

IN THE GAUHATI HIGH COURT
**(THE HIGH COURT OF ASSAM, NAGALAND, MIZORAM AND
ARUNACHAL PRADESH)**
ITANAGAR BENCH

W.P.(C) No. 283 (AP) of 2008

Shri. K. Indu Singh,

S/o. Shri. K, Iboyaima Singh,

Moirang Kumam Keikai,

P.O/P.S Moirang,

District Bishnupur, Manipur,

Presently working as Urban Programme Officer

in the Office of the Chief Engineer-cum-

Director Urban Development & Housing Department, Itanagar.

..... **Petitioner**

-Versus-

1. The State of Arunachal Pradesh
to be represented by the Secretary
Urban Development & Housing,
Government of Arunachal Pradesh, Itanagar.
2. The Chief Engineer-cum- Director
Urban Development & Housing Department, Itanagar.
3. Shri. Himar Ete,
Urban Programme Officer (UPO),
C/o The Deputy Director,
Department of Urban Development, Pasihgat (Arunachal Pradesh).
4. Shri. R.D Lewi,
Urban Programme Officer (UPO),
C/o Office of the Chief Engineer-cum-Director,
Department of Urban Development & Housing, Itanagar.
Arunachal Pradesh.

..... **Respondents**

BEFORE
HON'BLE MR. JUSTICE P.K. SAIKIA

For the petitioner : Mr. B.L. Singh,
: Mr. A.D Singh,
: Mr. S.S Nag, Advocates

For the State respondents : Ms. G. Deka, Addl. Sr. GA

For the respondent No.3 : Mr. I. Basar,
: Mr. N. Ratan,
: Mr. M. Kato,
: Mr. K. Tasso,
: Mr. D. Tadu,, Advocates

Dates of hearing : **25.07.2013**

Date of Judgment : **04.11.2013**

JUDGMENT AND ORDER
(CAV)

1. In this proceeding, the seniority list dated 16/7/2008 at Annexure-15 to the writ petition has been called into question. By the said seniority list, the present petitioner has been shown as junior to private respondent No.3 and 4.
2. Heard Mr. B.L. Singh, learned counsel for the petitioner. Also heard Ms. G. Deka, learned Addl. Sr. Government Advocate for the State respondents and Mr. I. Basar, learned counsel appearing for the private respondent No. 3 & 4.
3. The facts as they emerge from the writ petition under consideration and which are necessary for disposal of the present proceeding in brief are that the petitioner was initially appointed as Junior Engineer (in short JE) in PWD Department on 27/3/1986 and he joined such a post the same day. On the other hand, the respondent No. 4 joined the same department in the same capacity in 1993 whereas the respondent No.3 is said to have joined the PWD as Junior Engineer in 1994.
4. On the basis of their seniority in the PWD, a provisional seniority list of Junior Engineers was prepared and in that seniority list, the petitioner was placed at Sl.No.228 whereas respondent No.4 was shown at

Sl.No.454 of the seniority list of Junior Engineers. Quite importantly, the name of respondent No. 3 did not appear in such a list.

- 5.** After working for 15 years as Junior Engineer in PWD Department, the petitioner along with others including the respondent No 4 was appointed as Urban Programme Officer (in short UPO) on deputation basis in Urban and Housing Development Department (in short, the Housing Department). Being so appointed, he joined as UPO on 29/3/2001 whereas the respondent No. 4 joined the same post in Housing Department on deputation basis on 12/4/2001.
- 6.** On the other hand, the respondent No.3 who joined PWD as Junior Engineer in 1994 had joined as Assistant Urban Programme Officer, (in short, AUPO) in the Housing department on 29/12/1997 on deputation basis. Subsequently, vide order dated 5/2/2001, he was absorbed permanently in the Housing Department w.e.f. from 29/12/1997 which happens to be the day when he initially joined the department as AUPO on deputation basis.
- 7.** The petitioner along with respondent No. 4 and two others were also absorbed permanently in Housing Department w.e.f. 20/8/2004 vide order dated 23.08.2004 and such absorption was made on the basis of recommendation made by the duly constituted DPC in its meeting held on 06.07.2004
- 8.** In the meantime, private respondent No. 3, who was then working as AUPO, had been transferred and posted to District Urban Development Agency, West Siang district to function as UPO without any financial benefit vide order dated 22/10/2001 at Annexure-4 to the petition. Vide DPC resolution dated 7/2/2005, the respondent No.3 was recommended for promotion to the post of UPO on regular basis and in that connection, the order dated 24/2/2005 was issued.
- 9.** By the aforesaid order, the respondent No. 3 was given retrospective promotion to the post of UPO w.e.f. 22/10/2001 i.e. the day when he assumed the charge of UPO on functional basis. Such retrospective promotion in favour of the respondent No. 3 is said to be illegal since the relevant Recruitment Rules (in short, the RR) did not provide for retrospective promotion. It is also illegal since the resolution dated 7/2/2005 did not recommend the retrospective promotion of the respondent No.3 to the post of UPO.

