(2022) 11 GAU CK 0018

In the Gauhati High Court

Case No : Writ Appeal No. 191 Of 2017

Commissioner Of Excise Office Committee — APPELLANT

Vs

Bishnu Deo Roy — RESPONDENT

Date of Decision : 07-11-2022

Acts Referred:

Constitution Of India, 1950 — Article 309
Assam Directorate Establishment (Ministerial) Service Rules, 1973 — Rule 2(c), 2(e), 2(g), 3, 8
Assam Ministerial District Establishment Service Rules, 1967 — Section 2, 2(4)

Citation : (2022) 11 GAU CK 0018

Hon'ble Judges : R.M. Chhaya, CJ;Soumitra Saikia, J

Bench : Division Bench

Advocate : N.J. Khataniar, R. Deka, A. Baruah

Final Decision : Dismissed

Judgement

1. This writ appeal arises out of the Judgment and Order dated 01.12.2015 passed by the learned Single Judge in W.P(C) No. 2395/2011. The writ petition was filed by the petitioner with the following reliefs:

(1) To declare that ministerial staff in the office of the Joint Commissioner of Excise, Assam, are part of ministerial staff under the Head of the Department, i.e., Commissioner of Excise, Assam;

(2) To direct the respondents to prepare a common cadre-wise gradation list of all the ministerial staff under the establishment of Commissioner of Excise, Assam;

(3) To direct the respondents to provide consequential service benefits to the ministerial staff serving in the office of the Joint Commissioner of Excise, Assam, following preparation of common gradation list;

(4) To direct the respondents to promote the petitioner to the post of Superintendent effective from the date on which his juniors were promoted.

2. The case projected by the writ petitioner before the learned Single Judge was that he was appointed as LDA-cum-Typist by order dated 01.02.1978 issued by the Chemical Examiner of Excise, Assam. Vide order dated 30.07.1988 passed by the Commissioner of Excise, Assam, the petitioner was placed at the disposal of the Deputy Commissioner of Excise, Assam and in his place another person was placed temporarily as LDA-cum-Typist at the disposal of Chemical Examiner (Excise), Assam. Thereafter, the services of the petitioner was utilized in the office of the Joint Commissioner of Excise, Assam who was attached to the office of the Commissioner of Excise, Assam. Vide order dated 06.03.1997 issued by the Commissioner of Excise, Assam, the services of the petitioner was placed in the Office of the Commissioner of Excise, Assam. However, by a subsequent order dated 25.06.1997, the attachment of the petitioner in the Office of the Commissioner of Excise, Assam was withdrawn by the Commissioner of Excise. The petitioner was granted the third stagnation increment with effect from 01.02.2005 vide order dated 30.03.2005 by the Joint Commissioner of Excise, Assam. Thereafter, by order dated 25.03.2008, issued by the Commissioner of Excise, Assam, the petitioner and one Smt. Babita Lahan were promoted to the post of UDA against the existing vacancies in the office of the Joint Commissioner of Excise. The petitioner submitted representation before the Commissioner of Excise, Assam ventilating his grievance that during his entire service career, he had the benefit of only one promotion and that persons junior to him had received prior promotion enabling them to receive promotion to still higher post. The respondent No. 5, namely Smt. Suchitra Brahma, vide order dated 13.08.2007 issued by the Secretary to the Government of Assam, Excise Department, was promoted to the post of Superintendent. The promotion order was passed under Rule 8 of the Assam Directorate Establishment (Ministerial) Service Rules, 1973. According to the petitioner, the said respondent No. 5 served as a UDA in the office of the Commissioner of Excise and was junior to the petitioner in so far as the length of service is concerned. The petitioner along with other similarly situated persons jointly submitted another representation dated 23.09.2009 addressed to the Secretary to the Government of Assam, Excise Department, requesting for parity of pay equivalent to the pay-scale with staff in the office of the Commissioner of Excise, Assam holding equivalent post. Though the views of Commissioner of Excise, Assam, was sought for by the Government vide letter dated 29.04.2010 and by subsequent letters, no response was forthcoming. Being aggrieved, the writ petition was filed seeking the reliefs as indicated above.

