

IN THE SUPREME COURT OF INDIA

CIVIL APPELLATE JURISDICTION

CIVIL APPEAL NO(S). 10662 OF 2018
(ARISING OUT OF SLP (C) NO. 25770 OF 2015)

AJIT KR. BHUYAN AND OTHERSAPPELLANT(S)

VERSUS

DEBAJIT DAS AND OTHERSRESPONDENT(S)

WITH

CIVIL APPEAL NO(S). 10663 OF 2018
(ARISING OUT OF SLP (C) NO. 29168 OF 2015)

A N D

CIVIL APPEAL NO(S). 10664 OF 2018
(ARISING OUT OF SLP (C) NO. 17329 OF 2017)

J U D G M E N T

A.K.SIKRI, J.

Leave granted.

2. These appeals were heard together and are being disposed of by this judgment because of commonality of issues therein. The

judgment impugned is also the same, i.e., judgment dated August 07, 2015 passed by the High Court of Gauhati.

3. Mr. Debajit Das (respondent No.1 herein) was appointed as an Assistant Engineer in the Public Works Department on September 30, 1996 and on completing six years of service he was promoted to the post of Assistant Executive Engineer in December 2002. Subsequently, a post for ex-cadre Executive Engineer was created and he was promoted to the said post vide Notification dated April 02, 2005. Respondent No.1 was granted regular promotion by encadring him on the recommendation of the Selection Committee pursuant to its meeting dated July 27, 2005.
4. On October 14, 2014, an inter se seniority list of Executive Engineers was published and within three days a Selection Committee meeting was convened for promotion to the post of Superintending Engineer. Although the Selection Board proceeded on the basis that there were thirteen vacancies for the post of Superintending Engineers on that date, the appellants herein contend that the number of available vacancies were only ten (six for the year 2011 and four for the year 2014). The appellants have also contended that this increased number of

vacancies was shown only to accommodate respondent No.1 who was at Serial No. 52 in the seniority list. As per the Selection Committee, however, one Ajit Kr. Kakati was promoted from Superintending Engineer to Assistant Superintending Engineer; one Jiauddin Ahmed had suffered the punishment of compulsory retirement and one Kamkhya Prasad Bezbarua was sent on deputation. Thus, three new vacancies arose. With thirteen vacancies, respondent No. 1 was brought within the zone of consideration and was recommended for promotion to the post of Superintending Engineer on October 28, 2014 and the promotion order was issued.

5. Respondent No.11 herein had filed the writ petition being Writ Petition (Civil) No. 5470 of 2014 before the Gauhati High Court challenging the promotion of respondent No.1 to the post of Superintending Engineer. Subsequently, the Assam PWD Engineers Service Association submitted a representation to the Chief Minister of Assam, who by endorsement dated November 11, 2014 directed the Additional Chief Secretary (Personnel Department) to conduct an inquiry into the matter and submit a report. Pursuant thereto, an inquiry was conducted and the report was forwarded to the Commissioner and Special Secretary

to the Government of Assam (PWD) which mentioned grave irregularities and illegalities committed in promoting respondent No.1. Thereafter, the PWD (Confidential Cell), Government of Assam, issued a letter dated December 24, 2014 to various officials of the Personnel Department informing them that a Review Selection Board meeting would be held on January 02, 2015 regarding the promotion to the rank of Executive Engineer (Civil) and Superintending Engineer (Civil).

6. Respondent No.1 also approached the Gauhati High Court by filing Writ Petition (Civil) No. 5 of 2015. During its pendency, an order of demotion was passed against respondent No.1 demoting him to the ex-cadre post of Executive Engineer.
7. The learned Single Judge of the High Court held that the respondent No.1's encadrement to the post of Executive Engineer was illegal. It was also held that the Selection Committee erred in holding the number of vacancies as thirteen as against ten. The learned Single Judge also found respondent No.1 guilty of committing fraudulent acts in getting his promotion to the post of Executive Engineer which was also contrary to the Service Rules as he had not put in minimum of five years service. While holding so, the learned Single Judge negated the

contention of respondent No.1 that the writ petitions filed by the appellants herein suffered from delay and laches.

