
(2005) 04 GAU CK 0034

In the Gauhati High Court

Case No : Writ Petition (C) No"s. 133 (K) of 2002 and 16 (K) of 2003

H.M. Rawther and Others

APPELLANT

Vs

State of Nagaland and Others

RESPONDENT

Date of Decision : 04-04-2005

Acts Referred:

Constitution of India, 1950 — Article 14, 16

Citation : (2005) GLT 843 Supp

Hon'ble Judges : B.K. Sharma, J

Bench : Single Bench

Advocate : R. Iralu, Ayungla, Asangla Walling, Taka Masa Ao, M. Theyo and O.P. Phom, for the Appellant; Lucy, Taka Masa Ao and R. Iralu, for the Respondent

Judgement

B.K. Sharma, J.—Both the writ petitions are by and between the same parties making claim and counter claim in respect of determination of seniority amongst them and thus were heard analogously and are being disposed of by this common judgment and order. The issue involved is as to whether the Petitioner in WP(C) No. 16(K)/2003 is entitled to count his seniority from the date of absorption in the borrowing department to which he was sent on deputation or he is entitled to count his earlier period of service in the lending department, followed by deputation service in the borrowing department.

2. The Petitioner in the first writ petition, i.e., WP(C) No. 16(K)/2003, while was working as Upper Division Assistant (UDA) in the office of the Deputy Commissioner, Tuensang District, under the Government of Nagaland was confirmed in his service by an order No. 50/77 issued on 2.5.77. Prior to that, he was appointed as Lower Division Assistant (LDA) in February, 1967. He was promoted to the post of UDA in 1974. The Petitioner continued in his service in the capacity of UDA till he was appointed as Stenographer Grade-II by an order dated 1.5.78 on officiating basis. When one post of Stenographer Grade-II was upgraded to Grade-I the Petitioner was appointed to the said post on adhoc basis by an order dated 4.6.84. While was serving as such the Petitioner was

appointed on deputation as Stenographer Grade-I and was posted to Nagaland Civil Secretariate, Kohima by an order dated 11.2.87 initially for a period of one year with effect from 29.11.86. According to the Petitioner he was appointed on deputation to an equivalent post of Stenographer Grade-I. Prior to his such appointment on deputation, he had rendered more than two years of continuous service in the grade of Stenographer Grade-I under the establishment of Deputy Commissioner, Tuensang.

3. While the Petitioner was serving as Stenographer Grade-I on adhoc basis in the former establishment, i.e., the Deputy Commissioner, Tuensang, he appeared in a speed test conducted by the Nagaland Public Service Commission on 28.11.86 for departmental promotion to the post of Stenographer Grade-I and he was selected vide notification dated 15.12.86 and the Petitioner was placed at serial No. 3. Pursuant to his such selection, the Petitioner was promoted on regular basis to the post of Stenographer Grade-I by an order dated 15.12.86. Accordingly, necessary entries were made in his service book regularizing his service as Stenographer Grade-I with effect from 15.12.86.

4. The Petitioner continued in his deputation service in the borrowing department and by order dated 10.4.97, he was absorbed with effect from 28.2.97. Consequent upon such absorption with prospective effect only, he was placed at serial No. 9 of the tentative seniority list published by notification dated 10.4.1997. Being aggrieved by such prospective absorption and fixation of seniority on that basis, the Petitioner made several representations praying for his retrospective absorption and/or to count his seniority from 15.12.86, i.e. with effect from which date he as given regular promotion as Stenographer Grade-I in the former department.

5. By Annexure-G order dated 13.3.2002, the Government of Nagaland in the Home Department, Secretariat Administration Branch re-fixed the seniority of the Petitioner with effect from 15.12.1986 in the grade of Stenographer Grade-I and placed him at serial No. 11 of the seniority list above the three Petitioners in the second writ petition, i.e. WP(C) No. 133(K)/2002 who are private Respondents in the first writ petition. By yet another notification dated 28.3.2002, the post of Stenographer Grade-I held by the Petitioner was upgraded as Senior Grade Stenographer with effect from 1.8.98 and against the said upgraded post, the Petitioner was promoted with effect from 1.8.98 which was the date of promotion of his erstwhile seniors, who became juniors pursuant to re-fixation of the seniority of the Petitioner by the aforesaid notification dated 13.3.2002.

6. Being aggrieved by such promotion of the Petitioner to the post of Senior Grade Stenographer and re-fixation of his seniority over the private Respondents, they have preferred the second writ petition, i.e., W.P.(C) No. 133/2002. In this writ petition the case of the Petitioners is that the impugned notification dated 13.3.2002 could not have been issued granting retrospective seniority to the Petitioner and consequential promotion to the post of Senior Grade Stenographer. In this connection they have placed reliance on the office memorandum dated

12.8.75 issued by the Government of Nagaland in the Home Department, Administrative Reforms (O & M) Branch, by which the decision was conveyed that upon absorption of a deputationist, his seniority will be counted from the date on which the decision is taken to absorb the deputationist in the deputation post. The present Petitioner has been impleaded as the Respondent No. 4 in the second writ petition.