3. The learned Single Judge upon hearing the parties arrived at a finding that the Commissioner of Excise has got overall control over the Ministerial Staff in any of the three establishments namely, the Offices of the Chemical Examiner (Excise), Joint Commissioner of Excise and the Commissioner of Excise. The learned Single Judge rejected the contentions of the Department that the Offices of the Chemical Examiner (Excise) and the Joint Commissioner of Excise are the separate establishments and are treated as district establishments not within the

purview of the Head of Department i.e., Commissioner of Excise. The learned Single Judge held that to accept the contention of the respondent department that the establishments of Chemical Examiner (Excise) and the Joint Commissioner of Excise to not form a part of the Head of Department, i.e., Commissioner of Excise, would run counter to the views of the Apex Court relating to career advancement of the employees as declared in the case of Union of India Vs. Hemraj Singh Chouhan, reported in (2010) 4 SCC 290 as well as the judgment of this Court rendered in Tridip Namasudra Vs. State of Assam reported in 2010 (5) GLT 39. The learned Single Judge held that accepting the contentions of the respondent department would result in complete service stagnation of the ministerial staff serving in the office of the Chemical Engineer (Excise) and the Joint Commissioner of Excise. The writ petition was allowed and the following consequential directions were issued by the learned Single Judge:

(1) Ministerial staff serving in the offices of Chemical Examiner (Excise)and Joint Commissioner of Excise are required to be treated as part of the ministerial staff of the establishment of Commissioner of Excise, which is the Head of Department;

(2) Consequently, common gradation list of the ministerial staff, cadre wise, would have to be prepared;

(3) Consequent upon preparation of such gradation list, case of the petitioner for further promotion beyond UDA (Senior Assistant) shall be considered at par with his junior and if he is found eligible for such promotion, notional promotion shall be given which will entitle him to pension relatable to the higher post and consequential financial benefits.

(4) The above exercise shall be carried out within a period of six months from the date of receipt of a certified copy of this order.

4. Being aggrieved, the present writ appeal has been filed by the appellants assailing the Judgment and Order dated 01.12.2015 passed in W.P(C) No. 2395/2011 by the learned Single Judge. The appellants were not party respondents in the writ petition. They are an association of ministerial employees of Assam Government and claimed to be affected by the direction issued vide impugned Judgment and Order passed by the learned Single Judge.

5. The appellants claimed to be affected primarily by the direction for a common gradation list as directed by the learned Single Judge vide the impugned Judgment and Order. Accordingly, leave to appeal was filed and vide order dated 08.08.2016 passed in I.A.(C) 957/2016 connected to the present writ appeal, the appellants were granted leave to file the writ appeal. Subsequently, the delay of 172 days which had occurred in filing the present writ appeal was also condoned by this Court.

6. Before us, the appellants have urged that going by the prayers made in the writ petition it is apparent that the Office of the Commissioner of Excise, Assam

and the Offices of the Chemical Examiner/ Joint Commissioner are separate establishments and the ministerial staff in the said offices have all along been governed by different conditions of service. According to the appellants, the learned Single Judge passed the directions for a common gradation list inter alia, upon wrong interpretation of the provisions of the Assam Directorate Establishment (Ministerial) Service Rules, 1973 (hereinafter referred to as “the Rules of 1973”). The appellants urged that the effect of the impugned Judgment and Order is that the Offices of the Chemical Examiner/ Joint Commissioner have also been brought under the purview of the 1973 Rules. The appellants urged that the ministerial staff in the Offices of the Chemical Examiner/Joint Commissioner are covered by the Assam Ministerial District Establishment Service Rules, 1967 (hereinafter referred to as “the Rules of 1967”). However, by erroneous interpretation given by the learned Single Judge, the Offices of the Chemical Examiner(Excise)/ Joint Commissioner are also brought under the purview of the 1973 Rules although they come under the purview of the 1967 Rules only.

