer-in-Chief (Mechanical) which was lying vacant before the retirement of the petitioner inasmuch as the petitioner was to retire / superannuate on 31.7.2024, therefore, the petitioner was fully eligible for being considered for promotion on the post of Engineer-in-Chief (Mechanical) as the criteria thereof is merit.

6. Not only the above, the Government Orders dated 23.1.1998 and 4.10.2019 provides that vacancy occurring on first July on account of the retirement of the incumbent on 30th of June should be included for consideration in the Departmental Promotion Committee (hereinafter referred to as DPC) for the preceding year.

7. Sri Trivedi explained the aforesaid Government Order by submitting that if a vacancy occurred on 1.7.2024 as the incumbent attains the age of superannuation and retires on 30.6.2024, the claim of eligible persons for filling the said vacancy by promotion shall be considered by the DPC convening for the selection year commencing on 1.7.2023.

8. Since the competent authority of the State i.e. Additional Chief Secretary, Department of Appointment and Personnel, the opposite party no. 3 was not convening the meeting of DPC / selection committee for which the petitioner was being adversely effected for the reason that he would be retiring on 31.7.2024 so he filed the present writ petition on 8.5.2024.

9. The matter was taken up on 10.5.2024 and on the request of learned Standing Counsel to seek instructions the matter was posted for 17.5.2024.

10. On 17.5.2024 the learned Standing Counsel has informed the Court on the basis of instructions that the vacancy which would be created on the retirement of existing incumbent for the post of Engineer-in-Chief on 30.6.2024 would be considered for the next year i.e. 2024-25. Learned Standing Counsel has also informed the Court that since there is an ambiguity in the initial appointment of the petitioner on the post of Assistant Engineer, therefore, the notice has been issued against him, though no departmental inquiry was pending against the petitioner. On that learned counsel for the petitioner has submitted that in view of clause 2(1) of the Government Order dated 4.10.2019 the vacancies which are to arise in the year of recruitment would also include the vacancy which would occur on 1.7.2024 on account of retirement of the person and same is to be treated in the same year of recruitment.

11. Placing reliance on the definition clause of the Rules, 1990 Sri Trivedi referred Rule 3(h) which defines 'year of recruitment' means a period of 12 months commencing from the first day of July of a calendar year. Therefore, Sri Trivedi contended that once the year of recruitment is to commence from first day of July of a calendar year and the vacancy which would be arising on 30.6.2024 on account of retirement has to be treated as a vacancy to the recruitment year starting from 1.7.2023 to 30.6.2024 and thus, the contention of the respondents that same would relate to the year 2024-25 i.e. from 1.7.2024 to 30.6.2025 is patently misconceived. So as to clarify the aforesaid position learned Standing Counsel prayed for three days time to seek specific instructions.

12. The aforesaid case was taken up on 24.5.2024 and on that date learned Standing Counsel on the basis of instructions has informed the Court that no eligible person has been found for the purpose of being considered for promotion to the post of Engineer-in-Chief (Mechanical) for the year 2023-24 and one notice under Rule 10(2) of Uttar Pradesh Government Servants (Discipline & Appeal) Rules, 1999 (hereinafter referred to as the Rules, 1999 in short) has been issued against the petitioner on 21.5.2024 to which the petitioner is to file reply. On that date this Court observed that no reasons have been indicated by the learned Standing Counsel as to how no eligible persons have been found in the zone of consideration for promotion on the post of Engineer-in-Chief

(Mechanical) in view of the earlier observation of this Court vide order dated 17.5.2024. This Court noticed the submission of Sri Trivedi that the petitioner shall be filing his reply to the show cause notice within two days but directed the learned Standing Counsel to clarify as to why the instructions have been given that there is no eligible person for being considered for promotion to the post of Engineer-in-Chief (Mechanical) for the year 2023-24 and even if a notice under Rule 10(2) of Rules, 1999 has been issued, the candidature of the eligible persons should be considered and the sealed cover procedure may be adopted in the case of the petitioner. To clarify the aforesaid position the next date was fixed for 29.5.2024.

13. On 29.5.2024 Sri Prashant Singh Atal, learned C.S.C.-I has informed the Court on the basis of instructions that the matter of the petitioner has been considered but as per Rule 5(v)(b) of the Rules, 1990 the promotion to the post of Engineer-in-Chief (Mechanical) is to be made by promotion from amongst the substantively appointed Chief Engineers (Level-I) of the Mechanical Department and no Chief Engineer (Level-I) in the Mechanical Department is available. Sri Atal has however, informed the Court, on the basis of instructions, that sufficient number of Chief Engineers in Level-I (Civil) are available so there cannot be any question for consideration of the claim of the petitioner for promotion to the post of Engineer-in-Chief (Mechanical) as he was then working as Chief Engineer, Level-II.

14. Sri Trivedi, learned counsel for the petitioner has stated that the aforesaid instructions are not only insufficient and improper but deliberately not referring the proviso clause of Rule 5(v)(b) of Rules, 1990 would be a deliberate attempt to mislead the Court also inasmuch as the proviso of the aforesaid Rule clearly provides that in case Chief Engineer (Level-I) in either branch is not available or is not found suitable for promotion to the post of Engineer-in-Chief may be filled by promotion amongst the substantively appointed Chief Engineers (Level-II) of the **respective branch**. Therefore, Sri Trivedi has stated that if the proviso is read in totality it would indicate that the word '**respective branch**' would mean that the availability of Chief Engineer (Level-I) has to be seen in the respective branch and not in all the branches, therefore, in the present case

the promotion should be made on the post of Engineer-in-Chief (Mechanical) considering the candidature of the petitioner who was then sole Chief Engineer (Level-II) in Mechanical Branch.