- 10.** It may be stated that the aforesaid retrospective promotion in favor of respondent No.3 is illegal for other reason as well. In that connection, it has been contended that since the petitioner is senior to both the private respondents in the parent department and since, he along with respondent No.4 and two others were permanently absorbed with effect from 20/8/2004, long before the birth of the respondent No. 3 in the grade of the UPOs, he was to have declared senior to both of the private respondents in the grade of UPOs.
- 11.** In the meantime, the provisional seniority list of UPOs under Urban Development and Housing w.e.f. the period from 30/11/97 to 16/6/05 was prepared and circulated among the concerned officers for submitting representation, if any, against such provisional seniority list and those representations were to be submitted within 30 days from the date of issuance of such memorandum vide memorandum dated 30/6/05 at Annexure-9 to the writ petition.
- 12.** The said provisional list was objected to by the private respondents as well as Mr. T. Tabin. After hearing their objection, the official seniority list of UPO's w.e.f. 30/11/97 to 1/11/2007 was circulated seeking objection, if any, against such seniority list vide memorandum dated 02/11/07 at Annexure-10 to the writ petition. In the seniority list, the private respondent No.3 were shown at Sl.No.6 whereas petitioner and private respondent No.4 was shown at Sl. No. 7 and 8 respectively. Other two persons namely, Taku Tachang and H.Welly were shown at Sl. No. 9 and 11 respectively.
- 13.** All those four persons therefore, submitted representation to the Chief Engineer cum Director, Housing deaprtment highlighting their grievances in placing the respondent No.3 above them. In that connection, a Committee was constituted to consider the representations at Annexure-11, 12, 13 and it accordingly, heard the parties and thereafter, put the private respondent Nos. 3 and 4 above the petitioner in the seniority list dated 16.07.2008 at Annexure-15 to the writ petition.
- 14.** It has been pointed that since the petitioner is senior to both the private respondents in the parent Department in the grade of Junior Engineers, since he joined the Department as UPO even before the respondent No.4 and since the respondent No.3 was given retrospective promotion in violation of service jurisprudence thereby making the petitioner junior

to both the respondents, he approached this court urging it to set aside the impugned seniority list dated 16.08.2008.

- 15.** Notice of the proceeding was served on the respondents. The respondent Nos. 1 to 4 had filed joint counter affidavit whereas respondent No.3 also filed a separate affidavit refuting the claim of the petitioner. In his counter affidavit, respondent No.3 has contended that when the Urban Development and Housing Department was created in 1996, officers and staff were borrowed from other Departments. The respondent No.3 is a B.Tech in Civil Engineering and joined as Junior Engineer in PWD on 10/3/94.
- 16.** However he joined the Housing Department on 29/12/97 as AUPO on deputation basis. Subsequently, the respondent No.3 was permanently absorbed as AUPO w.e.f. 29/12/97 vide order dated 5/2/01. As per the Service Rules, prevailing during the time under consideration, for promotion to the post of UPO from AUPO, a degree holder AUPO must put in 5 years of continuous service whereas a Diploma holder required to put in 10 years of continuous service as above.
- 17.** Since the respondent No.3 is a degree holder working as Junior Engineer in PWD department with effect from 10.03.1994 to 28.12.1997 and since he joined the Housing department as AUPO in the rank of J.E and since he worked continuously for 5 years as AUPO, the respondent No.3 became eligible for promotion to the post of UPO w.e.f. 10/3/99. Since he became eligible for promotion to the post of UPO with effect from 10.03.1999 as per service jurisprudence and also in view of order absorbing him as AUPO in the Housing department, he deserved to be promoted to the rank of UPO well before 22.10.2001.
- 18.** In that connection, it has been pointed out that as per the order absorbing him in Housing department, his past service experience in the parent department was to be counted for all purposes including seniority. However, in spite of all these, he was promoted as UPO----- not from the date when he became eligible for promotion-----that is from 10/3/99----- but only with effect from 22/10/01 vide order dated 24/02/05.
- 19.** Drabbing the appointment of the petitioner and respondent No.4 as illegal, it has been stated that as per RR, prevalent then, deputation against promotional quota is permitted only when there is no departmental candidate for filling up the post of UPO on promotion.