7. The appellants urged that certain orders passed by the Commissioner of Excise in respect of the writ petitioner/ respondent No. 1 regarding the utilization of his services, cannot have the effect of bringing the services of the petitioner/ respondent No. 1 within the purview of 1973 Rules inasmuch as even under the 1967 rules, certain powers are conferred of the Commissioner of Excise and it is under those powers that the Commissioner of Excise had passed certain orders relating to the utilization of the services of the respondent No. 1.

8. It is urged by the appellants that notwithstanding the finding recorded by the learned Single Judge that there was “no declaration” as envisaged under Rule 2(C) of the 1973 Rules that the Offices of the Chemical Examiner (Excise) and the Joint Commissioner of Excise are district offices under the control of the Commissioner of Excise, the learned Single Judge proceeded to hold that the ministerial staff of the Offices of the Chemical Examiner/Joint Commissioner would be governed by the 1973 Rules. The appellants urged that there was a long standing practice followed in the Department of Commissioner of Excise that ministerial staff in the offices of the Chemical Examiner/Joint Commissioner are governed by the 1967 Rules whereas the ministerial staff under the Office of the Commissioner of Excise come under the purview of 1973 Rules. It is strongly urged on behalf of the appellants that under the Rule 2(C) of the 1973 Rules, a declaration is required to be given for any district offices to come into existence and it is only upon such a declaration being issued by the competent authority that any district offices under the Commissioner of Excise will come to be governed by the 1973 Rules. However, in spite of the finding arrived at by the learned Single Judge that there was no such declaration that the offices of Chemical Examiner (Excise)/ Joint Commissioner of Excise are district offices under the control of the Commissioner of Excise, the learned Single Judge ought not to have issued the directions in the impugned Judgment. The appellants rely on the Judgment of the Apex Court in Onkar Lal Bajaj Vs. Union of India reported

in (2003) 2 SCC 673 to contend that where two views are possible, the view adopted by the Government will prevail. Reliance is also placed on the Judgments of the Apex Court rendered in N. Suresh Nathan Vs. Union of India reported in 1992 Supp (1) SCC 584 and Shailendra Dania Vs. S.P. Dubey reported in (2007) 5 SCC 535, to contend that where two views are possible, while interpreting the provisions of Rules, the view which has the support of the uniformly followed practice will prevail. It is submitted that on the basis of the contentions urged, the impugned Judgment and Order passed by the learned Single Judge being rendered upon erroneous interpretation of the 1973 Rules, the same is bad in law and it should be therefore, suitable interfered with and quashed.

9. The respondent No. 1 disputed the contentions raised by the appellants and submitted that there is no infirmity in the Judgment dated 01.12.2015 passed by the learned Single Judge in W.P(C) No. 2395/2011. The respondent No. 1 contended that his services were initially placed at the disposal of the Offices of the Joint Commissioner of Excise and Deputy Commissioner of Excise by virtue of the orders passed by the Commissioner of Excise. Furthermore, his services were also utilized by the Office of the Commissioner of Excise by virtue of the orders passed by the Commissioner of Excise. It is contended that the ministerial staffs working under the three wings namely, Commissioner of Excise, Joint Commissioner of Excise and Chemical Examiner (Excise) are of interchangeable placements and the same are carried out upon such orders as may be passed by the Commissioner of Excise as the Head and the controlling authority of the establishment. The respondent No. 1 contended that by the order dated 25.03.2008, he was promoted to the post of UDA by the Commissioner of Excise. It is further contended that under Rule 2(c), since there is no declaration that the offices of the Joint Commissioner of Excise and Chemical Examiner (Excise) are notified as “District Offices” under Rule 2(C) of the 1973 Rules, there is no question of the applicability of the Rules of 1967 in so far as the respondent No. 1 is concerned. Since the Commissioner of Excise is the Head of the Department and the controlling authority and as the ministerial staff under the three wings are interchangeable, it is the Rules of 1973 which are applicable and the same has been correctly held and applied by the learned Single Judge. It is submitted that the Writ Appeal is therefore, devoid of any merit and the same should therefore be dismissed accordingly.

