
(2016) 05 GAU CK 0082
In the Gauhati High Court
Case No : WA No. 96 of 2015

Fowzia Farmin

APPELLANT

Vs

Noor Hashina Begum

RESPONDENT

Date of Decision : 31-05-2016

Acts Referred:

Citation : (2016) 4 GauLJ 666 : (2016) 4 GauLR 643

Hon'ble Judges : Mr. Hrishikesh Roy and Mr. Paran Kumar Phukan, JJ.

Bench : Division Bench

Advocate : Mr. B. Gogoi, Advocate, for the Appellant; Mr. I. Choudhury, Mrs. R.S. Chowdhury and Mr. A.K. Baruah, Advocates, Mr. B. Sarma, Advocate, Mr. R.K. Bora, GA, Assam, for the Respondent

Final Decision : Dismissed

Judgement

Hrishiksh Roy, J (Oral) - Heard Mr. B. Gogoi, the learned Counsel appearing for the appellant. Also heard Mr. I. Choudhury, the learned Counsel appearing for the respondent No.1 (writ petitioner). The learned Advocate Mr. B. Sarma appears for the Assam Tourism Development Corporation (ATDC) and their officers. The State is a formal party and they are represented by Mr. R.K. Bora, the learned Government Advocate.

2. This is a seniority dispute between the appellant (6th respondent) and the writ petitioner, Noor Hashina Begum who are at present serving in the rank of Sr. Manager in the ATDC. The Corporation has not framed any Service Rules but they do follow the Assam Tourism Service Rules, 1992 (hereinafter referred to as "the 1992 Rules"). The post of Tourist Information Officer is a cadre post under the 1992 Rules and the writ petitioner was appointed to the cadre post of Tourist Information Officer on 27.1.1992. The appellant was appointed as an Asst. Liaison Officer on 17.12.1991 but this was not a cadre post under the 1992 Rules. On 27.1.1992, the post of Asst. Liaison Officer was upgraded and the office order reflects that the up gradation of the appellant to that of Liaison Officer was given retrospective effect from the date of her joining as an Asst.

Liaison Officer i.e 18.12.1991. The Pay Scale of the Liaison Officer and the Tourist Information Officer was the same which the two litigants received w.e.f. 27.1.1992 and both were then given the revised Pay Scale w.e.f. 21.6.2005.

3. When the parties were serving in the cadre of Sr. Manager, a provisional Gradation List of the three Sr. Managers of the ATDC was notified on 30.7.2011 (Annexure-F) where the appellant was placed in the 1st position and the writ petitioner in the 3rd position and objections were invited to this provisional Gradation List. Since the representation of the writ petitioner against the provisional Gradation List was not being considered, earlier she filed the WP(C) No.2940/2013 which was disposed of on 5.8.2013 (Annexure-H). The learned Single Judge observed that the 6th respondent Fowjia Farman (appellant herein) was upgraded from the post of Asst. Liaison Officer to the post of Liaison Officer with retrospective effect and therefore her claim for placement in the higher seniority position, should be considered and inter se seniority in the rank of Sr. Manager, should be re-determined by the ATDC.

4. To resolve the seniority issue, the ATDC constituted a 3 Member Committee headed by the Managing Director (MD) on 18.8.2013 and the writ petitioner gave a written representation before the MD on 26.8.2013 (Annexure-J), where she indicated the justification for her higher placement in the Seniority List vis-à-vis the appellant Fowjia Farman. In her representation, the writ petitioner stated that she was the only one who was appointed against the cadre post of Tourist Information Officer but the appointment of appellant Fowjia Farman was in a non-cadre post. Therefore the appointment of either as Asst. Liaison Officer or Liaison Officer, should play no role in determination of seniority between two persons, who were serving in different posts. The Committee deliberated on the matter in their meeting held on 28.6.2013 but primarily because the appellant was given retrospective up gradation to the post of Liaison Officer w.e.f. 18.12.1991, when she joined as an Asst. Liaison Officer, she was declared to be senior to the writ petitioner. Consequently, the Final Gradation List was notified on 30.8.2013 (Annexure-K), whereby the appellant was placed in the 1st position with the writ petitioner placed just below her.

5. Aggrieved by the final seniority position declared on 30.8.2013, the respondent challenged the same through the WP(C) No.7130/2013, where the appellant was arrayed as the 6th respondent. The Writ Court formulated the moot issue as whether the 6th respondent can claim seniority over the writ petitioner on the basis of the retrospective up gradation of her post to an equivalent post hold by the writ petitioner. In other words, whether the past service deemed to have been rendered by the 6th respondent prior to her up gradation to the post of Liaison Officer can, ipso facto, be counted for the purpose of seniority, vis-à-vis the writ petitioner.

