
(2008) 09 GAU CK 0055
In the Gauhati High Court
Case No : Writ Petition (C) No. 4158 of 2004

Ghana Kanta Nath

APPELLANT

Vs

State of Assam and Others

RESPONDENT

Date of Decision : 10-09-2008

Acts Referred:

Assam Directorate Establishment (Ministerial) Services Rules, 1973 — Rule 12, 19, 19(3)(4), 19(7), 8

Citation : (2009) 1 GLD 548 Supp

Hon'ble Judges : Biplab Kumar Sharma, J

Bench : Single Bench

Final Decision : Dismissed

Judgement

B.K. Sharma, J.—The challenge made in this writ petition is the promotion of the respondent No. 4 as Superintendent effected in 2003. Further challenge made in this writ petition is the gradation list of 1992 of Upper Division Assistant (UDA).

2. The brief facts leading to filing of the instant writ petition are that the petitioner, a Graduate in Arts was appointed as Lower Division Assistant (LDA) in the office of the Inspector of Schools, Tezpur on 20.10.1975. He was confirmed in service/post on 20.10.1980. As against the said position of the petitioner, the respondent No. 4 was appointed as LDA in the office of the Deputy Commissioner, Tezpur on 20.11.1976. It is the case of the petitioner that since the respondent No. 4 is only matriculate, he is not qualified to be promoted as UDA/Superintendent. In this connection, the petitioner has referred to the provisions of Assam Directorate Establishment (Ministerial) Service Rules, 1973. Rule 12 lays down the Educational qualification for the post of LDA as Higher Secondary Examination passed. Rule 9 dealing with the appointment to the post of UDA by way of promotion, provides that the same is on the basis of seniority-cum-merit from amongst the LDA of the service and by selection strictly on the basis of merit from amongst the ministerial staff of the District offices having at their credit not less than two years of continuous service as UDA.

3. As against the aforesaid position in 1973 Rules, both the petitioner and the respondent No. 4 were appointed as per the provisions of the Assam Ministerial District Establishments Rules, 1967. Further, like that of 1973 Rules, 1967 Rules also provided Higher Secondary Examination pass as the qualification for appointment as LDA. It is the case of the petitioner that, both the incumbents with their promotion to the post of UDA in another establishment came to be governed by 1973 Rules. Rule 8 of the 1973 Rules provides for appointment to the post of Superintendent by promotion on the basis of seniority-cum-merit from amongst UDA of the service who have rendered not-less than 7 years of service as UDA. Rule 19 provides for maintaining inter se seniority both for the post of Superintendent and UDA according to the order of preference/selection made by the appointing authority subject to the condition that the promotees join the post within 15 days. However, in case a candidate is prevented from joining within 15 days, if the period is not so extended, seniority shall be determined according to the date of joining.

4. The selection for promotion to the post of UDA was held on 15.11.1986 followed by interview held on 21.1.1987 in which both the petitioner and the respondent No. 4 alongwith others appeared. While the petitioner occupied 1st position, the respondent No. 4 occupied 7th position in the merit list. Since the petitioner did not fulfil the criteria laid down in Rule 9(2) which is 2 years continuous service as UDA as ministerial staff of District offices, the petitioner could not be promoted immediately. However, he was promoted by order dated 29.10.1987 in relaxation of the rules requiring the said two years of continuous service. On the other hand, the respondent No. 4 was promoted immediately after the selection on 7.2.1987. Thus going by the dates of promotion as UDA, the respondent No. 4 is admittedly senior to the petitioner. The petitioner accepted the position and continued to serve as UDA.

5. The gradation list of UDA was published and circulated in 1992 vide notification dated 25.9.1992 (Annexure E) in which the petitioner was shown at serial No. 3 while the respondent No. 4 was shown that at serial No. 1. It appears that the petitioner did not make any grievance against the same and the gradation list attained its finality. According to the petitioner he came to know that the post of Superintendent in the office of the Commissioner, NAD, Tezpur was lying vacant since September/2002. Since he was serving as UDA for more than 15 years and had the requisite experience, he made representation dated 13.5.2003 requesting the competent authority to consider his case for promotion to the post of Superintendent. However, it was the respondent No. 4 who was promoted to the post by the impugned notification dated 1.10.2003 (Annexure J). Being aggrieved and his appeal having not been disposed of, the petitioner has approached this Court making the prayers for setting aside and quashing of the aforesaid gradation list and the order of promotion.

6. As against the aforesaid stand of the petitioner, the respondents both official and private, have justified the action of the authority in preparing the gradation

list and granting the promotion to the respondent No. 4. According to them at the time of entering into service, the respondent No. 4 was governed by the aforesaid Rules of 1967. Although the qualification for the post of LDA was prescribed as HSSLC passed, it appears that there was general relaxation in respect of such qualification and matriculation was fixed to be the minimum educational qualification instead of Higher Secondary Examination passed for entry in the District offices. Subsequently, 1967 Rules were also amended by notification dated 17.3.1994 in terms of which matriculation was held to be the prescribed qualification for appointment as LDA. Thus it cannot be said that the respondent No. 4 was not qualified to hold the post of LDA at the time of entering into service way back in 1976.

