
(2015) 04 GAU CK 0025
In the Gauhati High Court
Case No : Writ Petition (C) No. 7130/13

Noor Hashina Begum

APPELLANT

Vs

The State of Assam and Others

RESPONDENT

Date of Decision : 02-04-2015

Acts Referred:

Constitution of India, 1950 — Article 14, 16

Citation : (2015) 2 GLT 971

Hon'ble Judges : Tinlianhang Vaiphei, J

Bench : Single Bench

Advocate : I. Choudhury, A.K. Baruah and T. Jini, for the Appellant; D.K. Saikia, GA, N. Dutta, B. Gogoi and A. Deka, Advocates for the Respondent

Final Decision : Allowed

Judgement

Tinlianhang Vaiphei, J.—The inter-se seniority between the petitioner and the respondent No. 6 is the issue confronting this Court in this writ petition. The facts of the case, as pleaded by the petitioner, are that her employer is a State owned corporation, namely, the Assam Tourism Development Corporation (ATDC), which is undoubtedly an agency of the Government of Assam. Petitioner, after her graduation, completed her post graduate diploma course in Tourism. The ATDC does not have service rules of its own, but follows the spirit of the Assam Tourism Service Rules, 1992. Under the said rules, the post of Tourist Information Officer is a cadre post and 50% of the cadre is required to be filled up by direct recruitment. The petitioner was appointed as Tourist Information Officer under the ATDC on 27-1-1992 in a consolidated pay of Rs. 2,500/- per month. The respondent No. 6 was appointed as Assistant Liaison Officer under the same Corporation in the pay scale of Rs. 580-1165/- per month on 17-12-1991. The pay scale of the petitioner was admittedly lower than that of the respondent No. 6. However, on 27-1-1992, the post of the Assistant Liaison Officer was upgraded to that of Liaison Officer. It is contended by the petitioner that neither the post of Assistant Liaison Officer nor the post of Liaison Officer is

a cadre post.

2. Pursuant to the decision taken by the ATDC, the petitioner and the respondent No. 5 were granted a regular scale of pay of Rs. 1475-3825/- on 21-6-1994 with effect from 1-6-1994. Subsequently, by the common order dated 25-1-2005, both the petitioner and the respondent No. 6 were promoted to posts of Senior Manager (Publicity and Liaison) and Senior Manager (Information) respectively. The Managing Director, ATDC (respondent 4) thereafter issued the letter dated 30-7-2011 placing the petitioner below the respondent No. 6 and one N.C. Deka in the inter se seniority list i.e. at the bottom. However, when the name of the said N.C. Deka was subsequently placed below the petitioner, she has no grievance in this behalf. The petitioner is still aggrieved by the action of the respondent authorities in placing the respondent No. 6 above her, and submitted her representation to the respondent authorities on 2-9-2011 raising objection against the said seniority list. When her repeated representations did not evoke a positive response, she moved this Court in WP(C) No. 2940 of 2013 seeking its intervention, and this Court by the interim order dated 28-5-2013 directed that no promotion should be effected to the next promotional post on the basis of the impugned provisional gradation list dated 30-7-2011.

3. Subsequently, this Court by the order dated 5-8-2013 disposed of the writ petition observed that the seniority positions of the incumbents were at the provisional stage and, therefore, remanded the case to the respondent authorities for determination of their inter-se seniority after hearing the parties. Pursuant to the order of this Court, a Committee comprising of three members was constituted to determine the inter-se seniority among the three incumbents. The Committee heard the parties on 26-8-2013 and thereafter issued the impugned order dated 30-8-2013 placing the respondent No. 6 once again above the petitioner in the seniority list. The copy of the minutes of the meeting dated 26-8-2013 was never made available to the petitioner despite the request made by him repeatedly. It was only after she filed RTI application that the respondents finally and inordinately supplied a copy of the said minutes on 21-11-2013. After going the minutes of the said meeting, the petitioner was surprised to know that her grievances projected in her representation dated 21-11-2013 did not receive any consideration while determining the inter-se seniority dispute between her and the respondent No. 6: on the contrary, they took into account irrelevant matters in taking the impugned decision. Aggrieved by this, the petitioner is now coming before this Court again to seek the intervention of this Court.