However, despite the petitioner being eligible for consideration for promotion to the post of UPO with effect from 10.03.1999, the petitioner and respondent No.4 were appointed as UPO on the deputation basis against the promotional quota.

- 20.** Since the very entry of the petitioner and private respondents in the Housing department is illegal, they cannot claim seniority over the respondent No.3 as he completed 5 years of continuous service as AUPO as early as 10/3/99, long before the petitioner and respondent No.4 had joined the Housing department in the grade of UPO same being equivalent to Assistant Engineer in PWD Department.
- 21.** It has again been stated that in its meeting held on 6/7/04, the DPC could not consider the matter regarding extension/absorption of as many as 8 UPO's on deputation including the petitioner and respondent No.4 due to non-availability of the relevant service records and therefore, the matter regarding absorption/extension of deputation of all those UPOs was deferred to the subsequent DPC. This clearly shows that the claim of the petitioner that he was absorbed in Housing department with effect from 20.08.2004 becomes extremely doubtful-----argues the respondent No.3..
- 22.** It has also been pointed out that the respondent No.3 being aggrieved for not giving promotion against the departmental quota w.e.f.10/3/99 approached this Court by way of W.P.(C) 325 AP/2008 and this Court after hearing the parties therein ordered the official respondents to give him promotion with effect from 10.03.1999. A copy of the judgment passed in the proceeding aforesaid is attached as Annexure-3 to his counter affidavit.
- 23.** In support of his contention, he has relied on the decision of Hon'ble Supreme Court in the case of Sub-Inspector Rooplal Versus Lt. Governor reported in (2000) 1 SCC 644 as well as the Direct Recruitment Class-II Engineering Officers Association versus State of Maharashtra & Ors., reported in (1990) 2 SCC 715.
- 24.** On the other hand, in their counter affidavit, State respondents have submitted that there was absolutely no wrong whatsoever in placing the respondent No. 3 and 4 above the petitioner since both of them have higher educational qualification and since both of them had special reason to be placed above the petitioner in seniority list of UPO's. In that context, it has been pointed out that petitioner was absorbed----

not w.e.f.29/3/2001---- the date on which he joined the Urban Development Department on deputation ---but---- on 20/8/04 only.

25. On the other hand, the respondent No.3, who was permanently absorbed as UPO with effect from 22/10/01, (an order which has never been questioned by the petitioner at any point of time), is unquestionably senior to the petitioner in the rank of the UPO, the date of the absorption of the petitioner and the respondent No.3 in Housing department, being 20.08.2004 and 22.10.2001 respectively and as such, the petitioner cannot claim seniority in the rank of the UPO over the respondent No.3.

26. It has further been stated that though originally the petitioner was placed above the private respondent ---yet----- on realizing and identifying the mistake, same was corrected and ultimately, respondent No.3 and respondent No.4 were placed above the petitioner. In order to fortify his case more and more, the learned counsel for the respondent No 3 has referred me to the decisions of Hon'ble Supreme Court in:-

1. (2008) 1 SCC 747 (R.K. Mobisana Singh versus K.H. Temba Singh),
2. (1990) 2 SCC 715 (Direct Recruitment Class-II Engineering Officers Association versus State of Maharashtra & Ors).

27. On the other hand, the learned counsel for respondent No. 1 to 2 has referred me to the decisions of Gauhati High Court case of :-

1. AIR 1999 SC 1510 (B.S. Bawa -VS- The State of Punjab),
2. AIR 1974 SC 2271 (P.S. Sadasivaswamy -versus- State of Tamil Nadu),
3. AIR 2013 SC 454 (Bhupen Hazarika -versus- State of Tamil Nadu),
4. 1997 (2) GLT 654 (Nawab Amanukh & Ors. -Versus- State of Assam).
5. (1999) 8 SCC 381 (Ramwar Prasad -VS- MD, UP Rajkiya Nirman Nigam) and

28. I have heard the arguments, advanced by the learned counsel for the parties. Before I proceed further, one needs to know when a person who has been working in a borrowing department on deputation and who has later been absorbed can claim seniority in the borrowing department. The law on this point has been well settled. It has been held again and again that normally such a person can claim seniority in

borrowing department only from the date when he is regularly absorbed in borrowing department although the service rendered by such officer in his parent department may be counted for pensionary and other pension related matter.