10. The respondents No. 3 & 4, namely the Excise Department support the contentions raised by the appellants. According to the respondents No. 3 & 4, since the Offices of the Joint Commissioner of Excise and the Chemical Examiner (Excise), Assam have not been notified by the Government of Assam as the Head of the Excise Department, the employees of the said two establishments are governed by the Rules of 1967 and not by the Rules of 1973 as held by the learned Single Judge. It is contended that the Offices of the Commissioner of Excise, Assam and the Chemical Examiner (Excise), Assam are individual and separate from each other with separate drawl, pay-scale and Disbursal Officers.

It is contended that since both the Office are separate and distinct, the staff of both the Offices belong to different cadre and therefore, the staff of one office cannot claim parity in promotion with the staff of the other office. The entry level qualifications are also different. It is also contended that in the absence of any declaration as required under the Rule 2(C) of the 1973 Rules, the staff of the district establishment cannot be treated as equal to that of the Head of the Department. It is contended that since the ministerial staff under the Commissioner of Excise and the ministerial staff under the offices of the Joint Commissioner of Excise/ Chemical Examiner (Excise) are distinct and separate, they are governed by two separate set of Rules. There is a separate gradation list for the staff of the Commissioner of Excise as well as the Chemical Examiner (Excise), therefore, the finding of the learned Single Judge that the services of the respondent No. 1 are governed under the Rules of 1973 and not by the Rules of the 1967 is erroneous and therefore, liable to be set aside and quashed.

11. The learned counsels for the parties have been heard. Pleadings on record have been carefully perused. The judgment of the learned Single Judge dated 1.12.2015 impugned in the present appeal is also carefully perused.

12. We have also carefully perused The Assam Directorate Establishment (Ministerial) Services Rules, 1973 and The Assam Ministerial District Establishment Service Rules, 1967.

13. The Rules of 1973 are made under Article 309 and are applicable to the ministerial staff of the offices of the Heads of Departments as mentioned in column (i) of scheduled 1.

Under Clause 2(a)(iii), it is provided that "appointing authority: means: Head of the Department as indicated under column (1) of the Schedule I in respect of posts of [Senior Assistant, Junior Assistant]

Under Rule 2(c), "District Offices" means and includes the different district offices of district and other offices declared as such under the controlling authority of the officer as indicated under column (1) of the Schedule I;

Rule 2(e), "Member of the Service" means a member of the ministerial service in the respective offices appointed to the service either before or after the commencement of these rules;

Rule 2(g):" Service" means the ministerial service in the respective office where the member serves;

Under Rule 3. "Service"

(1) There shall be combined cadre of administrative officers for the offices mentioned in column (1) of Schedule I.

Note:- The offices for which such posts will be created may be determined by Government from time to time and that on the commencement of the rules the offices where such posts are in categories of posts-

(2) The service in an office shall comprise of the following categories of posts-

(a) Registrar;

(b) Superintendent;

(c) [Senior Assistant];

(d) [Junior Assistant];

(e) Typists-

(i) Selection Grade,

(ii) [(ii) Deleted]

[Note;- After the commencement of the Assam Directorate Establishment (Ministerial) Service (Amendment) Rules, 1987, there shall be no further appointment to the post of Selection Grade Typist and this category of post shall be filled up by (Junior Assistant] after the existing incumbents retire or finally cease to hold the posts:]

Provided that the entertainment of a post of Registrar or Superintendent in an office shall be subject to the yardstick of staff fixed is by Government under general order from time to time

(3) Each of the categories of posts mentioned in sub-rule (2) shall from an independent cadre. Members of a lower cadre shall have no claim for appointment to any of the higher cadres except in accordance with the provisions made in these rules."

14. Under Schedule-I at serial No. 36, the Office of the Commissioner of Excise is shown as the Head of the Department. Similarly, in Schedule-4 "Under the lists of Heads of Departments", the Commissioner of Excise is shown as Serial No. 12.

