

**(2006) 06 GAU CK 0004**  
**In the Gauhati High Court**  
**Case No : Writ Petition (C) No. 7411 of 2005**

Sushanta Nath and Others

APPELLANT

Vs

State of Assam and Others

RESPONDENT

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**Date of Decision :** 08-06-2006

**Acts Referred:**

Assam Industries Service (Recruitment and Promotion to the Posts) Orders, 1989 — Order 6

Assam Industries Service Rules, 1997 — Rule 20, 20(3)

**Citation :** (2006) 3 GLT 409

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

**Bench :** Single Bench

**Advocate :** T.C. Khatri and P. Mahanta, for the Appellant; A.M. Mazumdar, C. Choudhury, D. Mazumdar and R. Chakraborty, for the Respondent

**Final Decision :** Dismissed

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## Judgement

B.K. Sharma, J.—The grievance raised in this writ petition is in respect of seniority positions assigned between the Petitioners, who are the direct recruits and the Respondents who are the promotees in the Assam Industries Service.

2. The facts material for the purpose of disposal of the writ petition and which are not disputed by the parties are as follows:

3. The six Petitioners alongwith five others, were appointed as Assistant Manager (NT) under regulation 3 (f) of the APSC (L&F) Regulation 1951 for a period of four months. They were so appointed by Annexure-1 notification dated 13.1.1992. The Petitioners, although were appointed for a period of four months on temporary basis, they continued in their services with orders of extension. Eventually, their services were regularized by Annexure-2 notification dated 22.6.1995 on the basis of their selection and recommendation by the Assam Public Service Commission (APSC). The regularization of their services was stated to be with effect from the date of APSC's recommendations dated 10.10.1994. The respective places of posting of the selected candidates which

included the Petitioners were also indicated in the notification. It will be pertinent to mention here that in the order it was specified that the inter-se-seniority of the incumbents would be fixed later on.

4. As against the aforesaid regularization/appointment of the Petitioners as direct recruits, the private Respondents numbering 28 were promoted as Assistant Manager and other equivalent posts by Annexure-3 notification dated 7.4.1995. Their such promotion was as per the recommendation of the Selection Committee constituted for promotion from the substantive grades of Extension Officer and Instructors. As in the case of the Petitioners in their case also it was stipulated that their inter-se seniority would be fixed later on. The order of promotion was issued as per the provisions of Executive Order, which was in existence at that relevant point of time. According to the Petitioners, their such promotions was regularized by another notification dated 31.5.1996.

5. The gradation list (provisional) indicating the seniority positions of the officers born in the Assam Industrial Service (Class-I and Class-II) as on 1.4.1995 was published by Annexure-4 notification dated 22.1.1996. In this gradation list the name of the private Respondents appeared at serial No. 54 onwards, but the names of the Petitioners were not included. Be it stated here that both the groups belong to the Assam Industries Service (Class-II). According to the Petitioners, their services having been regularized with effect from 10.10.1994 and the Respondents having been promoted by notification dated 7.4.1995, they would rank senior to them and accordingly their names ought to have been included in the gradation list.

6. Being aggrieved by the aforesaid provisional gradation list, the Petitioners lodged their protest by way of representations according to the liberty granted while publishing the provisional gradation list. Thereafter, the final gradation list was published by notification dated 5.6.1997 wherein the Petitioners were placed at serial No. 49,52,54,62 and 69 respectively. The Petitioners were satisfied with the seniority positions assigned to them, which were above the private Respondents and according to them correct seniority positions were assigned to all the incumbents taking into account all the relevant factors and the criteria for fixation of seniority.

7. Being aggrieved by the aforesaid gradation list, it was the turn of the promotees to raise objections against the same. On the basis of the objections raised, the Government of Assam in the Industries Department passed an order dated 30.12.1997 (Annexure-6) suspending the final gradation list. Thereafter, by Annexure-7 notification another provisional gradation list as on 1.4.1997 was published showing the seniority positions of the Petitioners from serial No. 75 onwards alongwith other direct recruits and that of the private Respondents above them. According to the Petitioners, such fixation of seniority is illegal and contrary to the relevant rules. Being aggrieved, the Petitioners made representations against the provisional gradation list.