15. Considering the fact that the post of Engineer-in-Chief (Mechanical) was to fall vacant on 30.6.2024 and D.P.C. was to be held prior to that date this Court listed the case in the week commencing 18.6.2024 but on the same date the case could not be taken up and the case was heard at length on 26.7.2024 and judgment was reserved. On 31.7.2024 the petitioner would have been retired / superannuated.

16. On a specific query as to why the meeting of D.P.C. could not be convened on or before 30.6.2024 or before the retirement of the petitioner, it has been informed that since the show cause notice dated 21.5.2024 has been issued against the petitioner and considering the reply of the petitioner the petitioner was awarded punishment of censure entry and withholding of one increment for one year and when such punishment order was sent to the U.P. Public Service Commission for approval, the Commission was of the opinion that instead of aforesaid punishment the petitioner should be awarded major punishment of dismissal for his misconduct applying for the post of Assistant Engineer when he was under age. However, Sri Atal has informed the Court that till 26.7.2024 the date of final hearing, no such punishment order was passed by the appointing authority. However, the case of the petitioner for promotion on the post of Engineer-in-Chief (Mechanical) could not be considered for that reason.

17. Heard learned counsel for the parties and perused the material available on record.

18. At the very outset I would like to indicate that on the same date i.e. 26.7.2024 the another writ petition of the petitioner bearing Writ -A No. 4764 of 2024 (Hameedullah and others vs. State and others) wherein the show cause notice dated 21.5.2024 was assailed, was heard and that writ petition was allowed quashing the impugned show cause notice dated 21.5.2024.

19. For the convenience and better appreciation of the facts and circumstances of the issue in question on the touchstone of the legal

provisions of Rule 3(h) and Rule 5(v)(b) are being reproduced herein below :

"Rule 3(h): "Year of recruitment" means a period of twelve months commencing from the first day of July of a calendar year.

Rule 5(v)(b): Engineer-in-Chief (Mechanical) Irrigation Department-By promotion from amongst the substantively appointed chief Engineers, Level-I of Mechanical Branch:

Provided that in case Chief Engineer(Level-I) in either branch is not available or is not found suitable for promotion, the posts of Engineer-in-Chief may be filled by promotion from amongst substantively appointed Chief Engineers (Level-II) of the respective branch."

20. Clause 2(1) of the Government Order dated 4.10.2019 (Annexure no. 4) reads as under :

"2(1) चयन वर्ष के दौरान घटित होने वाली रिक्तियों की संख्या रिक्ति घटित होने के कारण, (उक्त रिक्ति के सापेक्ष कोई धारणाधिकार, मुहरबंद लिफाफा, आस्थगित चयन या अन्य कोई स्थिति नहीं होनी चाहिए)। संगत चयन वर्ष में दिनांक 30 जून को सेवानिवृत्ति से घटित होने वाली रिक्ति को उसी चयन वर्ष की रिक्तियों से ही शामिल किया जायेगा।"

21. If in the present case the year of recruitment is read in the light of the clause 2(1) of the Government Order dated 4.10.2019 the inference would be drawn that once the year of recruitment is to commence from the first date of July of the calendar year and vacancy which would be arising on 30.6.2024 on account of the retirement of an incumbent, has to be treated as a vacancy of the same recruitment year and the vacancy would relate back to the recruitment year starting from 1.7.2023 to 30.6.2024 and it would not relate back to the year 2024-25 i.e. from 1.7.2024 to 30.6.2025.

22. I am unable to comprehend as to why the proviso of Rule 5(v)(b) of Rules 1990 has been ignored by the respondents and also as to why the aforesaid proviso was not placed before this Court at the time of advancing arguments by the C.S.C.-I assisted by the Standing Counsel. The proviso of any provision of law explains and clarifies the substantive provision and the relevant substantive provision must follow the proviso of that substantive provision. The aforesaid proviso of the Rule 5(v)(b) clearly provides that in case Chief Engineer (Level-I) in the particular branch is not available or is not found suitable for promotion, the post of

Engineer-in-Chief may be filled by promotion amongst substantively appointed Chief Engineers (level-II) on the respective branch. Meaning thereby, if the Chief Engineer (Level-I) of Mechanical Branch is not available, the post of Engineer-in-Chief (Mechanical Branch) of the Irrigation Department should be filled up through promotion amongst available Chief Engineers (Level-II) of the Mechanical Branch and in the present case only the present petitioner was serving on the post of Chief Engineer (Level-II) in the Mechanical Branch, therefore, he was the only eligible to be considered for the promotion on the post of Engineer-in-Chief (Mechanical Branch) in the Irrigation Department.

23. Besides, the impugned show cause notice dated 21.5.2024 which was issued against the petitioner has been quashed vide judgment and order dated 26.7.2024 (supra).

24. Since the petitioner has already retired / superannuated on 31.7.2024, therefore, now he cannot be promoted on the post of Engineer-in-Chief (Mechanical) in the Irrigation Department but he would be entitled for such promotion notionally and he would be getting his post retiral dues admissible for the post of Engineer-in-Chief notionally.

25. Therefore, in view of above, writ petition is **allowed**.

26. A writ in the nature of mandamus is issued commanding the competent opposite parties to consider the claim of the petitioner for promotion from the post of Chief Engineer (Level-II) (Mechanical) to the post of Engineer-in-Chief (Mechanical) in the Irrigation Department notionally, within a period of four weeks from the date of production of certified copy of the order of this Court and he shall be entitled for all consequential service benefits.

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[Rajesh Singh Chauhan, J.]

Order Date :- 23.08.2024/Om