4. The impugned order is supported by the respondent authorities and the respondent No. 6 by filing their respective affidavits-in-opposition. According to the respondent No. 4, the post of Assistant Liaison Officer originally held by the respondent No. 6 on 18-12-1991 was subsequently upgraded the post of Liaison Officer on 27-1-1992 with effect from 18-12-1992 i.e. the date of her joining the post of Assistant Liaison Officer. On the other hand, the petitioner had joined the

post of Tourist Information Officer, which is an equivalent post of Liaison Officer, only on 27-1-1992. On 27-1-1992, when both the petitioner and the respondent No. 6 joined their respective posts, they were given the same pay scale of Rs. 2,500/- per month: moreover, the respondent No. 6 was drawing the salary @ Rs. 2,500/- per month with effect from 18-12-1991 in pursuance of the order dated 27-1-1992. It is, therefore, contended by the answering respondent that the respondent No. 6 is obviously senior to the petitioner on the basis of her entry into service on 18-12-1991, that both of them were granted regular scale of pay of Rs. 1475-3825/- on 21-6-1994 and that both of them were also promoted to the posts of Senior Managers on the same day. The impugned gradation list was prepared on the basis of the findings of the Committee based on all the relevant records and after giving personal hearings to the parties, and the same does not suffer from any infirmity. The contents of the affidavit-in-opposition filed by the respondent No. 6 have also been perused by me, and they need not be reproduced as they are in consonance with the contents of the affidavit of the respondent authorities.

5. As already noticed, the petitioner was initially appointed as Tourist Information Officer of the ATDC on 27-1-1992 in the pay scale of Rs. 2,500/- while the respondent No. 6 was initially appointed as Assistant Liaison Officer on 17-12-1991 in the pay scale of Rs. 580-1165/-. However, by the office order dated 27-1-1992, the post of Assistant Liaison Officer held by the respondent No. 6 was up-graded to the post of Liaison Officer in the scale of pay of Rs. 2,500/-, the same pay scale in which the petitioner was appointed, but with a difference that the up-gradation was to be effective from the date of her joining the post of Assistant Liaison Officer i.e. from 17-12-1991. Before proceeding further, it may be noticed that there is no issue between the parties that the spirit of the Assam Tourism Service Rules, 1992 is applicable to the Assam Tourism Service Rules, 1992 ("the Rules" for short) to the ATDC. However, on perusing the provisions of these Rules, it is obvious that the posts of Assistant Liaison Officer or Liaison Officer are nowhere to be found in the service. But then, so are the posts of Senior Manager (Publicity and Liaison) and Senior Manager (Information). Therefore, I take it that both the petitioner and the respondent No. 6 have proceeded on the assumption that they now belong to the same cadre sharing a common gradation/seniority list. The question to be considered now, having regard to the fact that the post initially held by respondent No. 6 was up-graded to the equivalent post held by the petitioner with retrospective effect, is, therefore, whether the respondent No. 6 can claim seniority over the petitioner? In other words, whether the past services deemed to have been rendered by the respondent No. 6 prior to his up-gradation to the post of Liaison Officer can, ipso facto, be counted for the purpose of seniority vis-a-vis the petitioner?

6. It is the contention of Mr. I. Choudhury, the learned counsel for the petitioner that the post of Assistant Liaison Officer or the post of Liaison Officer are not at all envisaged in the Rules, but the post of Tourist Information Officer initially held by the petitioner is a cadre post included in the Rules and the appointment of the

respondent No. 6 to the post of Assistant Liaison Officer and thence to Liaison Officer, after up-gradation, was clearly de hors the Rules and the service rendered by her in such posts cannot be counted for the purpose of seniority vis-a-vis the petitioner. He further submits that retrospective seniority cannot be given to the respondent No. 6 when she was not even borne on the cadre of Liaison Officer, assuming this post to be a cadre post. In any case, as both the petitioner and the respondent No. 6 were appointed on the same day, the seniority shall have to be determined with reference to their age: the petitioner is admittedly older than the respondent No. 6, she has to be placed above the respondent No. 6 in the gradation list. In support of his various contentions, he relies on the decision of the Apex Court in P. Sudhakar Rao and Others Vs. U. Govinda Rao and Others, (2013) 8 AD 197 : AIR 2013 SC 2533 : (2013) 9 JT 591 : (2013) 3 LLN 37 : (2013) 8 SCALE 504 : (2013) 8 SCC 693 : (2014) 1 SCC(L&S) 690 : (2013) 4 SCT 185 : (2013) 3 SLJ 97 , D.P. Das Vs. Union of India (UOI) and Others, AIR 2011 SC 2947 : (2011) 9 JT 120 : (2011) 8 SCALE 469 : (2011) 8 SCC 115 : (2011) 5 UJ 2868 : (2011) AIRSCW 4626 : (2011) 8 Supreme 141 and State of Bihar and others Vs. Sri Akhouri Sachindra Nath and others, AIR 1991 SC 1244 : (1991) 62 FLR 874 : (1991) 2 JT 279 : (1991) 2 LLJ 312 : (1991) 1 SCALE 748 : (1991) 1 SCC 334 Supp : (1991) 2 SCR 410 .

