
(2018) 09 GAU CK 0038
In the Gauhati High Court
Case No : Civil Writ Petition No.3200 Of 2015

Anil Kr. Brahma

APPELLANT

Vs

State Of Assam And 7 Ors

RESPONDENT

Date of Decision : 15-09-2018

Acts Referred:

Assam Scheduled Castes and Scheduled Tribes (Reservation of Posts in Services) Act,
1978 — Section 5, 5A
Constitution of India, 1950 — Article 16(4B)

Citation : (2018) 09 GAU CK 0038

Hon'ble Judges : Nelson Sailo, J

Bench : Single Bench

Advocate : M. Sarania, N. Goswami, S. Sarma

Final Decision : Disposed Off

Judgement

1. Heard Mr. M. Sarania, the learned counsel for the petitioner. Also heard Mr. N. Goswami, the learned Government Advocate for the respondent

Nos. 1 to 4 as well as Mr. S. Sarma, the learned counsel for the private respondent Nos. 5 to 8.

2. Facts of the case may briefly be narrated at the outset. The petitioner was appointed as Fishery Extension Officer vide order dated 24.01.1986

(Annexure-I). As many as 41 persons were appointed by the said order. The petitioner was placed at serial No.38 while the private respondent Nos. 6

to 8 were placed at serial No.4, 5 & 6 respectively.

3. The next promotional post from the post of Fishery Extension Officer as per the relevant rules is to the post of Sub-Divisional Fishery Development

Officer (SDFDO). The petitioner vide notification dated 31.10.1992 (Annexure-II) was promoted to the post of SDFDO and by the same notification,

he was posted to Udalguri.

4. The next promotional post from the post of SDFDO is to the post of District Fishery Development Officer (DFDO). According to the petitioner, he

has been serving in the post of SDFDO for more than 22 years and that there are 18 numbers of sanctioned post of DFDO lying vacant under the

Fishery Department. The petitioner has also been holding the charge of DFDO since the year 2004. While he was expecting to be promoted to the

post of DFDO, to his surprise, the private respondent Nos. 5 to 8 were promoted to the post of DFDO vide notification dated 22.04.2015 (Annexure-

III). As many as 18 officers were promoted to the post of DFDO by the said notification but, however, the name of the petitioner did not figure

amongst those who were promoted. Being aggrieved, he is before this Court.

5. Mr. M. Sarania, the learned counsel for the petitioner, contends that a provisional gradation list of Gazatted Officers of the Fishery Department was

published by the Official respondents on 28.10.1998 and thereafter, a final gradation list was published vide notification dated 13.07.1999 (Annexure-

IV). As per the final gradation list, the petitioner was placed at Serial No.35, while the private respondent Nos. 5, 6, 7 & 8 were placed at Serial

No.24, 25, 26 & 28 respectively. In fact, all the private respondents are junior to the petitioner and that, he never received a copy of the provisional

gradation list published on 28.10.1998 and therefore, grave injustice has been caused to him. Furthermore, the same has resulted in the promotion of

the private respondents to the post of DFDO vide the impugned notification dated 22.04.2015.

6. Mr. M. Sarania submits that it is the case of the petitioner that consequent upon the amendment of Article 16 (4B) of the Constitution of India,

fixation of seniority between the reserved candidates and the general candidates in the promotion post is required to be revised and for that purpose,

Office Memorandum dated 12.03.2002 was issued by the Department of Personnel (B) on 12.03.2002 (Annexure-V). He contends that as per the

Office Memorandum, Government servants who belong to the Scheduled Caste/ Scheduled Tribes category, on their promotion by virtue of the Rule of

Reservation/Roster will be entitled to consequential seniority w.e.f. 17.06.1995. However, the official respondents prior to issuance of the order of

promotion of the private respondents vide the impugned notification dated

22.04.2015 failed to prepare a fresh gradation list in terms of the Office

Memorandum dated 12.03.2002 by showing the petitioner senior to the private respondents. However, as the same was not done, the impugned

notification dated 22.04.2015 is not sustainable.