8. By Annexure-8 order dated 23.6.1999 issued by the Government of Assam in the Industries & Commerce Department and in the name of Governor of Assam, the objection raised by the private Respondents was rejected on the ground that the seniority of the direct recruits was required to be fixed as per the merit positions obtained in the APSC merit list and not from the date of initial appointment under Regulation 3(f) of the Regulation.

9. It is the case of the Petitioners that inspite of raising objection against the fixation of their seniority below the private Respondents, the official Respondents published another gradation list as on 1.7.2000 vide notification dated 7.11.2000 (Annexure-9) maintaining the same seniority positions and placing the Petitioners below the private Respondents. Being aggrieved they raised further objections claiming seniority over the private Respondents. However, it is their case that instead of redressing the grievance, the official Respondents promoted one Sri H.R. Hazarika, since retired, a promotee officer to the next higher rank of Senior Special Officer on the basis of the provisional seniority list, against which the Petitioners raised objections.

10. Being aggrieved by such promotion, one of the direct recruits namely Sri Kanakeswar Sonowal filed the writ petition being WP (C) No. 6507/2001 and the same was disposed of providing that the Petitioner might approach the Assam Administrative Tribunal raising his grievance. Accordingly said Sri Sonowal filed an appeal before the Tribunal and the same was numbered and registered as Appeal No. 1 ATA/2002 with the prayer to direct the Respondents to promote him to the next higher rank and to set aside and quash the provisional gradation list.

11. The Tribunal by its judgment and order dated 5.7.2003 came to the conclusion that the Appellant Sri Sonowal and said Sri Hazarika having been regularized in two separate years, they formed two separate batches and could not have been clubbed together in the gradation list and held the Appellant to be senior to the Respondent No. 1. The Tribunal upon setting aside of the impugned gradation list issued further direction to prepare the revised seniority list in terms of the order passed and in accordance with the service rules. Be it stated here that none of the Petitioners and the Respondents herein were party to the proceeding before the Tribunal. Further, in the instant case, the seniority dispute is between the two groups of the same year.

12. After the aforesaid developments, the provisional gradation list was finalized as on 1.2.2003 vide Annexure-11 notification dated 15.3.2003 stating the same to have been finalized after taking into account the objections/suggestions raised by the officers and upon due consideration of the same. In this final gradation list also, the seniority positions of the Petitioners vis-a-vis the private Respondents were maintained and the private Respondents continued to be senior to the Petitioners. Being aggrieved some of the Petitioners made further representations to the authorities, but to no effect. According to the Petitioners, they approached the Tribunal by filing the appeal being case No. 40 ATA/2003 and the same was disposed of by order dated 16.6.2004 directing the official

Respondents to dispose of the representations made by the Petitioners. A copy of the order has been annexed as Annexure-13 to the writ petition and on perusal of the same it appears that the appeal was filed by one Sri S.K. Bharali against the State, who is not a Petitioner in the instant writ proceeding. Be that as it may, as the matter has been taken for final decision taking into account the grievance raised by the Petitioners, this aspect of the matter need not detain us.

13. The official Respondents have filed their counter affidavit supporting the fixation of seniority between the two groups and the final gradation list impugned in this proceeding. Apart from raising the preliminary objection of there being alternative remedy by way of approaching the tribunal, the Respondents have contended that the final gradation list have been published taking into account all the relevant factors as per the principle envisaged under the relevant rules towards fixation of seniority between the direct recruits and promotees. They have contended that the Petitioners cannot get their seniority fixed with effect from 10.10.1994 and their seniority has been rightly assigned as per the merit positions obtained by them in the APSC selection and as per the principles underlying determination of seniority between the direct recruits and promotees.

14.1 have heard Mr. T.C. Khatri, learned Sr. Counsel assisted by Mr. P. Mahanta, learned Counsel for the Petitioners. I have also heard Mr. A.M. Majumdar, learned Sr. Counsel assisted by Mr. C. Choudhury and D. Majumdar, learned Counsel representing the private Respondents. I have also heard Ms. R. Chakraborty, learned State Counsel representing the official Respondents. I have also considered the relevant materials brought on record including the relevant executive orders and the rules holding the field.