29. In this connection, we may profitably peruse the judgment of the Hon'ble Supreme court in the case of Sub-Inspector Rooplal Versus Lt. Governor reported in (2010) 1 SSC 674. In Sub-Inspector Rooplal (supra), Hon'ble Supreme Court held as follows:-

"In law, it is necessary that if the previous service of a transferred official is to be counted for seniority in the transferred post then the two posts should be equivalent".

30. I have found that respondent No.3 had joined the parent department on 10.03.1994 in the rank of J.E. I have also found that he joined the Housing department on deputation on 29.12.1997 and he joined such department as AUPO in the rank of J.E in parent department. Being so, in normal circumstances, and in absence of any rule in the RR, repugnant to such arrangement, the petitioner may claim his service experience in the parent department in fixation of his seniority in the grade of AUPO in Housing department.

31. Coming back to our case, we have found that the draft Service Rules, under which the petitioner and private respondents were absorbed in housing department, was silent regarding the fixation of seniority in the borrowing department of the officers who had served both the lending department and the borrowing department in posts which are equivalent in status and position. Being so, his seniority in the grade of AUPO could have been counted from the date on which he joined the parent department.

32. However, he was not given promotion to the post of UPO with effect from 10.03.1999 when he reportedly acquired the qualification to be considered for promotion to the post of UPO. However, he was given functional promotion to such post with effect from 22.10.2001 and such functional promotion was regularized with effect from 22.10.2001 vide order dated 24.02.2005. That being the position, in my considered opinion, the respondent No.3 became a regular member in the grade of UPO in Housing department with effect from 22.10.2001.

33. The claim of the respondent No. 4 that he was born in the grade of UPO with effect from 22.10.2001 is found justified when we view the matter from a

different angle. We have also found that vide order dated 22.10.2001, the respondent No.3 was given officiating promotion to the post of UPO in Housing department. More importantly, such officiating promotion was regularized by the State respondents vide order dated 24.02.2005.

34. Now, we need to know if officiating promotion confers any benefit or advantage to the person who is so favored with officiating promotion. This question was considered and answered by the Apex Court in the case of L. Chandra Kishore Singh -Versus State of Manipur & Ors., reported in (1989) 8 SCC 287. In L. Chandra Kishore Singh (supra), Apex Court held as follows:-

.. "It is now well settled that even in the case of probation or officiating appointments which are followed by a confirmation unless a contrary rule is shown, the service rendered as officiating appointment or on probation cannot be ignored for reckoning the length of continuous officiating service for determining the place in the seniority list. Where the first appointment is made by not following the prescribed procedure and such appointee is approved later on, the approval would mean his confirmation by the authority and shall relate back to the date on which his appointment was made and the entire service will have to be computed in reckoning the seniority according to the length of continuous officiation. In this regard we fortify our view by the judgment of this court in G.P. Doval Chief Secy., Govt. of U.P."

35. Similar view has been rendered in the case of Direct Recruitment (supra) wherein it was held as follows:-

" If the initial appointment is not made by following the procedure laid down by the rules but the appointee continues in the post uninterruptedly till the regularization of his service in accordance with the rules, the period of officiating service will be counted."

36. In view of the law laid down in the L. Chandra Kishore Singh (supra) as well as in the case of Direct recruitment (supra) and also in view of silence of the draft service Rules, on the matter under consideration, I am of the opinion that the State respondents committed no wrong in either in giving officiating promotion to the respondent No.3 to the post of UPO with effect from 22.10.2001 or regularizing such officiating promotion with effect from 22.10.2001. Thus, I have no hesitation in holding that the promoting of the respondent No.3 to the post of UPO w.e.f 22.10.2001 is legal and as such, sustainable in law.

37. On some other counts too the petitioner claim as far as respondent No.3 is concerned is liable to be dismissed. It is a settled law that unless one questions the basic order, he cannot question the consequential orders. In our instant case consequential order is the seniority list dated 16.07.2008 whereas the order dated 03.02.2005 giving the respondent No.3 promotion to the grade of UPO with effect from 22.10.2001 is the basic order.

38. Equally importantly, the minutes of the meeting dated 11.07.2008 which affirms the promotion of the respondent No.3 to the rank of UPO with effect from 22.10.2001 is another basic order since the seniority list dated 16.07.2008 is founded on aforesaid document. There is nothing on record to show that order dated 03.02.2005 or resolution dated 11.07.2008 had ever been questioned by the petitioner anywhere at any point of time.