15. The Assam Ministerial District Establishment Service Rules, 1967 are also Article 309 Rules and it is for regulating recruitment and conditions of service of person appointed to the Assam District Ministerial Establishment Service. Definitions as provided under Rule 2 of 1967 Rules are extracted below:

"2. Definitions:- In these rules unless there is anything repugnant in the subject or context,-

(1) "appointing authority" means-

(a) the Commissioner & Secretary to the Govt. of Assam, General Administration (B) department, the Secretary to the Govt. of Assam General Administration (B) Department in case of appointment to the post of Administrative Officer and Revenue Sheristadar;]

(b) Deputy Commissioner in the case of appointment to all other ministerial posts in the District Establishment;

(2) “Commissioner” means the Commissioner of the Division in which the District is included;

(3) “Deputy Commissioner” means the Deputy Commissioner of the District;

(4) “District establishment” means and includes all non-gazetted ministerial staff in the offices of the Deputy Commissioner, Sub-divisional Officers [and] Sub-Deputy Collectors of the [**] of the District;

Note:-Offices of the Deputy Commissioner and Sub-divisional Offices shall include branches like Supply, Textile, Election, revenue, Excise, Development and other general branches.

5. “Government” means the Government of Assam;

(6) “Member of the service” means a member of the Assam Ministerial District Establishment Service;

(7) “Sub-Divisional Officer” means the Officer-in-charge of the general administration of a Sub-division of a District;

(8) “Sub-Deputy Collector” means the Officer placed in charge of a Revenue Circle;

(9) “Service” means the Assam Ministerial District Establishment Service;

(10) “Year” means the English Calendar year;

[(11) “Commission” means the Public Service Commission]”

16. It is clear from the perusal of the Rules as extracted above that the Rules of 1967 are meant for regulating recruitment and conditions of service of persons who are appointed to the District establishment. And District establishment is defined under Rule 2(4) as extracted above. In the note appended to Rule 2(4), it is also provided that the Offices of the Deputy Commissioner and the Sub-divisional officer shall include branches like Supply, Textile, Elections, Revenue, Excise, Development and other general branches. These rules do not laid down any prescription that the same should be applicable to any other office other than “District establishment” as defined under Rule 2(4).

17. The Rules of 1973 are also Article 309 rules which are made for regulating recruitment and conditions and services of persons appointed of the ministerial services under the various offices of the Heads of departments of the Government of Assam. The 1973 Rules have elaborately laid down the provisions, which will govern the recruitment and conditions of services of the ministerial staff working under the various Heads of department as prescribed under Schedule-I appended to the Rules. Serial No. 36 of Schedule –I appended to the Rules show “Commissioner of Excise” as the Head of Department in respect of the Excise Department. Similarly, under Schedule-IV appended to the Rules, the list of the Heads of Departments are shown. At Serial No. 12 of Schedule-IV, Commissioner of Excise is shown as the Head of the Department.

18. From the perusal of the provisions of 1967 Rules as well as the Rules of 1973, it is evident that these two sets of Rules prescribe for regulating appointment and governing service conditions of ministerial staffs.

The Rules of 1967 applies to the ministerial staff appointed under the District Establishments.

Under the said Rules "District Establishments" is defined to mean and include all non-gazetted ministerial staff in the offices of the Deputy Commissioner, Sub-divisional Officer, Sub-Deputy Collector of the District.

There is no prescription under the Rules of 1967 that the same would be applicable to other departments, more particularly, the Department of Excise as the same is relevant for the purposes of the present proceedings.

The definition under Rule 2 make it abundantly clear the prescription of the Rules regarding the appointing authorities. There is no prescription under Rules that the same would be applicable to the various Heads of Department under the Government of Assam. The employees in respect of whom the Rules of 1967 is applicable are clearly under prescribed under the rule 2(4) as discussed above.

