

(2005) 09 GAU CK 0053
In the Gauhati High Court
Case No : Writ Petition (C) No. 9251 of 2003

Debendra Nath Bania

APPELLANT

Vs

State of Assam and Others

RESPONDENT

Date of Decision : 27-09-2005

Acts Referred:

Citation : (2006) GLT 127 Supp

Hon'ble Judges : Biplab Kumar Sharma, J

Bench : Single Bench

Advocate : A.M. Bujarbaruah and D.C. Nath, for the Appellant; R. Chakraborty, for the Respondent

Judgement

B.K. Sharma, J.—Heard Mr. Bujarbaruah, learned Counsel for the Petitioner and Ms. R. Chakraborty, learned State counsel for the Respondents. None appears for the Respondent No. 5, although on earlier occasion, learned Counsel Mr. T. Das appeared on his behalf. Mr. K.N. Hazarika, Office Superintendent in the Establishment of the Chief Engineer, Irrigation is present in the Court in terms of the order dated 20.9.05.

2. The grievance raised in this writ petition is in respect of the order dated 29.10.03 (Annexure-6) by which the Respondent No. 5 was promoted as Divisional Head Assistant. According to the Petitioner, he being senior to the Respondent No. 5 and the criteria for promotion being seniority-cum-merit and there being no adverse remarks against him declaring him to be unfit for promotion, he was entitled to get the promotion ahead/of the Respondent No. 5.

3. The controversy raised in this application is in respect of the seniority of the two incumbents, i.e. the Respondent No. 5 and the Petitioner. There is no dispute that the Petitioner was all along held to be senior to the Respondent No. 5. It is also not the case of the Respondents that the Petitioner is not sustainable to get promotion as Divisional Head Assistant. However, while processing the case for promotion as Divisional Head Assistant, a note was given stating that the

Petitioner is junior to the Respondent No. 5 in view of the fact that he was transferred to the present Division by order dated 13.07.88. The said order reads as follows:

GOVERNMENT OF ASSAM Office of the Chief Engineer: Irrigation : Assam
(Establishment Branch)

OFFICE ORDER

Dated Guwahati, the 13th July, 1988

No CEI(E) 65/79/Pt.-I/109: In the interest of public service Shri Debendra Nath Bania, U.D. Assistant, is transferred and posted in the same capacity in the Office of Executive Engineer, Kaliabar & Intd. Kallong Division (Irrigation) Nagaon with immediate effect vide Mohidhar Bora, U.D. Asstt. transferred vide this Office Order No. CEI(E) 65/79/Pt.-I/110 dated 20.07.88.

Sd/- J.C. Mahanta Chief Engineer Irrigation, Assam, Guwahati-3

4. On perusal of the aforesaid order, it will be seen that there is no whisper in the order that the Petitioner will not be entitled to count his past service towards seniority. However, the Respondents while preparing the aforesaid note and comparative statement dated 20.8.03, made an endorsement that the Petitioner along with one Shri Surya Dev Brahmachari would not be entitled to count their past service since they were transferred to the present Division as per their own request. In the statement, both the Respondent No. 5 and the Petitioner have been shown to be graded as "good" in the relevant years. However, in spite of the fact that the Petitioner is senior to the Respondent No. 5, he was deprived of his promotion on the ground that he was transferred to the present Division as per his own request.

5. I have verified the records. There is no whisper of ignoring the past service of the Petitioner upon his transfer to the present Division by the aforesaid order. On the other hand, in respect of the transfer of said Shri Brahmachari, it was clearly mentioned in the order that his past service would not be counted for his seniority and that since the transfer was made on his own request, he would not be entitled to get the benefit of past service and TA etc. The order of transfer in respect of said Shri Brahmachari dated 16.07.86 reads as follows:

GOVERNMENT OF ASSAM Office of the Chief Engineer: Irrigation: Assam
(Establishment Branch)

OFFICE ORDER

Dated Guwahati, the 16th July, 1986

No. CEI(E)44/85/83: At their own requests, the following U.D. Asstts. of this Deptt. are hereby transferred and posted in the same capacity in the office shown against their name with effect from the date of their joining under the following conditions:

- 1) No transfer T.A. and joining time is allowed as the transfer has been made at their own request
- 2) They have no claims of past service benefit whatsoever rendered in their present offices towards seniority in the new offices of posting.