7. Mr. D. Saikia, the learned counsel appearing for the respondents, submits that though the petitioner was aware of the fact that the post of Assistant Liaison Officer originally held by the respondent No. 6 was up-graded to the post of Liaison Officer by the order dated 27-1-1992 with effect from 18-12-1991, the petitioner never challenged this order and cannot now challenge the same at this belated stage. He further contends that both the petitioner and the respondent No. 6 were allowed to enjoy the same pay scale of Rs. 2,500/- on 27-1-1992 on 27-1-1992, the respondent No. 6 had drawn this pay scale with effect from 18-12-1991 thereby making her senior to the petitioner. He, therefore, argues that the impugned seniority list does not suffer from any infirmity calling for the interference of this Court. To fortify his contentions, he relies on State of Madhya Pradesh and Others Vs. Ku. Sandhya Tomar and Another, (2013) 136 FLR 300 : (2013) 1 LLN 397 : (2012) 12 SCALE 561 : (2013) 1 SLJ 295 , Pramod K. Pankaj Vs. State of Bihar and Others, (2003) 9 JT 333 : (2003) 9 SCALE 813 : (2004) 3 SCC 723 : (2004) SCC(L&S) 534 : (2003) 5 SCR 916 Supp , Keshav Ram Agnihotri Vs. Distt. Inspector of Schools, U.P. and Others, (1998) 4 JT 472 : (1998) 4 SCC 72 : (1998) SCC(L&S) 998 and Satpal Antil and others Vs. Union of India and another, AIR 1995 SC 1858 : (1995) 3 SCALE 554 : (1995) 4 SCC 419 : (1995) 1 SCR 1 Supp : (1995) 2 SLJ 228 .

8. The Apex Court was again confronted with this controversy in "Uttaranchal Forest Rangers" Assn. (Direct Recruit) and Others Vs. State of U.P. and Others, (2006) 12 JT 513 : (2006) 9 SCALE 577 : (2007) 1 SCC(L&S) 116 : (2006) 7 SCR 609 Supp : (2007) 2 SLJ 133 and held as under:

"38. This Court has consistently held that no retrospective promotion can be

granted nor any seniority can be given on retrospective basis from a date when an employee has not even borne in the cadre particularly when this would adversely affect the direct recruits who have been appointed validly in the meantime. In *State of Bihar and others Vs. Sri Akhouri Sachindra Nath and others*, AIR 1991 SC 1244 : (1991) 62 FLR 874 : (1991) 2 JT 279 : (1991) 2 LLJ 312 : (1991) 1 SCALE 748 : (1991) 1 SCC 334 Supp : (1991) 2 SCR 410 this Court observed that: (SCC pp. 342-43, para 12)

"12. In the instant case, the promotee Respondents 6 to 23 were not borne in the cadre of Assistant Engineer in the Bihar Engineering Service, Class II at the time when Respondents 1 to 5 were directly recruited to the post of Assistant Engineer and as such they cannot be given seniority in the service of Assistant Engineers over Respondents 1 to 5. It is well settled that no person can be promoted with retrospective effect from a date when he was not borne in the cadre so as to adversely affect others. It is well settled by several decisions of this Court that amongst members of the same grade seniority is reckoned from the date of their initial entry into the service. In other words, seniority inter se amongst the Assistant Engineers in Bihar Engineering Service, Class II will be considered from the date of the length of service rendered as Assistant Engineers. This being the position in law Respondents 6 to 23 cannot be made senior to Respondents 1 to 5 by the impugned government orders as they entered into the said service by promotion after Respondents 1 to 5 were directly recruited in the quota of direct recruits. The judgment of the High Court quashing the impugned government orders made in Annexures 8, 9 and 10 is unexceptionable."