19. On the other hand, the Rules of 1973 clearly prescribe that these Rules shall regulate recruitments and conditions of service of persons appointed to the ministerial service in the various officers of the Heads of department in the Government of Assam. Rule 2(a)(3) thereof prescribes that 'appointing authority' in respect of the post of 'Senior Assistant' and 'Junior Assistant' to be the Head of Department as indicated under column 1 of schedule-I. Column 1 of schedule-I, at serial No. 36 shows Commissioner of Excise as the Head of Department. The Post of Senior Assistant and Junior Assistant were earlier known as 'Upper Division Assistant' and 'Lower Division Assistant' and the same was re-designated as 'Senior Assistant' and 'Junior Assistant' vide the Notification No. ABP. 59/2000/51 dated 18.11.2006 (w.e.f. 12.04.2006)

20. The appellant before us as well as the respondent department have not been able to refer to any Rules/Orders/OMs to support their contentions that the Rules of 1967 and not the Rules of 1973 are applicable in cases of ministerial staff under the Head of the Department and the Commissioner of Excise, Government of Assam and its subordinate offices. The contentions of the appellants as well as the respondents No. 2 & 3 that in terms of Rule 2(c) a declaration by the controlling authority is necessary to the effect that "district offices" will include the different district offices of the district officers and other officers and no such declaration having been made, the ministerial staff under the office of the Chemical Examiner (Excise)/Joint Commissioner are excluded from the purview of 1973 Rules is incorrect and the same cannot therefore be accepted.

21. A perusal of these Rules along with the schedules appended to the Rules made it abundantly clear that in respect of the Heads of Department of the Government of Assam as prescribed under Schedule-I, the ministerial staff

attached of those offices are to be governed by these Rules of 1973. The prescription under Rule (2) (c) for any such declaration of "District Offices", are meant to include such district offices as may be available under a particular Head of department under the Government of Assam.

22. There is no supporting documents placed before the learned Single Judge or before this Court by the appellant as well as the respondents No. 2 & 3 to support their contentions that under the head of Department of "Commissioner of Excise", Government of Assam, there are district offices and which are required to be declared by declaration as prescribed under Rule 2(c). There is also no such material placed before the learned Single Judge or before this Court to support their contention that the offices of Chemical Examiner (Excise)/ Joint Commissioner are to be treated as District Establishment and therefore, the declaration prescribed under Rule 2(c) is necessary to include the employees of such offices under the purview of 1973 Rules. The so-called long standing practice stated to have been followed in the department as contended by the appellants as well as by the respondents No. 2 & 3 is an omnibus statement unsubstantiated by any such Office Memorandum or Departmental Orders. There is also no document placed before this Court that in so far as the service conditions of the ministerial staff employed under the offices of Chemical Examiner (Excise)/Joint Commissioner, they are to be governed by the 1967 Rules and that the same has been adopted by the Department of Excise for regulating the appointment and service conditions of such employees. Any such practice stated to have been followed by the Department must be based upon some Rule or some executive instruction in the absence of any such Rules. No such material has been placed before this Court to suggest the necessity of the Department to follow the practice of applying the 1967 Rules in respect of the service conditions of the ministerial staff employed under the Head of the Department which is the Commissioner of Excise, in the present case.

23. In the absence of any documents/Office Order/Executive instructions placed before this Court in support of the contentions made by the appellants and the respondents No. 2 & 3, the findings arrived at by the learned Single Judge vide the impugned Judgment dated 1.12.2015 passed in WP(C) No. 2395/2011 cannot be faulted with. The learned single Judge has passed a reasoned order by correctly interpreting the Rules of 1973 vis-a-vis Rules of 1967.

24. We subscribe to the views of the learned Single Judge that it is the Rules of 1973 which will govern the service conditions of the respondent No. 1/writ petitioner.

25. In view of our findings and discussions made above, the Judgments relied upon by the appellants do not come to their aid as they have no application to the facts of the present proceedings.

26. In view of all the above, we uphold the Judgment and Order dated 01.12.2015 passed in W.P(C) No. 2395/2011 by the learned Single Judge and the

directions contained therein. There is no merit in the appeal and the same is, therefore, dismissed. No order as to costs.