7. There is no dispute that 1973 Rules was not applicable to the petitioner when he was first appointed as LDA. Subsequently his service was confirmed in the office of the Commissioner, North Assam Division, Tezpur vide office order dated 7.10.1994 under whom he earned his promotion as UDA prior to time than the petitioner about which discussions have been made above. While the respondent No. 4 was promoted as UDA w.e.f. 7.2.1987, the petitioner was promoted as such w.e.f. 29.10.1987. He was so promoted relaxing the requirement of Rule 9(2) of the 1973 Rules in terms of which the incumbent has to have two years of continuous service as UDA in the District offices. Admittedly, the petitioner did not have the said service to his credit. Consequently, he could not have been invited for selection. However, he was invited and although was selected, could not be appointed in view of the embargo under Rule 9(2) of the Rules. It was only after his selection, Rule 9(2) was relaxed and he was appointed as UDA after more than 8 months of promotion of the respondent No. 4.

8. The case of the petitioner does not come within the purview of proviso to Rule 19(7) of the 1973 Rules. It is true that as per the proviso to Rule 19(3)(4), inter se seniority is to be maintained as per the merit positions obtained in the select list, but the same is subject to the conduct that the incumbent joins the post within 15 days relaxable by another 15 days. Such relaxation can be only on the grounds/reasons beyond the control of the incumbent. Same was not the case with the petitioner. Although he was selected, but could not be appointed due to lack of two years of continuous service to his credit as UDA in the District offices. Thus he was not even qualified to be called for the selection/interview. However, he was allowed to sit in the selection in which he qualified. It was only after relaxation extended to him he could be appointed in October, 1987 as against the appointment of the respondent No. 4 in February, 1987. There is nothing to show that any further relaxation was provided to the petitioner in the matter of joining the post of UDA. If that be so, by operation of the proviso of Rule 19(7) also he became junior to the respondent No. 4. As per the proviso if the period of joining is not extended, the seniority shall be determined according to the date of joining. The period of joining was never extended for the petitioner and thus upon his joining the post of UDA in October, 1987, he was entitled to count his seniority only from October, 1987 and not from any earlier point of time.

9. The above position now leads us to the issue raised by the petitioner about the purported lack of educational qualification on the part of the respondent No. 4. As noted above, he was qualified but to hold the post of LDA at the time of initial entry into service. His service was borrowed to the office of the Commissioner when he duly earned his promotion as UDA in the year 1987. At that point of time the petitioner never raised any grievance against his promotion. Their inter se seniority got finalized with the issuance of 1992 gradation list to which also there was no grievance on the part of the petitioner. Now after 12 years of publication of the gradation list and 16 years of promotion of the respondent No. 4 as UDA, the petitioner has filed this writ petition with the grievance that the respondent No. 4 has been further promoted to the post of Superintendent. While making the challenge to the promotion order of the respondent No. 4 as Superintendent effected by Annexure J order dated 1.10.2003, the petitioner has also collaterally challenged the gradation list of 1992 and has also questioned the promotion of the respondent No. 4 as UDA w.e.f. 7.2.1987 which in my considered view is not at all admissible at such a distant date and that too without any explanation as to the delay in making the challenge.

10. As noted above, the respondent No. 4 was qualified to hold the post LDA at the time of initial entry to the service under the 1967 Rules which was further amended in 1994 prescribing the educational qualification for the post of LDA alternatively as HSLC passed. Prior to that there was general relaxation extended to the matriculates. After entering into the service, the respondent No. 4 was inducted to the Office of Commissioner where he earned his promotion as UDA and thereafter as Superintendent. It will be too much to say that since the petitioner was inducted to the office of the Commissioner and was governed by 1973 Rules, he was not qualified to hold the post of UDA and consequently the post of Superintendent. It is not the case in which the petitioner volunteered for his service in the office of the commissioner, rather he was inducted there by way of borrowing his service. In such a situation, it will be against the interest of justice to hold that the respondent No. 4 was not qualified to hold the post of UDA and consequently the post of Superintendent.

11. Apart from the above, there is also no explanation about the delay and laches on the part of the petitioner in approaching this Court. He has questioned the very promotion of the respondent No. 4 as UDA effected in February, 1987 by filing the writ petition in the year 2004. He has also questioned the gradation list published in 1992. Apart from such delay on his part, the collateral challenge made to the gradation list of 1992 and the question being raised in respect of promotion of the respondent No. 4 as UDA way back in 1987 while making the challenge to his promotion as Superintendent cannot be gone into in this petition.

12. As regards the promotion of the respondent No. 4 as Superintendent, it is on record that the case of all the incumbents including the petitioner was considered by duly constituted selection committee. The selection committee recommended the respondent No. 4 for promotion acting on which the appointing authority

appointed him as the Superintendent. Thus, it is not the case of non-consideration of the case of the petitioner. His case was also considered alongwith the respondent No. 4 and the selection committee found the respondent No. 4 more suitable and accordingly recommended him for promotion as Superintendent. The respondent No. 4 is also senior to the petitioner in the cadre of UDA. Thus, there is no infirmity in promoting him.

13. For the aforesaid reason, I do not find merit in the writ petition and accordingly it is dismissed. However, there shall be no order as to costs.