15. The whole basis of the claim of the Petitioners to count their seniority with effect from 10.10.1994 is the regularization of their service with effect from the said date on which the APSC made recommendation. Their such regularization was with the rider that their in-ter-se seniority would be fixed later on. Admittedly, they were appointed/regularized by Annexure-2 notification dated 22.6.1995. There is no dispute that their earlier period of service under Regulation 3(f) of the regulation cannot be counted towards seniority. Law is also well settled that seniority of the direct recruits is required to be fixed as per the merit positions obtained in the select list prepared by the APSC. If the Petitioners' date of regularization i.e. 10.10.1994 is taken into account forgiving them seniority, same will lead to a chaotic and anomalous situation, inasmuch as, the candidates without the background of Regulation 3(f) appointments, but higher in merit positions than the Petitioners, would rank junior to them irrespective of their higher merit positions in the select list.

16. The Respondents in their counter affidavit have annexed the select list dated 10.10.1994, which was forwarded by the APSC to the Government of Assam. The select list was prepared in order of preference. Merely because the Petitioners were in employment under Regulation 3(f) of the regulation on 10.10.1994, it cannot be said that their regularization for the purpose of seniority would

effective from the said date. A select list and for that matter inclusion of the names of the selected candidates does not by itself create any vested right for the selectees to get appointment, till such time the same is acted upon by issuing appointment orders, the Petitioners were admittedly appointed by notification dated 22.6.1995 (Annexure-2 to the writ petition). Thus, their seniority ignoring the adhoc period of service rendered under Regulation 3(f) would count only from that date and that too in accordance with the merit positions obtained in the select list.

17. In the case of Dr. Satyabrata Dutta Choudhury Vs. State of Assam and Others, above aspect of the matter has been discussed. It has been held that, even in absence of any Rule governing the inter-se seniority of persons recruited through APSC, the instruction of the State Government as contained in notification dated 5.2.1964, quoted in the judgment would govern the seniority. As per the said instruction, it is the merit positions in the select list, which would govern the seniority of the appointees. As regards the temporary appointments like that of the present Petitioners, it has been observed that the appointments are defeasible and cannot give rise to any legal right in favour of the persons concerned. The Apex Court has further observed that as the appointments of the Appellants visa-vis the Respondents therein were admittedly in one batch, after reference to the Service Commission, their inter-se seniority had to be determined according to the merit list of the Commission.

18. The above case really clinches the issue as regards the contention of the Petitioners that their seniority is to be fixed from the date of APSC's recommendation dated 10.10.1994 and not on the basis of merit positions obtained by the candidates. The private Respondents in their counter affidavit have annexed another office memorandum dated 28.2.1978 issued by the Government of Assam in the Appointment (B) Department, Appointment Branch laying down the criteria for determination of seniority according to preference indicated in the select list prepared by the Commission and that the period of Regulation 3(f) appointment should be ignored.

19. In the case of Food Corporation of India v. Thaneswar Kalita, also a case from Assam, reported in Food Corporation of India Vs. Thaneswar Kalita and others, the Apex Court reiterated the aforesaid principle relating to words determination of seniority observing that:

It is settled law that if the appointments are made according to rules, though initially on adhoc basis and are continued for a long time, on regularizing the service, the entire period of temporary service would be counted for seniority...In other words, if the appointments were not made in accordance with rules, though the appointees might have continued for a long time, the entire period of service would be fortuitous and so would not be counted towards seniority.

20. Thus, from the above discussion, there is no manner of doubt that the inter-se seniority of the Petitioners and for that matter the direct recruits would be

governed by the respective merit positions obtained by them in the APSC select list and not from the date of recommendation i.e. 10.10.1994. However, I hasten to add that Regulation 3(f) period of service including the period of service with effect from 10.10.1994 in respect of the Petitioners and for that matter any other Regulation 3(f) appointees may be recognized and/or taken into consideration for any other purpose, other than seniority such as for the purpose of increments, pensionary benefits etc.

