

(2023) 05 GAU CK 0052

In the Gauhati High Court

Case No : Writ Petition (Civil) No. 6052, 6236 Of 2022, 2959 Of 2023

Shyam Sundar Saha

APPELLANT

Vs

State Of Assam And 4 Ors

RESPONDENT

Date of Decision : 24-05-2023

Acts Referred:

Assam Ministerial District Establishment Service Rules, 1967 — Rule 6, 6(6)

Citation : (2023) 05 GAU CK 0052

Hon'ble Judges : Suman Shyam, J

Bench : Single Bench

Advocate : S K Goswami

Final Decision : Dismissed

Judgement

1. Heard Mr. S. K. Goswami, learned counsel appearing for the writ petitioner in WP(C) 6236/2022 and WP(C) 6052/2022 as well as Mr. N. Barman, learned counsel for the writ petitioner in WP(C) 2959/2023. Also heard Mr. R.M. Das, learned Standing Counsel, Water Resource Department, Assam, appearing for the respondent nos. 1, 2 & 3 and Mr. P. Nayak, learned Standing Counsel, Finance Department, Assam, representing the respondent no. 4. Mr. D. Chakraborty, learned counsel has appeared on behalf of the respondent no. 5.

2. All these three writ petitions are inter-connected wherein the writ petitioner seeks to assail the appointment of the respondent no. 5 in the post of Lower Division Assistant (LDA) so as to wipe out his seniority in the gradation list on the ground that his initial appointment was illegal. If the writ petitioner, succeeds in these writ petitions then he would rank senior in the gradation list of Senior Assistant and, therefore, would be eligible for promotion to the next higher post of Divisional Head Assistant in the Department of Water Resources.

3. The facts of the cases necessary for disposal of all the three writ petitions may be briefly noticed herein below.

4. The respondent no. 5, viz. Sri Sukhendu Narayan Dhar Choudhury was initially

appointed as a Work Charge (W.C.) Khalasi under the Silchar Flood Control Division at Silchar vide Office Order No. 215/1990-91. His engagement as a W.C. Khalasi was extended from time to time. On 24/09/1993, the Executive Engineer, Silchar F.C. Division had issued a notice inviting applications from persons having the requisite educational qualification and knowledge of type writing for filling up one vacant post of LDA (subsequently re-named as Junior Assistant) in the said division. It appears from the materials on record that apart from circulating the aforesaid notice, the authorities had also intimated the District Employment Exchange about the recruitment process. In response to the notice dated 24/09/1993, as many as 5 (five) applicants including the present respondent no. 5 had applied for the post of LDA. Accordingly, a Selection Board was constituted for holding written examination and type writing test. Out of the 5(five) applicants, only 3 (three) of them including the respondent no. 5 had participated in the written test and type writing test. On conclusion of the process, it turned out that the respondent no. 5 had scored the highest mark (40). Consequently, order of appointment dated 07/03/1994 was issued appointing the respondent no. 5 in the vacant post of LDA under the Executive Engineer, Silchar F.C. Division. After tendering continuous service in the post of LDA for nearly 7 (seven) years, the service of the respondent no. 5 was confirmed as an LDA w.e.f. 01/06/2001 by issuing notification No. 74/2001-02 dated 07/08/2001. Thereafter, vide order dated 01/03/2008, the respondent no. 5 was promoted to the post of Upper Division Assistant (UDA), (renamed as Senior Assistant) in which post he is continuing till date. The writ petitioner, on the other hand, was appointed as a Junior Assistant (LDA) on 19/02/2011 by means of direct recruitment process initiated by the Executive Engineer, Water Resource Division (erstwhile F.C.) Silchar. On 27/10/2017, the writ petitioner was promoted to the post of Senior Assistant (UDA) in the office of the Executive Engineer, W.R. Division, Silchar. Thereafter, a provisional gradation list of Senior Assistants in the Silchar W.R. Division was published on 14/02/2022, wherein, the name of the respondent no. 5 appeared at serial No. 1 whereas, the writ petitioner's name appeared at serial no. 2.

5. Being dis-satisfied with the provisional gradation list, the writ petitioner had submitted a representation on 17/02/2022 before the departmental authorities. However, since no action was taken on such representation submitted by the petitioner, he had approached this Court assailing the provisional gradation list of Senior Assistant published on 14/02/2022 by filing WP(C) 3727/2022, which was disposed of by the learned Single Judge, at the stage of motion hearing, by order dated 06/06/2022 with a direction upon the respondents to consider the representation dated 17/02/2022 submitted by the petitioner and take a decision in the matter within a month from the date of receipt of certified copy of the order. Accordingly, the representation submitted by the petitioner was examined by the Chief Engineer, Water Resources Department, whereafter, his claim was found to be untenable. Accordingly, by a speaking order dated 08/09/2022, the representation submitted by the writ petitioner raising objection against the

provisional gradation list dated 14/02/2022 was rejected. Aggrieved by the order dated 08/09/2022, the writ petitioner had filed WP(C) 6052/2022. Meanwhile, on 13/09/2022, the department had published the final gradation list of Senior Assistants under the Silchar W.R. Division wherein, the position obtaining in the provisional gradation list dated 14/02/2022 was maintained. Situated thus, WP(C) 6052/2022 was filed by the petitioner assailing the final gradation list dated 13/09/2022.