Name and address of the U.D. Asstt.

- 1) Shri Suryya Dev. Brahmachari Office of the E.E., Kaliabar Intd. and Kallong Electrical Division (Irrigation) Nagaon

Posted at

Office of the E.E., Kaliabar and Intd. Kallong Division. (Irrigation) Nagaon

- 2) Shri Nirod Kr. Kakati

Posted at

Office of the E.E., Kaliabar & Intd. Kallong Divn. (Irrigation) Nagaon

Office of the E.E., Kaliabar Intd. & Kallong Electrical Divn. (Irrigation) Nagaon
Shri Nirod Kr. Kakati is to move first.

Sd/- Chief Engineer Irrigation, Assam, Guwahati-3

6. On perusal of the aforesaid two orders concerning said Shri Brahmachari and the Petitioner, it will be seen that while a condition was imposed on transfer of said Brahmachari that his past service would not be counted, no such condition was imposed in respect of the Petitioner. Thus, the Petitioner could not have been deprived of his seniority over the Respondent No. 5 only on the basis of the note prepared in 2003. The settled seniority of the Petitioner could not have been done away with by a stroke of pen and that too behind the back of the Petitioner.

7. Mr. K.N. Hazarika, Office Superintendent in the Establishment of Chief Engineer, Irrigation, Guwahati, who is personally present in the Court, tried to explain the circumstances leading to the preparation of the note dated 20.8.03 about which a mention has been made above and in the order of this Court dated 20.9.05. In the order, it was noticed that the note was prepared on the basis of the fact that the Petitioner was transferred to the resent Division as per his own request. However, on being requested, nothing could be brought to the notice of this Court that any such order was passed to deprive the Petitioner of his past service and/or to suggest that he was entitled to count his seniority in the present Division only with effect from the date of joining the Division pursuant to the above quoted order dated 13.07.88.

8. Even if the Petitioner had come to the present Division on the basis of his own request, that by itself cannot be said to be a voluntary act of abandoning the past service. A Govt. employee is entitled to make request for his transfer from one Division to another Division. Unless a condition is imposed while accepting such request for transfer that the incumbent will have to abandon his past

service. Upon transferring the incumbent showing the same to be in public interest, he cannot be forced to abandon his past service and that too in complete violation of the principles of natural justice.

9. The records produced by the learned State counsel do not show anything so as to conclude that the Petitioner had come to the present Division abandoning his past service. As noticed above, the transfer order in no way forfeited his seniority in the substantive grade. Unlike the case of Shri Brahmachari, the Petitioner was never made to forfeit his past service, upon his transfer to the present Division. Rather, the transfer was in public interest.

10. The admitted position which has emerged is that the Petitioner is senior to the Respondent No. 5. If that be so, on the basis of the material on record, more particularly in view of the fact that both the Respondent No. 5 and the Petitioner have been graded as "good" for the relevant years, I am of the considered opinion that it was the Petitioner who was entitled to be promoted for Divisional Head Assistant and not the Respondent No. 5. Since the Respondent No. 5 was promoted as Divisional Head Assistant showing him to be senior to the Petitioner on a wrong assumption of facts, the order of promotion made in his favour is not sustainable.

11. In view of the admitted position that but for the wrong assumption of the official Respondents that the Petitioner had lost his seniority upon his transfer to the present Division by the above quoted order, the Petitioner was all along senior to the Respondent No. 5. When the records have revealed that the Petitioner was transferred without any condition that his past service would not be counted for seniority in the present Division, he naturally carried the said service on being transferred to the present Division and accordingly would rank senior to the Respondent No. 5.

12. In view of the above, there is no option than to set aside and quash the impugned order of promotion made in favour of the Respondent No. 5 vide order dated 29.10.03 (Annexure-6). Now the Petitioner shall be promoted as Divisional Head Assistant. Appropriate order shall be passed within a period of two months from the date of furnishing the certified copy of this order to the Respondents.