21. This now leads us to the second question as to whether the Petitioners and for that matter the direct recruits could have been placed en-block below the promotee private Respondents. Unlike the Petitioners, who were appointed under Regulation 3(f) by notification dated 13.1.1992, the private Respondents were promoted by notification dated 7.4.1995 on regular basis pursuant to the recommendation of the Selection Committee made in terms of Executive Order No. 6(4). It is admitted position that at the relevant point of time, the Department had no recruitment rules. However, the Department has adopted the Recruitment Rules called the Assam Industries Service Rules, 1997 by notification dated 19.2.1998. Prior to that, the Order called the Assam Industries Service (Recruitment and Promotion to the Posts) Orders, 1989 was holding the field.

22. Order 6 of the aforesaid Order of 1989, provided for appointment by promotion on the basis of suitability as might be decided by the Selection Board. The private Respondents were promoted by Annexure-3 notification dated 7.4.1995 admittedly on the basis of the recommendation of the Selection Committee constituted for promotion. Their such promotion was also approved by the APSC by communication dated 11.4.1996. It was on that basis, the learned Counsel for the Petitioners argued, that if in the case of the Petitioners i.e. the direct recruits, their seniority is to be counted only after the regularization by the APSC, the same procedure is also required to be followed in case of the promotee officers, their selection having been approved by the APSC only by the aforesaid communication dated 11.4.1996.

23. The aforesaid argument of the learned Counsel for the Petitioners has been mentioned only to be rejected. Unlike the Petitioners, who are the direct recruits and who were appointed without any selection as per the Recruitment Rules under Regulation 3(f), the private Respondents were promoted pursuant to regular selection conducted as per the provisions of the aforesaid Order. Merely because, the APSC delayed the approval and/or accorded the approval by its communication dated 11.4.1996, that by itself cannot nullify the period of service rendered by the promotee officers after their regular promotion by Annexure-3 notification dated 27.4.1995. In this connection, the observation made by the Apex Court in the aforesaid case of Thaneswar Kalita is worth mentioning. In the said case, as noticed above it has been held that:

It is settled law that if the appointments are made according to rules, though initially on adhoc basis and are continued for a long time, on regularizing the

service, the entire period of temporary service would be counted for seniority.

24. In the case of T. Vijayan and Others Vs. Div. Railway Manager and Others, , dealing with the question, whether the Respondents No. 4 to 143 therein were entitled to reckon the period of adhoc service towards their seniority, the Apex Court noticing that the Respondents were promoted on adhoc basis after due selection and their services were also regularized, held that they were entitled to the benefit of adhoc service towards counting seniority. In this connection I may also gainfully refer to the earlier decision of the Apex Court in The Direct Recruit Class-II Engineering Officers" Association and others Vs. State of Maharashtra and others, , wherein it has been observed thus:

47. (A) Once an incumbent is appointed to a post according to rule, his seniority has to be counted from the date of his appointment and not according to the date of his confirmation. The corollary of the above rule is that where the initial appointment only adhoc and not according to rules and made a stopgap arrangement, the officiation in such post cannot be taken into account for considering the seniority.

25. In the case of State of W.B. and Others Vs. Aghore Nath Dey and Others, , it has been held that to enable seniority to be counted from the date of initial appointment and not according to the date of promotion, the incumbent of the post has to be initially appointed "according to rules". In the instant case, the private Respondents were promoted by Annexure-3 notification dated 7.4.1995 following the regular process of selection and thus they would get their seniority from the initial date of promotion and not from the approval of the selection by the Commission by its communication dated 11.4.1996. Such approval was a mere formality and when the promotion of the private Respondents was in accordance with the rules, the approval of the same at a later point of time cannot tell upon the seniority of the private Respondents. By according such approval, the APSC simply endorsed the selection already made and in such approval there was no element of selection involved.

26. Above being the position, the second issue as to from which date the seniority of the private should be counted has to be answered in favour of the private Respondents holding that the same would be from the initial date of promotion i.e. 7.4.1995. This now leads us to the third and the main issue as to whether the private Respondents would en-block rank senior to the Petitioners, as has been assigned to them by the impugned seniority list. Going by the respective dates of appointment, the Petitioners were appointed/regularized by notification dated 22.6.1995 and their inter-se seniority is to be determined as per the merit positions obtained in the APSC select list. On the other hand, the promotee private Respondents were promoted at earlier point of time by notification dated 7.4.1995. Thus, even taking into account the respective dates of appointment, the private Respondents are senior to the Petitioners. However, there is another aspect of the matter as discussed below.