6. It appears that during the pendency of WP(C) 6052/2022 and WP (C) 6236/2022 before this Court, the petitioner had obtained certain information by filing application under the RTI Act, 2005, whereafter, WP(C) 2959/2023 has been filed challenging the notice dated 24/09/1993 issued by the departmental authorities inviting applications for filling up the posts of LDA against which the respondent no. 5 was appointed way back in the year 1994.

7. Mr. S.K. Goswami, learned counsel representing the writ petitioner has argued that although the case originally projected in WP(C) 6052/2022 was to the effect that the respondent no. 5 having been engaged as a Work Charge Khalasi and therefore, he could not have been absorbed in the post of LDA, inasmuch as, there is already an Office Memorandum dated 05/11/1999 as well as the subsequent order issued by the Water Resources Department on 28/08/2017 directing reversion of all such W.C. Khalasis, yet, at this point of time, the only issue pressed by the petitioner is pertaining to the validity of the process through which the respondent no. 5 was appointed as an LDA. Mr. Goswami has further argued that although his client is not seeking an order from this Court for terminating the service of the respondent no. 5, yet, the question of validity of his appointment in the post of LDA is being raised in this proceeding only to show that the appointment of the respondent no. 5 was de hors the rules and, therefore, he cannot claim seniority over the writ petitioner even though he was appointed in the post of LDA on a prior date.

8. By placing reliance on the decision of the Supreme Court rendered in the case of State of Orissa Vs. Mamata Mohanty reported in (2011) 3 SCC 436, Mr. Goswami has argued that the respondents are duty bound to maintain complete quality in the process of public employment. Since the notice dated 24/09/1993 had invited applications only from Work Charge Khalasi/SA/Tracers etc. without making it an open selection, hence, it cannot be said that the post of LDA was filled up by direct recruitment. By contending that the procedure adopted for recruitment of the respondent no. 5 ought to have been one as provided under the Assam Public Service (Direct Recruitment to Class-III and Class-IV Posts) Rules, 1997 (herein after referred to as Rules of 1997), Mr. Goswami has argued that no such procedure have been followed in this case. Mr. Goswami, therefore, submits that the authorities could not have filled up the post of LDA through direct recruitment without giving wide publication of the advertisement notice and giving an opportunity to all eligible candidates to participate in the recruitment process. On such count, the appointment of the respondent no. 5 in

the post of LDA is illegal and hence, no benefit of seniority can be given to him above the petitioner.

9. Mr. N. Barman, learned counsel for the writ petitioner in WP(C) 2959/2023 has also reiterated the same arguments and submits that the notice dated 24/09/1993 itself being illegal and de hors the provisions of the Rules, the appointment of the respondent no. 5 in the post of LDA, cannot be held to be valid. To that extent, the respondent no. 5 cannot claim seniority over the writ petitioner.

10. Mr. R.M. Das, learned Standing Counsel, Water Resources Department, Assam, has produced the records pertaining to the selection process and submits that the procedure laid down under the Assam Ministerial District Establishment Service Rules, 1967 was followed by the Department while filling up the post of LDA based on notice dated 24/09/1993. According to Mr. Das, Rule 6 of the Rules of 1967 lays down the criteria for filling up the posts of LDA, now redesignated as Junior Assistant, and the procedure followed in this case was strictly in compliance with Rule 6(6) of the Rules of 1997.

11. Mr. D. Chakraborty, learned counsel for the respondent no. 5 has argued that the challenge made to the appointment of the respondent no. 5, besides being devoid of any merit, is also barred by time since the petitioner was all along aware about the procedure through which the respondent no. 5 was appointed as an LDA but has failed to question his appointment at the relevant point of time. It is also the submission of Mr. Chakraborty that the petitioner, having been appointed as an LDA much later than the respondent no. 5, cannot claim seniority over the respondent no. 5.

12. I have considered the submissions advanced by the learned counsel appearing for the parties and have also gone through the records produced by the learned departmental counsel.