9. Though the facts of the case in *Uttaranchal Forest Rangers" Assn (Direct Recruit) (supra)* are not exactly similar to the facts obtaining in this case, the underlying principle enunciated therein that no retrospective promotion can be granted nor any seniority can be given on retrospective basis from a date when an employee has not even borne in the cadre particularly when this would adversely affect the direct recruits who have been appointed validly in the meantime. In *P. Sudhakar Rao and Others Vs. U. Govinda Rao and Others*, (2013) 8 AD 197 : AIR 2013 SC 2533 : (2013) 9 JT 591 : (2013) 3 LLN 37 : (2013) 8 SCALE 504 : (2013) 8 SCC 693 : (2014) 1 SCC(L&S) 690 : (2013) 4 SCT 185 : (2013) 3 SLJ 97 , there was inter-se seniority dispute between Supervisors, who were up-graded as Junior Engineers (JEs) on acquiring engineering degree and degree-holder directly recruited JEs. The seniority of the up-graded Supervisors was fixed retrospectively with effect from notional date arrived at after giving weightage for past service. Notional date was fixed without reference to existing vacancies. Seniority was, therefore, given to the up-graded Supervisor from a date when they had not even acquired eligibility by obtaining the requisite degree. The grant of retrospective seniority to the up-graded Supervisors over and above the directly recruited JEs was held to be violative of Articles 14 and 16 of the Constitution. Thus, once again, the principle that retroactivity should not go beyond the period when the incumbent was not even

borne on a cadre was upheld.

10. In the instant case also, the respondent No. 6 factually got upgraded to the post of Liaison Officer only on 27-1-1992: he never did render actual service as Liaison Officer prior to 27-1-1992. On the contrary, he was initially appointed as Assistant Liaison Officer, a post admittedly lower than the post of Tourist Information against which the petitioner was initially appointed on 27-1-1992. Therefore, the respondent No. 6 was factually holding the lower post of Assistant Liaison Officer prior to from 17-12-1991 to 27-1-1992. The law is also now well-settled that the benefit of previous service on lower post cannot be granted for determining seniority on higher post. This proposition of law was recently reiterated by the Apex Court in *Tamil Nadu Rural Development Engineers Association Vs. The Secretary to Government Rural Development Department and Others*, AIR 2014 SC 159 : (2014) 1 JT 245 : (2014) LabIC 1514 : (2013) 12 SCALE 246 : (2014) 1 SCT 610 . This is what it said:

"50. In fact, the appellants have already been given benefit of two years" service in the Highways Department on the basis that they had actually been functioning in the RD Department since 1997. But such concession would not create a legal right in favour of the appellants to claim that the services rendered in the Highways Department ought to be treated as service rendered in the RD Department. We, therefore, see no merit in the submissions that the degree-holder Overseers ought to be exempted from having rendered five years" service in the RD Department, before they can be eligible to be considered for promotion as Assistant Executive Engineer.

51. The appellants had relied on the judgment of *S.I. Rooplal and Another Vs. Lt. Governor Through Chief Secretary, Delhi and Others*, AIR 2000 SC 594 : (2000) 85 FLR 305 : (1999) 9 JT 597 : (1999) 7 SCALE 466 : (2000) 1 SCC 644 : (2000) SCC(L&S) 213 : (1999) 5 SCR 310 Supp : (2000) 2 SLJ 395 : (2000) 1 UJ 252 : (2000) AIRSCW 19 : (1999) 10 Supreme 300 in support of the submission that their past service of 20 years cannot be obliterated. The aforesaid submission cannot be accepted for the simple reason that the appellants were absorbed in the RD Department as Overseers. Their previous service in the Highways Department was also on the post of Overseers. In *Rooplal* case the appellants were Sub-Inspectors of Border Security Force who were initially taken on deputation in Delhi Police as Sub-Inspectors (Executive) and were later on absorbed in Delhi Police in the same capacity. While fixing their seniority in Delhi Police, service already rendered by them as Sub-Inspectors in BSF was not taken into consideration. This Court, therefore, held that there is no reason why the appellants on being absorbed in equivalent cadre in the transferred post should not be permitted to count their service in the parent department. The appellants herein claimed the benefit of the previous service on the lower post of Overseer for determining the seniority on the higher post of Assistant Engineer. The aforesaid submission cannot be accepted for the simple reason that the appellants had voluntarily accepted and given the option to be

absorbed in the RD Department on the post of Overseer. No claim was made at that stage to be either absorbed or promoted as Assistant Engineer or to be given the benefit of the service already rendered by them in the Highways Department. Having considered the entire matter, we see no reason to differ with the view taken by the High Court TN Rural Development Engineers Assn. v. Deptt. Of Rural Development, Writ Appeal No. 500 of 2005 decided on 29-1-2007."