7. Mr. M. Sarania, the learned counsel for the petitioner, submits that it is the further case of the petitioner that with the enactment of the Assam

Scheduled Castes and Scheduled Tribes (Reservation of Posts in Services) Act, 1978 (Act of 1978) and the Assam Scheduled Castes and Scheduled

Tribes (Reservation of Vacancies in Services and Posts) Rules 1983 (Rules of 1983) which came into force with effect from 01.07.1979, the

respondent authorities are required to follow the Rules of Reservation provided therein. As per the Act of 1978, as amended in 2012, vacancy based

reservation has been replaced by post based reservation with effect from 21.08.2012. Based on the decisions rendered by the Apex Court, backlog

vacancies in various Departments under the State Government are required to be filled up the same through special drive. The Ministry of Personnel,

Public Grievances and Pensions, Department of Personnel and Training, Government of India, in fact came up with Office Memorandum on

02.07.1997 requiring the vacancies to be filled up as per post based reservation. Likewise, Section 5 of the Act of 1978 provides that the appointing

authority is to follow a separate post based roster for recruitment and promotion in each cadre. Section 5A of the Act of 1978 postulates that the

roster shall be based on the Model Roster as per Schedule-I & II of the Act of 1978. Schedule-I provides the Model 100 Point Roster. Therefore,

according to the petitioner, in the cadre strength of DFDO's numbering 18 posts, by applying the 100 Point Roster, the official respondents were

bound to consider him for promotion before issuance of the impugned notification dated 22.04.2015.

8. Mr. M. Sarania also contends that the revision of gradation list dated 13.07.1999 as per the Office Memorandum dated 12.03.2002 was in the offing

and that by dropping the incumbents who are no longer in service, the position of the petitioner after revision of the gradation list would surely have

earned him a consideration for his promotion to the post of DFDO. However, as the official respondents have failed to abide by the guidelines issued

by the Department of Personnel (B) through the Office Memorandum dated

12.03.2002, the promotion of the private respondents vide the impugned notification dated 22.04.2015 cannot be sustained and therefore, it should be set aside and quashed. Consequently, the petitioner has come up with the following prayer in his writ petition:-

â??(i) To quash and set aside the impugned promotion order dated 22.04.2015 (Annexure-â??IIIâ?) in respect of private-respondents are concerned

being illegal and arbitrary and also being issued with mala-fide intension by the respondent No.3;

(ii) To prepare and publish up to date gradation list of the Sub-Divisional Fishery Development Officers of the Fishery Department in consonant with

OM dated 12.03.2002 by recasting the seniority of roster point promote;

(iii) To promote the petitioner to the post of DFDO as reserved category incumbent in the roster point post on the basis of gradation list so prepared

and

(iv) Up on cause or causes being shown and after hearing the parties be pleased to make the Rule absolute and/ or pass such further or other order(s)

as your Lordship may deem fit and proper considering the facts and circumstances of the case.â??

9. Mr. N. Goswami, the learned Government Advocate for the State respondents by relying upon the affidavit-in-opposition filed by the respondent

No.3 on 29.01.2016 submits that the criteria for promotion from the post of SDFDO to the post of DFDO as per the relevant recruitment rules is

Merit-cum-Seniority. 18 numbers of SDFDOs including the private respondents were promoted to the post of next higher rank of DFDO on the basis

of the recommendation made by the DPC, which held its meeting on 04.03.2015 after observing detail formalities including the Rules of Reservation.

By referring to the gradation list issued vide notification dated 13.07.1999 as well as the gradation list issued on 04.05.2002 (Annexure-H of the

affidavit-in-opposition of the private respondents), Mr. N. Goswami submits that the petitioner has neither objected the two gradation lists after it was

published nor challenged the same in his writ petition. Therefore, the petitioner cannot have any complaint on the recommendation and promotion given

to the 18 Officers including the private respondents vide the impugned notification dated 22.04.2015. As per the two gradation lists, the petitioner is

way below the private respondents in seniority and therefore, the grievance of

the petitioner is without any substance and only an afterthought. As such, the same should be dismissed.

10. Mr. S. Sarma, the learned counsel for the private respondents by referring to the affidavit-in-opposition filed by the private respondent on

15.10.2015 also submits that the petitioner has always been junior to the private respondents since his initial appointment as Fishery Extension Officer

vide order dated 24.01.1986. He submits that promotion to the next higher post of SDFDO was done by taking into account the relevant seniority of

the Fishery Extension Officer. By referring to the minutes of meeting of the selection committee held on 01.09.1992, which is annexed by the private

respondents as Annexure â?E in their affidavit-in-opposition, Mr. Sarma submits that both the petitioner and the private respondents were considered

by the selection committee. The petitioner was recommended against the reserved vacancy of ST (P) category, while the private respondents were

recommended against the unreserved vacancies. It was only due to administrative exigency that the petitioner was promoted to the post of SDFDO

vide notification dated 31.10.1992 while the private respondents were promoted vide notification dated 29.04.1993.