13. Since Mr. Goswami has submitted that he is not pressing the challenge made to the appointment of the respondent no. 5 on the ground that he was liable to be reverted to the post of Work Charge Khalasi, this Court need not go into the said aspect of the matter. It is clear from the arguments advanced by the petitioner's counsel that the only objection of the petitioner is pertaining to the procedure followed while appointing the respondent no. 5 in the post of LDA. Therefore, the core issue, arising for consideration in this case is as to whether, the initial appointment of the respondent no. 5 in the post of LDA was de hors the rules.

14. As noted above, it is stand of the learned departmental counsel that the authorities have followed the provisions of Rules 6(6) of the Service Rules of 1967. As such Rule 6(6) (as amended) is reproduced herein below for ready reference (as amended from time to time):-

"(6) Junior Assistants – (a) By direct recruitment on the basis of a competitive

examination [consisting of an Objective Type Written Test and Computer Proficiency Test (practical) as laid down in the Schedule-I of these rules to be conducted by the Deputy Commissioner at the beginning of each year, for any vacancy in the post of Junior Assistant, likely to occur in course of the year in their respective establishments unless otherwise directed by the Government in this behalf].”

15. A learned counsel for the writ petitioner has argued that the Rules of 1997 would be applicable in this case. However, the said submission of Mr. Goswami cannot be accepted for the simple reason that Rules framed in the year 1997 cannot be made applicable to the process of recruitment held in the year 1994.

16. A perusal of the departmental records goes to show that the Executive Engineer, Silchar F.C. Division had not only issued notice dated 24/09/1993 inviting applications but had also intimated the local Employment Exchange about the recruitment process. The duly constituted Selection Board had also subjected the three candidates to written test and type writing examination and upon evaluating the results, it was found that the respondent no.5, who had scored the highest mark. Accordingly, the order of appointment dated 07/03/1994 was issued in favour of the respondent no. 5. Be it mentioned herein that in Rule 6(6) “type writing test” had been replaced by “Computer Proficiency Test” at a much later stage.

17. The Rules of 1967 does not lay down any requirement to issue advertisement by newspaper publication. Moreover, there is no dispute about the fact that at the relevant point of time, conducting recruitment process by calling applications through the Employment Exchange was a permissible mode of recruitment. Therefore, merely because there was no newspaper publication of the advertisement notice, this Court is of the view that the appointment of the respondent no. 5, cannot be termed to be illegal only on such count. On the contrary, it transpires from the record that the recruitment process was conducted as per the provisions of the Rules of 1967.

18. It is not the case of the writ petitioner that the appointment of the respondent no. 5 was not against the sanctioned vacant post or that the order of appointment was made without holding a proper selection. It is also not the case of the writ petitioner that the respondent no.5 did not have the requisite qualification under the Rules for being appointed as an LDA. Under the circumstances, the plea of the writ petitioner to the effect that the initial appointment of the respondent no. 5 was de hors the Rules is found to be wholly un-sustainable in law and hence, rejected.

19. The respondent no. 5 was admittedly appointed in the post of LDA (Junior Assistant) prior to the writ petitioner. Therefore, once it is held that the appointment of the respondent no. 5 in the post of LDA was in accordance with law, the question of assigning him a lower position in the gradation list under the writ petitioner would not arise in the eyes of law. This Court, therefore, finds

itself in agreement with the views expressed by the Chief Engineer, Water Resources Department in the order dated 08/09/2022 rejecting the application submitted by the writ petitioner.

20. The decisions relied upon by the learned counsel for the writ petitioner were not in the context of Rules of 1967. Therefore, this Court is of the opinion that the decision in the case of Mamata Mohanty (Supra) would not have any application in the facts of this case.

21. There is yet another aspect of the matter which deserves mention herein. There can be no doubt about the fact that since the date of appointment of the writ petitioner as an LDA on 19/02/2011, he was aware about the fact that the respondent no. 5 was senior to him in the cadre of LDA. However, at no point of time did the petitioner raise any question either about his seniority or the validity of the initial appointment of the respondent no. 5. It was only when the procedure for promotion of eligible Senior Assistants to the post of Divisional Head Assistant in the Silchar Water Resources Department was initiated, that these writ petitions have been filed. It is, therefore, clear that the sole purpose of instituting these writ petitions is to denude the respondent no. 5 of his seniority that too after the lapse of nearly 29 years from the date of his initial appointment. Such an attempt on the part of the petitioner, in the opinion of this Court, lacks bona fide and, therefore, deserves to be deprecated.

22. For the reasons stated herein above, these writ petitions are held to be devoid of any merit. The same are accordingly dismissed. Interim order dated 21/09/2022 passed in WP(C) 6236/2022 is hereby vacated.

23. In view of the above determination, it would now be open to the departmental authorities to process the candidature of eligible departmental candidates for promotion to the post of Divisional Head Assistant, in accordance with law, if so advised.

There would be no order as to costs. Records be returned back.