11. The next question to be examined now is what should be the basis for determining the inter-se seniority between the petitioner and the respondent No. 6 when the latter is not allowed to count the period of services deemed to have been rendered by her prior to her up-gradation to the post of Liaison Officer. Both the petitioner and the respondent No. 6 were given the same revised scale of pay of Rs. 1475-3825/- with effect from 1-6-1994 and were further promoted to the post Senior Manager in the scale of pay Rs. 5725-11825/- by the common office order dated 25-1-2005. By the impugned letter dated 30-7-2011, the respondent No. 6 was made senior to the petitioner on the ground, as already noticed, that she was up-graded to the post of Liaison Officer with effect from 17-12-1991. Seniority is not a fundamental right. It is merely a civil right. Inter-se seniority of the candidates who are appointed on the same day would be dependent on the rules governing the same. In the absence of rules governing seniority an executive order may be issued to fill up the gap. Only in the absence of a rule or executive instructions, the court may have to evolve a fair and just principle which could be applied in the facts and circumstances of the case. This principle was applied by the Apex Court in D.P. Das Vs. Union of India (UOI) and Others, AIR 2011 SC 2947 : (2011) 9 JT 120 : (2011) 8 SCALE 469 : (2011) 8 SCC 115 : (2011) 5 UJ 2868 : (2011) AIRSCW 4626 : (2011) 8 Supreme 141 when it observed:

"23. The appellant (sic respondents) argued that the date of interview would have to be considered as a guide for determination of seniority. This cannot be accepted as such a date is wholly fortuitous. Accepting as a guideline, something which is absolutely fortuitous and based on chance, is inherently unfair and unjust. As in this case there is no rule prescribed for the determination of seniority, this Court is left with only the guideline flowing from the executive instruction of 1946, in order to evolve a just policy, for determination of seniority.

24. From the analysis of the executive instructions referred to hereinabove, it is clear that the 1946 instruction has not been superseded and the same refers to the acceptance of the age of the candidate as the determining factor for seniority. Such a basis is not fortuitous and is otherwise just and reasonable.

25. In the premises aforesaid the seniority of the officers who were recommended on the same date must be decided by their respective age. The contrary view taken by the High Court of fixing seniority on the basis of the date of interview, being wholly fortuitous, cannot be accepted."

12. In the instant case, there are no executive instructions for determining the inter-se seniority between employees when they are appointed on the same day. However, consistent with Articles 14 and 16 of the Constitution and to avoid element of chance and arbitrariness, the age of the petitioner and the respondent No. 6 should be made the decisive factor for determining their inter-se seniority. The statement of the petitioner in paragraph 22 of the writ petition that she is 53 years of age and the respondent No. 6 is 46 years old as per her declaration is not denied by the respondents in their respective counter-affidavits. That being the admitted position, the petitioner is found to be entitled to be placed above the respondent No. 6 in the gradation/seniority list. It is next contended by Mr. D. Saikia, the learned senior counsel for the respondents, that when the petitioner did not even challenge the order dated 27-1-1992 retrospectively appointing the respondent No. 6 to the post of Liaison Officer following the up-gradation of the post of Assistant Liaison Officer to the post of Liaison Officer, it is now too late in the day to the seniority of the respondent No. 6 over her. Refuting this contention, Mr. I. Choudhury, the learned counsel for the petitioner, argues that the petitioner would have been told off the gate at that time on the ground of lack of locus standi inasmuch as it was then not known to her that the posts of Liaison Officer and Tourist Information Officer belonged to the same cadre. I find force in the contention of the learned counsel for the petitioner. It is, therefore, not too late in the day to question the impugned gradation list/seniority list.

13. The result of the foregoing discussion is that this writ petition stands allowed. The impugned seniority/gradation list in so far as the petitioner and the respondent No. 6 are concerned, is hereby quashed. The respondent authorities are, therefore, directed to modify the impugned seniority/gradation list by placing the petitioner above the respondent No. 6 therein. The exercise shall be completed within a period of two months from the date of receipt of this judgment.