7. When the second writ petition was pending before this Court the Annexure-K order dated 23.1.2003 was issued cancelling the aforesaid order dated 13.3.2002 by which the seniority of the Petitioner was re- fixed. The order granting him retrospective promotion to the post of Senior Grade Stenographer was also cancelled. Being aggrieved, the Petitioner has filed the first writ petition. In paragraph 8 of the writ petition, the Petitioner has urged the following grounds.

a) The impugned order dated 23.1.2003 was passed from the back of the Petitioner. No notice was given to the Petitioner to show cause as to why the Petitioner should not be demoted and as to why his seniority position in the grade of Senior Grade Steno should be altered, and without giving any opportunity of being heard the impugned order was passed. On this score alone the impugned order cannot stand the scrutiny of law.

b) The impugned order dated 23.1.2003 was not passed in the name of the Governor of Nagaland for exigency of service and in the public interest. The impugned order was passed without considering the factors by which the Petitioner's seniority has been counted with effect from 15.12.1986.

c) No reason whatsoever was assigned justifying the issuance of the impugned order dated 23.1.2003 except that anomalies cropped up in fixing seniority of this Petitioner. This would clearly show the arbitrariness of action taken by the Respondents.

d) The Respondent-Government willfully overlooked the main reason of giving the benefit of counting seniority of the Petitioner from 15.12.1986 which was based on the instructions issued by the Government of India pursuant to a judgment dated 14.12.1999 passed by the Supreme Court of India.

8. In a nutshell, it is the case of the Petitioner that since he was a regular Stenographer Grade-I in the former establishment with effect from 15.12.86 and was sent on deputation to the borrowing department, upon his absorption in the same grade, he is entitled to count his seniority taking into account the former service in the same grade with effect from 15.12.86 and that the same was rightly given to him with consequential benefits. The Petitioner has also assailed the legality and validity of the aforesaid OM dated 12.8.75 conveying the decision for fixation of seniority with prospective effect upon absorption of a deputationist.

9. It is in the above back ground, the first writ petition has been filed making a challenge to the order dated 23.1.2003. He has also made a challenge to the aforesaid OM dated 12.8.75 and the initial order of his absorption dated

10.4.1997, by which he was absorbed in the borrowing department as Stenographer Grade-I with effect from 28.2.1997. The Petitioner has also prayed for restoration of the order dated 28.3.2002 by which his seniority was re-casted with retrospective effect, i.e. 15.12.1986 with consequential benefit of promotion to the grade of Senior Grade Stenographer.

10. Counter affidavits have been filed both by the official as well as private Respondents. The private Respondents have taken the plea of delay and laches on the part of the Petitioner in not making any challenge to the first order of absorption by which he was absorbed with effect from 28.2.1997. They have placed reliance on the aforesaid OM dated 12.8.75. According to them there is no infirmity in the impugned order cancelling the orders of re-fixation of seniority of the Petitioner and his retrospective promotion as Senior Grade Stenographer.

11. The official Respondents while defending the impugned action have taken the plea that the orders granting the Petitioner retrospective seniority and promotion had to be cancelled as the same was not routed through the Cabinet. Further stand of the official Respondents is that the Petitioner was shown promoted as Stenographer Grade-I with effect from 16.12.86 in his parent department after 16 days of his joining the borrowing department and as such his earlier service cannot be counted toward seniority. They have also placed reliance on the aforesaid OM dated 12.8.75. They have not denied the stand of the Petitioner that he was appointed on deputation to an equivalent post of Stenographer Grade-I.

12. The Petitioners in the second writ petition who are the private Respondents in the first writ petition had assailed the orders granting retrospective seniority and promotion to the Petitioner urging the same very grounds as has been urged in the counter affidavit filed in the first writ petition. During the pendency of this writ petition, the grievance raised by the Petitioners was redressed by the impugned order forming the subject matter of challenge in the first writ petition.

13. I have heard Mr. R. Iralu, learned Counsel for the Petitioner in the first writ petition who is the Respondent No. 4 in the second writ petition. I have also heard Mr. Taka Masa Ao, learned Counsel for the Petitioners in the second writ petition who are the private Respondents in the first writ petition. I have also heard Ms. Lucy, learned State Counsel on behalf of the official Respondents.