8. Aggrieved by the same, respondent No.1 filed the appeal. Vide the impugned judgment dated August 07, 2015, the Division Bench of the High Court has set aside the order of the Single Judge thereby permitting respondent No.1 to hold the post of Superintending Engineer (PWD). The appellants, being aggrieved of the same, have filed the instant appeals.
9. We have heard the learned counsel for the parties. The issues involved in these appeals are: (a) whether the promotion of respondent No.1 to the ex-cadre post of Executive Engineer, and encadrement thereof subsequently, is illegal?; (b) whether the delay and laches will come in the way of appellant No.3 in challenging the order of promotion of respondent No.1?; and (c) whether the Government was right in conducting an inquiry when the writ petitions were pending before the Court and whether subsequent demotion of respondent No.1 to the ex-cadre post of Executive Engineer is illegal?
10. The issue pertains to the promotion of respondent No.1 and his seniority vis-a-vis the three appellants in the appeal arising out of

Special Leave Petition (Civil) No. 25770 of 2015. The other two appeals are by the State of Assam as well as Assam PWD Engineers Service Association who are supporting the three appellants in the aforesaid appeal. For this reason, they also assailed the impugned judgment dated August 07, 2015 of the High Court. However, for the sake of convenience, the parties shall be referred to with reference to the appeal arising out of Special Leave Petition (Civil) No. 25770 of 2015, i.e. the appellants and respondent No.1 respectively.

11. Before proceeding further, it would be apt to discuss the manner in which the Division Bench of the High Court has proceeded with the matter resulting into the aforesaid outcome. After taking note of the seminal facts which have already been stated above, the High Court summarised the findings of the learned Single Judge in the following manner:

“(i) The encadrement of the appellant to the post of EE is illegal. As the date when the appellant was promoted from the post of AEE to the post of an excadre EE and thereafter within five months when he was encadred to the post of EE he had not completed the required five years of qualifying service and that he had put in only three years of service.

(ii) The learned Single Judge relied on the inquiry report to come to the conclusion that the number of vacancy in the cadre of SE on the date when the selection was made was only 10, therefore the selection committee grossly

erred in holding the number of vacancy as 13 as against 10.

(iii) The learned Single Judge found that the selection made at the review DPC and promoting the respondent 11 as SE consequent to the others passed in the enquiry by the government is legal and valid. The learned Single Judge also found that the appellant herein is guilty of committing fraudulent acts in getting his promotion to the post of EE out-of-turn and contrary to the service rules when he has not put in minimum five years of service the encadrement to the post of EE is not gazetted and that the records were concocted to show that the said promotion was said to have been gazetted.

(iv) The learned Single Judge negated the plea of the appellant that the inquiry committee has committed gross error in not giving him an opportunity of hearing before passing the order of his demotion.

(v) The learned Single Judge also negated the contention of the appellant that the writ petitions filed by the respondents suffer from delay and laches and held that there was a systematic manipulation at various stages to which complicity of the appellant cannot be ruled out. In the result the learned Single Judge upheld the order of the government in demoting the appellant to the post of EE (ex-cadre). The appellant aggrieved by the said order has filed this appeal.”

12. Thereafter, the Court took note of the submission of the counsel for respondent No.1 (appellant in the said appeal) and also recorded the contentions of the Advocate General for the State of Assam and the counsel for the appellants herein. On the basis of the arguments and counter arguments noted by it, as well as the subject matter of the controversy, the High Court mentioned that seven propositions arise for consideration. These propositions

and answers thereto are given in paragraph 18 of the impugned judgment and we deem it apposite to extract the said paragraph which will give the flavour and essence of the judgment of the High Court:

“18. On thoughtful consideration of the rival contentions the following propositions are arising for consideration:

(i) Whether the promotion of the appellant to the post of ex-cadre EE and en-cadre subsequently is illegal and, if it is so, whether the delay and laches will come in the way of respondent 12 challenging the order of promotion of the appellant.

The first part of the question is answered in the affirmative and the second part is in the negative.

(ii) Whether the government was right in conducting an inquiry when the writ petitions were pending before the Court?

The question is answered in the negative.

(iii) Whether the inquiry committee was wrong in breaching the principles of natural justice in not giving an opportunity of hearing to the appellant?

The question is answered in the affirmative.

(iv) Whether the Association has any locus standi in the matter?

