
(2018) 06 GAU CK 0031
In the Gauhati High Court
Case No : Writ Prtition (C) No. 1463 of 2018

Sachindra Nath Das And 14 Ors.

APPELLANT

Vs

State Of Assam And Ors.

RESPONDENT

Date of Decision : 07-06-2018

Acts Referred:

Assam Police Service Rules, 1966 — Rule 4, 5, 5(1), 5(1)(b), 5(1)(c), 18, 18(1), 18(3), 25
Constitution of India, 1950 — Article 14, 21, 309

Citation : (2018) 06 GAU CK 0031

Hon'ble Judges : SUMAN SHYAM, J

Bench : Single Bench

Advocate : S S Dey, D. J. Kapil, A.??Bhattacharjee

Final Decision : Dismissed

Judgement

1. Heard Mr. S. S. Dey, learned senior counsel assisted by Mr. D. J. Kapil and Mr. A. Bhattacharjee, learned counsel appearing for the writ

petitioners. I have also heard Mr. N. Dutta, learned senior counsel assisted by learned counsel Mr. S. Borthakur appearing for respondent Nos.4 to

32.Â Mr. D. Nath, learned Additional Senior Govt. Advocate, Assam, has appeared on behalf of respondent Nos.1, 2 and 3.

2. The petitioners herein are the officers serving in theÂ Assam Police Service-Junior Grade and have approached this Court assailing the Gradation

List dated 08.03.2018 on the ground that the seniority position assigned to them below the private respondents i.e. the direct recruits, has violated their

fundamental rights guaranteed under Articles 14 and 21 of the ConstitutionÂ of India.Â With the consent of the learned counsel for the parties, this

writ petition is being taken up for disposal at the stage of admission hearing.

3. The writ petitioners, while serving as Sub-Inspector of Police, were promoted to the rank of Inspector of Police (UB) vide Government notification

dated 31.12.2004 and their promotion to the said rank was confirmed by issuing the notification dated 30.07.2009, with effect from

01.08.2009. Thereafter, vide order dated 13.12.2010 issued by the Commissioner & Secretary to the Government of Assam, Home and Political

Department, the petitioners were promoted to the rank of Deputy Superintendent of Police/Assistant Commandant, which posts belongs to the

cadre of Junior Grade in the Assam Police Service. Subsequently, their promotions to the Junior Grade were regularised with effect from the date of

taking over charge based on the recommendation of the Assam Public Service Commission (APSC).

4. The respondent Nos. 4 to 32, on the other hand, were directly recruited in the Assam Police Service - Junior Grade on the basis of a selection

process conducted by the APSC. By the Notification dated 20.04.2010, the respondent Nos. 4 to 32 were asked to report at the Assam

Administrative Staff College on 03.05.2010 so as to undergo the Foundation Training Course and after successful completion of the training course,

they were assigned their respective places of posting. The core controversy in this writ petition relates to the question as to whether the writ

petitioners, being the promotee officers, ought to have been assigned seniority position above the direct recruits of the same year.

5. It is not in dispute that the conditions of service of the petitioners and the private respondents are governed by the Assam Police Service Rules,

1966, which is framed under the proviso to Article 309 of the Constitution of India. By referring to Rule 5 of the Rules of 1966, Mr. Dey, has argued

that since there are only two effective methods of filling up the posts of APS Junior Grade, i.e. by way of promotion and by direct recruitment, hence,

as per the provision of Rule 18(1) of the Rules of 1966, it is the promotee officers who would be senior to the direct recruits of the same year. In that

view of the matter, submits Mr. Dey, the impugned gradation list dated 08.03.2018 is unsustainable in law. The learned senior counsel has further

argued that even in the past, the Government of Assam has followed the practice of assigning seniority position to the promotee officers above the

direct recruits and therefore, regardless of the Rules of 1966, the impugned gradation list is in marked departure from the established departmental

norms. In support of the said argument, the learned senior counsel has relied upon the order dated 15.09.2008 issued by the Principal Secretary to the

Government of Assam whereby, seniority position of two promotee officers, viz., Sri Garga Narayan Dutta Choudhury and Sri Hari Prasad

Khanikar were restored above the direct recruits of the same year.

6. Mr. Dutta, learned senior counsel appearing for the private respondents, on the other hand, has argued that the date of appointment of the private

respondents precedes the date of promotion of the petitioners and therefore, as per sub-Rule (3) of Rule 18 of the Rules of 1966, the private

respondents have been rightly held to be senior to the writ petitioner.