14. Mr. Iralu, learned Counsel elaborating his argument submitted that the Petitioner having been absorbed in the borrowing department in the same grade as he was in, in the former department, the Petitioner is entitled to count his seniority from his initial date of entering the grade i.e. 15.12.86. He submitted that after having granted such seniority to the Petitioner and consequential benefits of promotion, same could not have been withdrawn without putting the Petitioner to any kind of notice. He submitted that in view of the legal position settled by the Apex Court in such matter, the criteria laid down in the aforesaid Office Memorandum dated 12.8.75 is no longer valid. He placed reliance on the

decisions of the Apex Court as reported in K. Madhavan and Another Vs. Union of India (UOI) and Others, and S.I. Rooplal and Another Vs. Lt. Governor Through Chief Secretary, Delhi and Others,

15. Countering the above arguments made by the learned Counsel for the Petitioner in the first writ petition, Mr. Taka Masa, learned Counsel for the private Respondents made submissions in tune with the stand in the counter affidavit. He submitted that the Petitioner cannot disturb the settled seniority positions of the private Respondents and that the Government is bound to follow the mandates in the aforesaid OM dated 15.8.75. Ms. Lucy, learned State Counsel adopted the above arguments made by Mr. Taka Masa and defended the action of the Government in cancelling the re-fixation of seniority of the Petitioner and the consequential benefits.

16. I have given my anxious consideration to the submissions made by the learned Counsel for the parties. I have also gone through the materials available on records.

17. As noticed above, the Petitioner entered the services of the Government of Nagaland way back in 1967 as an LDA. Thereafter, he was promoted as UDA in 1974 and eventually he became a Stenographer Grade-I on regular basis with effect from 15.12.86. Thereafter, he was appointed on deputation in the same capacity in the Home Department, Secretariate Administration Branch by order dated 11.2.87. The Petitioner in his writ petition has made a categorical statement that he was appointed on deputation to an equivalent post i.e. Stenographer Grade-I. In this connection the statements made by the Petitioner in paragraph 2 of his writ petition are quoted below:

It is most relevant and pertinent to mention here that the Petitioner was appointed on deputation to an equivalent post, i.e. Stenographer Grade-I. Prior to his appointment on deputation the Petitioner had rendered more two years of continuous service in the grade of Stenographer Gr.I under the establishment of the Deputy Commissioner, Tuensang.

18. The aforesaid categorical statement made by the Petitioner in paragraph 2 of the writ petition has been dealt with by the official Respondents in their counter affidavit as follows:

That paragraphs 2, 3, 4, 5 and 6 of the writ petition are admitted to the extent borne out by records.

19. The private Respondents in their counter affidavit have responded to the aforesaid statement made in paragraph 2 of the writ petition by making a statement that the post of Stenographer Grade-I in the Nagaland Civil Secretariat enjoys higher scale of pay and grade than the post of Stenographer Grade-I in the district establishment. As regards the claim of higher scale of pay for the Stenographer Grade-I in the Civil Secretariat, same is belied by the fact that the Petitioner was appointed on deputation in the time scale of pay of Rs.

1075/- to Rs. 2375/-, which is the pay scale he was given on his regular promotion as Stenographer Grade-I in the former department. Thus the pay scale for both the posts in both the departments were the same. The private Respondents have not placed anything on record as regards their statement that the Stenographer Grade-I in the Nagaland Civil Secretariat is in the higher grade. Had it been so the post to which the Petitioner was appointed on deputation would have carried higher scale of pay, which is not the case. Thus, there is no dispute that both the posts held by the Petitioner in his former and later department were in the same scale of pay and grade. The official Respondents have not denied such a position.

20. Thus the question now arises as to whether the services rendered by the Petitioner in the former department as Stenographer Grade-I from which he was appointed on deputation in the borrowing department also a Stenographer Grade-I as well as the services rendered on deputation till absorption, will get altogether obliterated for the purpose of seniority. The OM dated 12.8.75 on which the Respondents have placed reliance stipulates that a deputationist will get his seniority from the date of absorption. However, the Petitioner, upon his representation was given the retrospective seniority with effect from 15.12.86 with the consequential benefit of retrospective promotion at par with his juniors, i.e., the Petitioners in the second writ petition. Admittedly, such conferment of benefits were withdrawn by the impugned notification dated 23.1.2003 without putting the Petitioner to any kind of notice. Consequent upon issuance of the notification dated 28.3.2002 the Petitioner was given his seniority position above the private Respondents in the seniority list of Senior Grade Stenographer as on 30.4.2002. All these benefits given to the Petitioner were withdrawn by a stroke of pen without giving the Petitioner any notice.