He submits that the recommendation for promotion as per the meeting minutes dated 01.09.1992 clearly shows that the promotion was made in order

of their respective original seniority in the cadre of Fishery Extension Officer. Therefore, taking into consideration this fact, two gradation lists were

published by the official respondents i.e. vide notification dated 13.07.1999 and vide the communication dated 04.05.2002 (Annexure-H of the

affidavit-in-opposition of the private respondent). He submits that as can be seen from the two gradation lists, the petitioner is placed way below the

private respondents in seniority and therefore, without there being a challenge to his seniority position, the petitioner does not have any case. As such,

the writ petition being without any merit, the same should be dismissed. In support of his submissions, Mr. S. Sarma relies upon a decision of a co-

ordinate Bench of this Court in the case of Sukanta Saha vs. State of Tripura & Ors. reported in 2005 (4) GLT 353 and that of the Apex Court in Ajit

Singh and Others (ii) vs. State of Punjab & Ors. reported in (1999) 7 SCC 209.

11. I have heard the learned counsel appearing for the rival parties and I have perused the materials available on records. From the case projected by

the petitioner, what can be noticed is that the petitioner is admittedly junior to the private respondents since their appointment as Fishery Extension

Officers. However, he is aggrieved with the impugned notification dated 22.04.2015, wherein as many as 18 officers including the private respondents

were promoted to the post of DFDO. As per the relevant recruitment rules i.e. the Assam Fishery Service (Recruitment and Promotion) Orders,

1989, which was notified vide notification dated 30.01.1990 (Annexure-D of the affidavit-in-opposition), promotion to the post of DFDO from the post

of SDFDO is 100% by promotion method from the cadre of SDFO, having 5 years experience in the Department and out of which, 2 years in

administrative post. The criteria for considering the eligible candidates is by way of selection method on the basis of merit with due regard to seniority.

As may be noticed, the writ petitioner although aggrieved with the notification dated 22.04.2015 has not made any challenge to the gradation list

published vide notification dated 13.07.1999 and vide communication dated 04.05.2002. In absence of such a challenge, it will be difficult to accept the

contention of the petitioner that his seniority in view of his earlier promotion to the post of SDFDO and even otherwise, as per the Rule of Reservation

has been neglected by the respondent authorities, while filling up 18 posts of DFDO vide the impugned notification dated 22.04.2015.

12. In the midst of considering the rival contentions of the parties, Mr. N. Goswami, the learned Government Advocate, submits that there are

currently vacancies in the post of DFDO under the Fishery Department on account of the retirement the incumbence concerned. Mr. S. Sarma, the

learned counsel also submits that during the pendency of the writ petition, the respondent Nos. 5 & 7 have retired from service. Mr. M. Sarania also

submits that as many as 5 incumbents, who were promoted vide notification dated 22.04.2015, have since retired from their service, while one of the

promoted officers in fact did not join his promotional post. Mr. M. Sarania, the learned counsel for the petitioner, further submits that the petitioner is in

the verge of attaining the age of superannuation early next year i.e. 2019.

13. Having regard to the nature of the controversy and also the fact that the gradation lists which are invariable required to be considered by the

selection committee to recommend those found eligible making recommendation for promotion from the post of SDFDO to the post of DFDO has not

been challenged by the writ petitioner, I am of the considered view that it will not be possible to examine the correctness or otherwise of the gradation

lists through the present proceeding. However, at the same time, having regard to the fact that there are vacancies existing in the post of DFDO, the

petitioner can be considered for his promotion against the existing vacancies.

14. In view of above, without interfering with the impugned notification dated 22.04.2015, the official respondents are directed to consider the case of

the petitioner for his promotion against the vacancies available in the post of DFDO as per law. Such consideration should be made as expeditiously as

possible considering the fact that the petitioner is approaching the age of superannuation. The authorities relied upon by the learned counsel for the

private respondents in view of the findings are not gone into.

15. With the above observations and directions, the writ petition is disposed of. No cost.