The question is answered in the negative.

(v) Whether the findings to the inquiry committee that there are only 10 vacancies available for promotion to the post of SE and consequent to the demotion of the appellant to the post of EE (ex-cadre)?

The question is answered in the affirmative.

(vi) Whether the order of the government in upsetting the order of promotion of the appellant and reverting him to the post of EE (ex-cadre) is illegal?

The question is answered in the affirmative.

(vii) Whether the appellant is entitled to any equities?

As per the final order?"

13. A glance at the aforesaid questions and answers thereto would amply demonstrate that the High Court has affirmed the finding of the learned Single Judge that the promotion of respondent No.1 herein to the post of ex-cadre Executive Engineer and his encadrement thereafter was illegal. The Division Bench of the High Court has also given a categorical finding that there were only ten vacancies available for promotion at that time. However, at the same time, it observed that the order of the Government in upsetting the promotion of respondent No.1 and reverting him to the ex-cadre post of Executive Engineer was illegal. The reason for setting aside the demotion order of respondent No.1, in spite of specific finding to the effect that calculation of thirteen vacancies was incorrect and further that respondent No.1 was given undue favour while promoting him to the post of Superintending Engineer is captured in paragraph 26 of the impugned judgment, which is reproduced below:

“26. It may be that the notification of July 1997 which declares that if a person overstays on deputation beyond the five years is deemed to have been absorbed may be illegal because the person on deputation will have lien in the post in the parent department until the lien gets terminated and the said post cannot be considered as vacant, but nonetheless a government order was there and based on the material the bureaucracy have worked out the vacancy as 13. The government notification of July 1997 was issued much prior to the dispute in question. Based on the said notification when the authorities have worked out the vacancy position and the PWD Minister has also approved it the Court should not expect the bureaucracy to apply the strict judicial standards and legal acumen in interpreting notifications and the provisions of law while discharging their duties. Any mistakes on the part of the bureaucracy in interpretation should be considered only as a bona fide error and not as a deliberate mistake. In that view the calculation of 13 vacancies may be incorrect but considering the position today when Kamakhya Bezbaruah is repatriated there will be still four vacancies of SE available. Therefore there does not appear to be any difficulty for Kamakhya Bezbaruah on his repatriation to get back to the post of SE. Therefore we find that in fitness of things it is a case where although the appellant took some undue favour in the year 2005 on the ground of delay and laches it is not proper to upset his position and also his promotion to the post of SE having been worked out on the basis that there are 13 vacancies which appears to be a bona fide mistake. In view of subsequent developments new vacancies of SE have arisen. Kamakhya Bezbaruah who is repatriated will continue to hold the post of SE and he would be senior to appellant. With the above observations the writ appeal is disposed of.”

14. The argument of the appellants, including the State of Assam, is that even when the Division Bench concurred with the findings of the learned Single Judge that it was a case of total favouritism shown to respondent No.1 in giving him promotion to the ex-cadre post in the first instance and thereafter encadring him and

the same were found to be contrary to the Rules; the writ petitions of the appellants were dismissed on the purported ground of delays and laches.

15. Mr. Nalin Kohli, learned counsel who appeared for the State of Assam, gave the following details to show that respondent No.1 was much junior to the three appellants and still allowed to stealmarch over them, which was clearly impermissible:

Party	Assistant Engineer	Assistant Executive Engineer	Executive Engineer
Appellant No.1	1980	1989	2002
Appellant No.2	1981	1988	2002
Appellant No.3	1992	1999	Yet to be promoted
Respondent No.1	1996	2002	2005 (within 3 years, as per Rule it has to be 5 years)

He submitted that the learned Single Judge of the High Court had, therefore, rightly interfered with the orders of promotion and encadrement of respondent No.1, which was upset by the Division Bench on spacious grounds.

16. The reply of Mr. Mukul Rohatgi, learned senior counsel appearing for respondent No.1, was that the course of action adopted by the Division Bench was quite reasonable and equitable. He

submitted that the promotion was given to respondent No.1 as Executive Engineer way back in the year 2005 against an ex-cadre post. Thereafter, he was encadred also in the same year. Respondent No.1, thus, had been working on this post since 2005. Thereafter, he stood promoted as Superintending Engineer with effect from October 17, 2014. It would, therefore, be unjust to upset the applecart.