39. Even in the present proceeding, the petitioner did not question the legality of the aforesaid order/resolution. Since the petitioner did not question those two basic order(s)/resolution, it cannot question the seniority list dated 16.07.2008 which is nothing but consequential order of aforesaid resolution and order. On this count also, the petitioner case as far as respondent No.3 is liable to be dismissed.

40. So far the case between the petitioner and respondent No.4 is concerned, I have found that before joining the Housing department on deputation, both the petitioner and respondent No.4 worked in PWD as Junior Engineer. Admittedly, while petitioner joined the Department in 1986 as Junior Engineer, the respondent No.4 joined the same in the same capacity in the year 1993 for which the petitioner was placed at Sl.224 whereas the respondent No.4 was placed at Sl.454 of the seniority list of J.E in the PWD department.

41. On perusing the matter further, I have found that the age wise too, the petitioner is senior to private respondent No.4, their dates of birth being 1/2/65 and 2/11/68 respectively. Further, whereas the petitioner joined the Department as UPO on 29/3/04, respondent No.4 joined the Department same post on 14/4/04. Thus, the petitioner joined both the parent department as well as in borrowing department well ahead of respondent No. 4.

42. I have also noticed that while absorbing the petitioner and private respondent No.4, the Secretary, Urban Development and Housing, Government of Arunachal Pradesh, vide clause 1 of order dated 23.08.2004, stipulated that inter-se-seniority of the officers shall be decided by DPC on the basis of their performance cum merit. The relevant part is reproduced below:-

1. *“The inter-se-seniority of the officers shall be decided after conducting DPC by a Board based on performance cum merit of the above officers.”*

43. Such a clause in order dated 23.08.2004 indicates that in matter of granting seniority among officers who are absorbed there-under, the Department retains authority to decide the seniority of them on the basis of performance etc.

44. Now, let us see what are the factors which the State respondents took into consideration while ascertaining the inter-se-seniority of the officers, absorbed under the order dated 23.08.2004. In that connection, I find it necessary to look at the resolution of the DPC adopted on 11.07.2008. For ready reference same is reproduced below:-

“As per the general principle of seniority and other relevant guidelines issued by the Government of India as well as State Government of Arunachal Pradesh, in case of the counting of service of deputationist absorbed later on in the department, the guiding principle is that the absorbed person is treated on par with direct recruitment and his seniority is always absorbed counted from the date of absorption. And in case of persons who were absorbed on same date, the determining factor for counting seniority shall be the date of joining to the new post. Accordingly, the Committee had decided to reckon the date of joining as determining factor for the officers who were absorbed in the department on same date for fixing seniority”.

45. A bare perusal of the resolution above reveals that in its meeting held on 11.07.2008, the Committee resolved that in case of problems in fixing seniority of the officers who were absorbed in the Housing department on the same day, the officer, who joined the department first in point of time, would be given seniority over the others who arrived the department later. But such principle so laid down the DPC for its own guidance was given a complete go by in case of fixation of seniority between the petitioner and respondent No.4.

46. I have already found that petitioner joined the department on deputation on 29.03.2001 whereas the respondent No.4 joined such department on deputation only on 12.04. 2001. Thus, the petitioner, being the first to arrive in the department, ought to have been given seniority over the respondent No. 4 on application of policy/principle which the Committee framed for its own guidance. The Committee, however, refused to follow its own guide lines that too without assaying any reason whatsoever.

47. These apart, the petitioner is found senior to the respondent No. 4 in age as well. The petitioner is also found senior to him in the grade of JE in

parent department. Since both of them were absorbed in the Housing department on the same day, the factors, enumerated above, unmistakably show that the petitioner was to have given seniority over the respondent No.4.

48. Since that was not done, the resolution in question as well as the order under challenge to extent as stated above is found illegal and is liable to be set aside.

49. In view of above, I am of the considered opinion that the State respondents committed no wrong in placing the respondent No.3 above the petitioner in the final seniority list of UPOs dated 16.07.2008 and to that extent, the seniority list in question does not invite any interference from this court.

50. However, as stated above, I have already found that the petitioner was wrongly and illegally placed below the respondent No.4 in the seniority dated 16.07.2008 and as such, same being illegal is liable to be set aside.

51. Consequently, the seniority list aforementioned in respect of petitioner and respondent No. 4 is set aside with further direction to the State respondent to correct the seniority list dated 16.07.2008 by placing the respondent No.4 below the petitioner and same needs to be done at the earliest but in case beyond 4(four) months from the date of the receipt of the certified copy of this order.

52. In the result, this petition is partly allowed to the extent as stated above, of course, without any cost.

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JUDGE

Kevi