6. After considering various judgments, the learned Single Judge opined that retroactivity should not go beyond the period when the incumbent was not even born in a cadre and accordingly the it was opined that the benefit of previous

service in a lower post can't be counted, for determining seniority in the higher post. Noticing that Service Rules have not been framed by the ATDC, the Court felt the necessity to evolve a fair and just principle which could be applied for determination of seniority and to avoid the element of fortuitous circumstances. The Court accordingly held that the age of the two litigants could be the decisive factor, for determination of the inter se seniority. It was found that the writ petitioner was aged about 53 years and the 6th respondent is younger to her by 7 years and accordingly the Court held that the writ petitioner is entitled to be placed above the respondent No.6 in the Gradation List. Examining the issue of lack of challenge to the retrospective up gradation of the 6th respondent to the post of Liaison Officer order on 27.1.1992, by the writ petitioner, the Court held that up gradation in a non-cadre post like that of the Liaison Officer can't be a matter of concern for an incumbent working in the cadre post of Tourist Information Officer. Therefore the subsequent challenge to the retrospective up gradation of the 6th respondent was found to be justified. With such conclusion, the writ petition was allowed on 2.4.2015 by directing the authorities to place the writ petitioner above the 6th respondent, in the gradation List of Sr. Managers of the ATDC.

7. Assailing the impugned judgment, the learned Counsel for the appellant projects that the 6th respondent is serving in the ATDC since 18.12.1991 as an Asst. Liaison Officer whereas the writ petitioner joined the Corporation a month later on 27.1.1992 as the Tourist Information Officer and hence he contends that the length of service can be a rational basis for determination of seniority. Therefore since the post of Asst. Liaison Officer was retrospectively upgraded and the Liaison Officer was made equivalent to the post of Tourist Information Officer, it is argued that the 6th respondent was rightly declared to be senior to the latter incumbent.

8. Mr. B. Gogoi as the appellant's lawyer cites D.P. Das v. Union of India, reported in (2011) 8 SCC 115 to contend that in the absence of specific Rules, seniority of person holding similar posts should be determined, on the basis of the length of service and not on some fortuitous circumstances. The appellant also cites Pramod K. Pankaj v. State of Bihar reported in (2004) 3 SCC 723 to project that continuous officiating in the lower post can under certain situation be the basis, for determination of seniority in the higher post.

9.1. On the other hand, Mr. I. Choudhry, the learned Counsel submits that retrospective up gradation can't impact the seniority of an incumbent already born in the higher cadre. While the 6th respondent may secure all other service benefits by her retrospective up gradation to the post of Liaison Officer, she can't claim seniority against the writ petitioner, who was already serving in the cadre post of Tourist Information Officer.

9.2 The learned Counsel for the respondent No.1/writ petitioner refers to Rule 22 of the 1992 Rules to project that those criterion will not be relevant for determination of seniority between a person holding the cadre post of Tourist

Information Officer and a person holding the non-cadre post of Liaison Officer in the ATDC. Mr. Choudhury also refers to the Rule 24 to project that the cadre wise seniority list is to be published and date of birth of the incumbents can be a relevant factor. As the writ petitioner is admittedly older by 7 years to the 6th respondent, the learned Counsel submits that the senior incumbent being preferred for the purpose of seniority is an approach, consistent with the Article 14 & 16 as it will provide chance to both to get the benefit of promotion. In other words when the senior incumbent reaches the age of superannuation, the junior can be promoted.

10. The Supreme Court in *State of Bihar v. Akhouri Sachindra Nath* reported in 1991 Supp. (1) SCC 334 has held that person promoted with retrospective effect can't adversely impact those who are already in the higher cadre. If we apply the ratio of this decision to the facts of the present case, it is clear enough that the retrospective up gradation of the post of Asst. Liaison Officer to that of Liaison Officer can't be allowed to impact the incumbent, who was already born in the equivalent post of Tourist Information Officer. The service rendered by the 6th respondent in the lower post of Asst. Liaison Officer in the lower Pay Scale may entitle her to all other service benefits under the retrospective up gradation order but that will not facilitate the upgraded employee to impact the seniority of those, who are already working in the higher cadre. That apart, the post of Tourist Information Officer is a cadre post under Rule 3 of the 1992 Rules whereas the post of Assistant Liaison Officer or Liaison Officer are not included in the cadre posts, under the Service Rules. In such circumstances, while it may be permissible for the Corporation in the absence of the Corporation's own Service Rules to treat cadre and non-cadre post, to be feeder cadre post for promotion to the higher post of Sr. Manager, for service rendered as Asst. Liaison Officer by the 6th respondent, can't justify her higher placement in the Gradation List, by deemed service as Liaison Officer, on the strength of the retrospective up gradation order.

11. While considering intra-court Appeal, we must bear in mind that a Writ Appeal is an Appeal on principles and unlike an Appeal in ordinary sense, only patent error on the face of record or infringement of settled principles of law can justify interference with the decision of the learned Single Judge. If two views are possible and a reasonable view is adopted by the learned Single Judge, another view however appealing it may appear to the Division Bench, should not normally be allowed to prevail (see *Tractor and Farm Equipment Ltd. v. Secretary to the Government of Assam, Department of Agriculture* reported in 2004 (1) GLT 117). Applying this principle, we find that the learned Single Judge has not committed any material error of facts or law and the view taken by the Court is found to be reasonable and consistent with known legal principles.

12. In the above circumstances, no justification is found to interfere with the impugned verdict rendered by the Writ Court and situated thus, agreeing with the conclusion and reasoning of the writ Court, we dismiss the writ Appeal. No

cost.