17. For appropriately dealing with the contentions of the counsel for the parties, it would be necessary to traverse through the documents vide which respondent No.1 was given the aforesaid benefits.
18. Record shows that the Government of Assam created an ex-cadre post of Executive Engineer (PWD), which fact was informed to the Accountant General (A&D), Assam, vide communication dated April 02, 2005. This letter mentions that the Governor of Assam has sanctioned the creation of one post of ex-cadre Executive Engineer from the date of the issue of the letter, i.e. April 02, 2005, for a period up to February 28, 2006. It was also stated that beyond February 28, 2006, PWD would move for further retention of this post, if necessary, with name of the

incumbent. It was subject to the following conditions which were contained in the said letter itself:

“1. The ex-cadre post of OSD to Chief Minister in the rank of Executive Engineer, PWD will be personal to Sri Debajit Das.

2. The ex-cadre post of OSD to Chief Minister in the rank of Executive Engineer, PWD shall Stand abolished as soon as Sri Debajit Das get regular promotion as Executive Engineer, PWD in the parent cadre.

3. Beyond 28-02-2006, Public Works Department will move for further retention of this post, if necessary, with name of the incumbent.

Meanwhile, Public Works Department is advised to initiate the process of regular promotion from Asstt. Executive Engineer to Executive Engineer.

Sd/-
Under Secretary
Finance (EC-II) Department”

19. It becomes clear from the aforesaid that this ex-cadre post was created specially for respondent No.1, which was to remain till the regular promotion of respondent No.1 as Executive Engineer in the parent cadre. It was nothing but an act of favouritism. Pertinently, respondent No.1 was attached with the Chief Minister as an Officer on Special Duty at that time. It is also relevant to note that though appellant Nos. 1 and 2 had already stood promoted as Executive Engineers (who were promoted in the

year 2002), appellant No.3 was yet to be promoted. They were, thus, much senior to respondent No.1.

20. Within three months of the aforesaid promotion of respondent No.1 in ex-cadre post, respondent No.1 was given regular promotion in the cadre. The manner in which it was done again shows that undue favour was accorded to him. The Selection Board meeting for encadrement of ex-cadre post held by respondent No.1 was held on July 27, 2005. Minutes of these meeting are placed on record. It is recorded that probable vacancies in the year 2004 as assessed by the Department are thirteen, which are inclusive of existing vacancy due to the retirement of one officer and twelve vacancies that occurred due to the promotion of twelve Executive Engineers to the rank of Superintending Engineers (Civil) during the year ending December 31, 2004. The Minutes also record that the Board was intimated by the Appointing Authority that the Department had given promotion to respondent No.1 as Executive Engineer (ex-cadre) with the concurrence of the Finance Department. *Inter alia*, on the aforesaid basis, the Selection Board recommended his encadrement. It was noted that since there were thirteen

vacancies and respondent No.1 was at the thirteenth position in the Select List, his encadrement was recommended.

21. Two things flow from the aforesaid Minutes, which are as follows:
- (a) The Board was wrongly informed that there were thirteen vacancies.
 - (b) Respondent No.1 was promoted as Assistant Executive Engineer in the year 2002 and stood promoted as Executive Engineer in the year 2005, i.e. within three years of his promotion as Assistant Executive Engineer. The extant Rules provide that a person, to be eligible for promotion to the post of Executive Engineer, should work for a minimum period of five years as Assistant Executive Engineer. He was, thus, not even eligible for consideration to the post of Executive Engineer. It appears that the Selection Board glossed over this fundamental aspect and proceeded on the basis as if respondent No.1 was eligible to be considered for promotion.

In spite of aforesaid two glaring defects, which go to the root of the matter, the recommendation of the Selection Board was accepted and the Government of Assam issued orders dated August 03, 2005 promoting various persons, including respondent No.1, to the rank of Executive Engineer (Civil), PWD.