21. In the case of K. Madhavan (supra) on which the learned Counsel for the Petitioner placed reliance, the Apex Court held that there is not much difference between deputation and transfer. It observed that it will be against all rules of service jurisprudence, if Government servant holding a particular post is transferred to the same or an equivalent post in another Government department, the period of his service in the post before his transfer is not taken into consideration in computing his seniority in the transferred post. The Apex Court went on to observe that the transfer cannot wipe out his length of service in the post from which he has been transferred. It is just and wholesome principle commonly applied where persons from different sources are drafted to serve in a new service that their pre-existing total length of service in the parent department should be respected.

22. In the next case on which the learned Counsel for the Petitioner placed reliance i.e. Sub-Inspector Rooplal (supra), the Apex Court was concerned with an executive instruction issued under OM dated 29.5.86 denying benefit of service rendered by a deputationist on equivalent post in his parent department. The Apex Court held that such executive instruction was against the law laid

down by the Apex Court. Dealing with the question, whether the Appellants before the Apex Court were entitled to count their service rendered by them as Sub-Inspector in BSF for the purpose of their seniority after absorption as Sub-Inspectors (Executive) in the Delhi Police or not, the Apex Court held that the question is no longer res-integra and is squarely covered by the aforesaid decision in K. Madhavan's case. Applying the principle laid down in earlier judgments, the Apex Court held that the Appellants were entitled to count the substantive service rendered by them in the post of Sub-Inspector of BSF while counting their service in the post of Sub-Inspector (Executive) in the Delhi Police Force. In paragraph 23 of the judgment, the Apex Court held as follows:

23. It is clear from the ratio laid down in the above case that any rule, regulation or executive instruction which has the effect of taking away the service rendered by a deputationist in an equivalent cadre in the parent department while counting his seniority in the deputed post would be violative of Articles 14 and 16 of the Constitution. Hence, liable to be struck down. Since the impugned memorandum in its entirety does not take away the above right of the deputationists and by sticking down the offending part of the memorandum, as has been prayed in the writ petition, the rights of the Appellants could be preserved, we agree with the prayer of the Appellant-Petitioners and the offending words in the memorandum "whichever is later" are held to be violative of Articles-14 and 16 of the Constitution, hence, those words are quashed from the text of the impugned memorandum. Consequently, the right of the Appellant-Petitioners to count their service from the date of their regular appointment in the post of Sub-Inspector in BSF, while computing their seniority in the cadre of Sub-Inspector (Executive) in the Delhi Police, is restored.

23. In view of the aforesaid law laid down by the Apex Court, the very basis of denying the Petitioner of his seniority with retrospective effect falls through. The whole basis of the claim of the Respondents is the aforesaid OM dated 12.8.75. In view of the law laid down by the Apex Court in the aforesaid decisions in which the Apex Court was concerned with similar OM towards denial of past services for the purpose of seniority and striking down the offending portion of the OM being violative of Articles 14 and 16 of the Constitution, the aforesaid OM dated 12.8.75 determining the seniority of the absorbed deputationist with prospective effect is no longer valid, being contrary to the law laid down by the Apex Court in the aforesaid decisions.

24. The above view of the Apex Court as regards counting of the past service of the deputationist has been reiterated in the cases of K. Anjaiah and Others Vs. K. Chandraiah and Others, (M. Ramachandran Vs. Govind Ballabh and Others,

25. In view of the aforesaid law laid down by the Apex Court, there cannot be any escape from the finding that the Petitioner is entitled to count his seniority with effect from 15.12.86. By the impugned action of the Respondents, not only the services rendered by the Petitioner in the equivalent grade of Stenographer Grade-I in the former department has been wiped out, but even the services

rendered by the Petitioner in the borrowing department after his deputation has also been wiped out. Such an action on the part of the Respondents is not sustainable. Thus the benefit of seniority and promotion extended to the Petitioner by order dated 28.3.2002 and consequent fixation of his seniority as Senior Grade Stenographer as on 30.4.2002 was perfectly justified in view of the aforesaid law laid down by the Apex Court which could not have been withdrawn by the impugned order dated 23.1.2003 and that too without issuing any notice to the Petitioner.

26. In view of the above, I have no hesitation to allow the writ petition being WP(C) No. 16(K)/2003 granting the prayers made therein and to dismiss the writ petition being WP(C) No. 133(K)/2002. Consequently the impugned orders in WP(C) No. 16(K)/2003 stand set aside and quashed and the position of the Petitioner as it stood in respect of his seniority over the private Respondents, the writ Petitioners in WP(C) No. 133(K)/2002 and the consequential benefit of promotion with retrospective effect to the grade Senior Grade Stenographer granted to him by earlier order dated 13.3.2002 and 28.3.2002 (Annexure- G and H) respectively gets restored.

27. The writ petitions are answered in the above manner leaving the parties to bear their own costs.