27. The order of 1989 did not provide for determination of seniority between the two groups. However, under Rule 20 of the Rules of 1997, the seniority between the two groups is to be determined ranking the promotees above the direct recruits, if, their appointments and promotions are in the same year. Rule 20 also provides for determination of seniority of the direct recruits and the promotees according to the order of merit in the respective select list about which discussions have been made above.

28. In the instant case, both the direct recruitment and promotion took place in the same year i.e. 1995. Thus, by applying the test of determination of seniority between the two groups as envisaged under Rule 20(3) of the aforesaid Rules of 1997, the promotees would rank senior to the direct recruits. This provision relating to determination of seniority between the two groups is in consonance with other recruitment rules relating to other State Services. Thus, in absence of any rule determining the seniority between the two groups, either of the principles i.e. the length of service of the incumbents or determination of seniority as per Rule 20(3) of the Rules of 1997 will have to govern the same and on either counts, it is the private Respondents being the promotees would rank senior to the Petitioners and for that matter, the direct recruits.

29. Before parting with the case records, a few words relating to the judgment and order of the Tribunal as has been referred to by the Petitioners about which a mention has been made above. Firstly, in the said proceeding none of the parties in this proceedings were involved and secondly, it appears that the said case was withdrawn by the Appellant Sri Sonowal and the same was permitted by the Tribunal by its order dated 19.2.2005, copy of which has been produced by the learned Counsel for the private Respondents. However, this aspect of the matter shall have no bearing as the issue has been decided on merit on the basis of the materials available on records.

30. There is another aspect of the matter. The objections raised by the Petitioners in respect of fixation of seniority of the promotees above them was dealt with and disposed of by Annexure-8 order dated 23.6.1999 and the Petitioners never made any grievance against the same and it was only after publication of the subsequent gradation list maintaining the earlier gradation list, the Petitioners once again started agitating their grievance, however, unmindful of the fact that the said Annexure-8 order dated 23.6.1999 still holds the field and there is no challenge to the same, even in this writ petition. Be it also stated here that barring the six Petitioners, no other direct recruits have made any grievance against the fixation of seniority of the private Respondents above them.

31. Another equally important fact is that none of the direct recruits have been made party Respondents in the writ petition. In view of the fact that the inter-se seniority among the direct recruits is to be determined as per the merit positions in the select list, in case of acceding to the prayer of the Petitioners to count their seniority with effect from 10.10.1994, those direct recruits would be affected. Thus, on that count also the writ petition is not maintainable. As has

been held by the Apex Court in the case of State of Bihar and Others Vs. Kameshwar Prasad Singh and Another, the writ petition claiming seniority and promotion should normally be dismissed in absence of the persons likely to be affected by the relief prayed for. In this connection, the observation of the Apex Court made in paragraph 26 of the judgment is quoted below:

It appears that the High Court totally lost sight of the fact that in his petitions filed from time to time Brij Bihari Prasad had not impleaded any of his seniors as party-Respondents. In the absence of persons likely to be affected by the relief prayed for, the writ petitions should have normally been dismissed unless there existed specific reasons for non-impledment of the affected persons. Neither was any reason assigned by the writ Petitioner nor did the Court feel it necessary to deal with this aspect of the matter. Ignoring such a basic principle of law has resulted in the supersession of 168 Inspectors and 407 Deputy SPs. The writ petition filed by Brij Bihari Prasad Singh being totally misconceived, devoid of any legal force and prayers made being in contravention of the rules applicable in the case deserved dismissal, which was unfortunately not done with the result that the interests of many seniors have been threatened, endangered and adversely affected. The appeal of the State has, therefore, to be allowed by setting aside the impugned judgment.

32. For all the aforesaid reasons, discussions and conditions, the writ petition merits dismissal, which I accordingly do.

33. The writ petition is dismissed, without, however, any order as to costs.