7. Mr. Dutta, has further argued that the notification dated 15.09.2008 was issued by relying upon the circular dated 31.03.1960 which stood repealed

with the coming into force of the Rules of 1966 and as such, the order dated 15.09.2008, having been issued on the basis of a non-existent

Government circular was invalid in the eye of law. By referring to a decision of the Supreme Court in the case of Gursharan Singh and others vs.

New Delhi Municipal Committee and others, reported in (1996) 2 SCC 459 Mr. Dutta has submitted that the petitioners cannot claim any relief by

relying upon previous government orders which did not have the sanction of law.

8. It is also the submission of Mr Dutta that in this writ petition, the petitioners have not challenged the Rules but on the contrary, have prayed for

implementation of the same. Since the impugned gradation list has been prepared as per the mandate of the Rules of 1966, as such, submits Mr. Dutta,

no case for interference with the Gradation List dated 08.03.2018 by this court has been made out in the present writ petition.

9. The learned Government Advocate, Assam had produced a copy of the written instruction dated 16.05.2018 issued by the Secretary to the

Government of Assam, Home (A) Department, which reflects the Department's stand in the matter. According to the said letter, the gradation list

dated 08.03.2018 has been prepared in terms of the provisions of the rules and the department has stated that it stands by the Rules. It has also

been mentioned in the letter that what has happened in the past was not in consonance with the Rules and therefore, is not supported by the

departmental authorities.

10. I have considered the rival submissions made at the bar and have

also perused the materials on record.

11. At the outset, it needs to be mentioned that Rule 4 of the Rules 1966 defines the cadre in the service. According to Rule 4, there are only two

cadres in the Assam Police Service, viz., (i) Junior Grade and (ii) Senior Grade. The method of recruitment to the service has been laid down in Rule 5

of the Rules of 1966. Rule 5 (1)

(a) provides that recruitment can be made on the basis of a competitive examination to be conducted by the APSC, whereas rule 5(1) (b) provides for

recruitment by promotion of confirmed Inspector of Police. Rule 5 (1) (c) lays down the procedure of recruitment in service in special cases which

practice has apparently been discontinued by the department.

12. As noted above, the writ petitioners in this case had initially joined service in the rank of Assistant Sub-Inspector of Police and were

promoted to the rank of Inspector of Police and thereafter, to the APS Junior Grade. In this case, there is no dispute about the fact that the

appointment orders in respect of the private respondents were issued at an earlier date and that they had also joined service before the writ petitioners

were promoted to the APS-Junior Grade.

13. Rule 18 of the Rules of 1966 deals with seniority. Since the core controversy in this writ petition revolves around interpretation of Rule 18 of the

Rules of 1966, the said provision is extracted herein below for ready reference :-

18. Seniority. --- (1) The seniority of a member of the service shall be determined on the basis of his date of appointment to the service :

Provided that inter se seniority of the persons recruited under Rules 5(1)(a), 5(1) (b) and 5(2) on the same date shall be according to the following

order :

(i) Persons recruited under R. 5(2);

(ii) Persons recruited under R. 5(1)(b);

(iii) Persons recruited under R. 5(1)(a);

Provided further that in the case of a person recruited under Rule 5(1)(c) the Governor may, in consideration of his previous service and/or

experience, fix a deemed date of appointment for the purpose of seniority after taking into consideration half the period of continuous service in

completed years subject to a maximum of 4 years rendered in previous service.

(2) Inter se seniority of persons appointed under any of the three clauses of R. 5(1), shall be in the order in which their names appear in the list from

which the appointment is made.

(3) The date of appointment for the purposes of this rule shall be, if a date is specified in the notification of appointment, such date, or if no such date is

specified, the date on which such notification is issued.

(4) Notwithstanding anything contained in sub-rules (1) to (3) the seniority of a person who does not join the service within three months of the date of

appointment as defined in sub-rule (3), shall be determined on the basis of the actual date of his joining the service.

(5) If the confirmation of a member of the service is delayed on account of his failure to qualify for such confirmation, he shall lose his post in the order

of seniority vis-à-vis such of his juniors as may be confirmed earlier than he. His original position shall, however, be restored on his confirmation

subsequently but any benefits of promotion, etc., shall not accrue to him with retrospective effect on such confirmation.

(6) Inter se seniority of persons promoted to the senior grade of the service shall be in the order in which their names appear in the list from which the

promotion is made.â??