22. We, thus, find that the findings of the learned Single Judge to the effect that encadrement of respondent No.1 to the post of Executive Engineer was illegal not only on the ground that he was ineligible for consideration, as he had put in only three years of service, but also for the reason that there were only ten vacancies and not thirteen and, therefore, respondent No.1 could not be promoted at all, are without blemish. We are also in agreement with the findings of the learned Single Judge that respondent No.1 was guilty of committing fraudulent acts in getting his promotion to the post of Executive Engineer out of turn and contrary to the service Rules. Even the Division Bench, in the impugned judgment, accepted the aforesaid position in paragraph 20 of its judgment, which reads as under:

“20) It is no doubt that the promotion of the appellant to the post of EE (encadre) and consequent encadrement is contrary to the service rules, since he had not put in the required service of five years to be eligible to the promotion to the post of EE. The condition in the promotion order that the officer “over the post so encadred” should be in the lowest position till the senior category comes to the position appears to be an untenable condition that could be attached to the promotion under the service rules. There appears to be compounded illegalities. The promotion may be illegal. So much so the conditions stipulated is also illegal. Promotions have to be granted according to the service rules.”

23. Interestingly, the Division Bench has also accepted that calculation of thirteen vacancies by the Government may also be

incorrect. However, this aspect is side tracked by stating that it was a *bona fide* mistake and not a deliberate one. Fact remains that the Division Bench has accepted that thirteen vacancies were not in existence.

24. Notwithstanding the same, the Division Bench has non-suited the appellants only on the ground that writ petition filed by the appellants suffered from delays and laches as it was filed nine years after the promotion of respondent No.1 and has stated that even when respondent No.1 had taken undue favour in getting the promotion, it was not proper to upset the decision because of delay and laches, as also the fact that in the meantime respondent No.1 has got promotion to the post of Superintending Engineer as well.
25. It, therefore, needs to be considered as to whether the order of the learned Single Judge warranted interference thereby denying the relief to the appellants on the ground that their writ petition suffered from delays and laches.
26. Having regard to the circumstances in which respondent No.1 was given promotion to the post of Executive Engineer by creating an ex-cadre post and thereafter the manner in which he

was encadred to the said post by stretching the number of vacancies against the record, speaks volumes about the manner in which undue favour was shown to respondent No.1. One has to keep in mind that at that time he was working as Officer on Special Duty to the Chief Minister. These facts reflect clear manipulation of the system at various stages to give out of turn promotion to respondent No.1 by bestowing undue favour. With such 'flyover promotions', respondent No.1 parachuted from Assistant Executive Engineer to Superintending Engineer by bypassing many senior colleagues in the cadre of Assistant Executive Engineer who are still stagnating in the same cadre. When this factual position emerged on record and was duly approved by the Division Bench as well, we are of the opinion that the writ petition could not be dismissed on the ground of delay and laches. In fact, the Division Bench has erred in invoking this principle by dubbing the entire exercise as a *bona fide* error. What happened cannot be termed as '*bona fide*'. It was a clear case of favouritism shown to respondent No.1 and the actions were contrary to Rules.

27. That apart, there is one more reason for coming to the conclusion that the Division Bench of the High Court was in error in saving

respondent No.1 on the premise that the writ petitions suffered from delay and laches. In fact, the Association had submitted a representation to the then Chief Minister. Going by the nature of allegations, the Chief Minister rightly acted thereupon and referred the matter to a Committee which, after examining the matter, had also given its report stating that the promotion of respondent No.1 was against the Rules. This provides reasonable explanation for delay, if any.

28. We are of the opinion that it was virtually a case of fraud, at least on three counts. First, by creating ex-cadre post of Executive Engineer only for respondent No.1 and giving him that post when he was much junior to many others. Second, encadrement of respondent No.1 as Executive Engineer by showing that there were thirteen posts when, in fact, there were only ten posts of Executive Engineer on that date. This was done obviously with the purpose of accommodating him. Third, the promotion was given when respondent No.1 was not even eligible as per Rules as he had not put in minimum service of five years. Fraud vitiates every action and cannot be kept under the carpet on the ground that the action challenged was belated, more so when there is a reasonable explanation for such delay.

29. We, accordingly allow these appeals, set aside the impugned judgment dated August 07, 2015 of the Division Bench of the High Court and restore the judgment of the learned Single Judge.

No order as to costs.

.....J.
(A.K. SIKRI)

.....J.
(ASHOK BHUSHAN)

**NEW DELHI;
OCTOBER 23, 2018.**