14. From a reading of the various sub-rules of rule 18, it can be seen that the procedure for determining the date of appointment of the officers in the

APS Junior Grade has been provided by sub-rule 3 of Rule 18. In the present case, the notification of appointment of the respondents Nos. 4 to 32 had

provided their date of reporting for the Foundation Training Course which was 03.05.2010. Since there is no dispute about the fact that the

respondents 4 to 32 had reported for the training program on the appointed date, their date of appointment obviously will have to be treated as

03.05.2010. However, even assuming that no firm date of appointment was provided in the notification dated 20.04.2010, even in that case, as per sub-

rule 3, the date of the notification itself will have to be treated as the date of appointment of the private respondents, which date also falls prior to

the date of promotion of the writ petitioners.â?? Therefore, there can hardly be any doubt about the fact that as per the prescription of Rule 18(1) of

the Rules of 1966, it is the respondent Nos. 4 to 32 who would be senior to the writ petitioners in the Junior Grade of the APS.

15. It is also to be noted here-in that the writ petitioners and the respondents Nos.4 to 32 had been appointed on different dates. As such, proviso to

Rule 18(1) of the Rules of 1966, which provision had been heavily relied upon by the petitioner's counsel, would have no application in the facts of

the present case. The Rules framed under the proviso to Article 309 of the Constitution will be equally binding upon the departmental officers as well

as the Government. As such, the gradation list of the officers in the cadre would have to be prepared strictly in conformity with the Rules and not by

following any past practice. Therefore, I, find sufficient force in the submission of Mr. Dutta that the gradation list dated 08.03.2018 having been

prepared strictly in conformity with the Rules, does not call for any interference by this Court in the facts of the present case.

16. Coming to the issue of past practice followed by the department, as urged by Mr Dey, it would be pertinent to mention here-in that the Office

Memorandum dated 31.03.1960 was issued prior to the framing of the Rules of 1966. As per section 25 of the Rules, all rules and orders repugnant to

these Rules would automatically stand repealed with the coming into force of the Rules of 1966.

17. A copy of the circular dated 31.03.1960 has been brought on record by the private respondents. On the issue of seniority of the officers promoted

from the lower grade, the notification dated 31.03.1960 provides as follows :-

2. No.AAP. 27/50. dated 31/03/60

Sub :- Seniority in case of promotions to a service .

1. If all the officers are promoted from a junior service their respective seniority in the former service is to be retained and when the same batch

consists of both promoted officers and direct recruits, the former are to gain seniority over the latter.

2. When none of the above criteria are available, the seniority should be fixed in accordance with the date of birth.

18. What is evident on the face of the records is that the criteria for fixation of seniority between the promoted officers and the direct recruit under the

Office Memorandum dated 31.03.1960 is in clear conflict with the provisions of Rule 18(1) of the Rules of 1966. As such, by operation of Rule 25

of the Rules of 1966, the Office Memorandum dated 31.03.1960 would have to be deemed to have been repealed with effect from 21.09.1966 i.e.

the date on which the Rules of 1966 were notified. Therefore, the OM dated 31.03.1960 was not even in existence on the date on which the

notification dated 15.09.2008 was issued restoring the seniority position of Sri Garga Narayan Dutta Choudhury and Sri Hari Prasad Khanikar. If that

be so, it is evident that the notification dated 15.09.2008 was issued by relying upon a nonexistent circular. The stand of the Government, as

communicated by the letter dated 16.05.2018, is also clear on the aforesaid issue.Â Considering the ratio of the law laid down by the Honâ??ble

Supreme Court in the case of Gursharan Singh (supra) and Secretary, Jaipur Development Authority, Jaipur vs. Daulat Mal Jain and others,Â

reported in (1997) 1 SCC 35,Â the submission of Mr. Dey that the past practice of the Government needs to be followed in this case also does not

merit acceptance by this Court.

19. In this case I find that the edict of the Rules of 1966 is clear and unambiguous. Unless the direct recruits and promotee officers are appointed on

the same day, the seniority of the officers in the Junior Grade cadre of the APS would have to be determined on the basis of their date of

appointment. If such criterion is applied to the facts of this case, then the private respondents would be senior to the writ petitioners in the APS-Junior

Grade by virtue of their prior date of appointment. Although Mr. Dey has arguedÂ that by following the past practice the Department had issued the

provisional gradation list dated 07.10.2017 showing that the petitioners are senior to the respondents, yet, I find from the records that the direct recruits

had submitted objection against the provisional list and acting on suchÂ objection,Â the Department had corrected the anomaly in the gradation list

and had rightly restored the seniority position of the direct recruits above the promotee officers.

20. For the reasons stated herein before, I am of the view that the writ petition is devoid of any merit and the same is accordingly dismissed.

Â Â Â The parties to bear their own cost.