

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

ITANAGAR BENCH

WP(C) 298 (AP)/2008

Shri Hali Welly
S/o- Shri Bado Welly,
presently posted as Urban
Programme Officer, Bassar,
P.O./P.S. – Bassar,
District –West Siang, Arunachal Pradesh.

...Petitioner

-Versus-

1. The State of Arunachal Pradesh
Represented by the Secretary Urban Development,
Government of Arunachal Pradesh, Itanagar.
2. The Director, School Urban Development Urban
Development, Govt. of Arunachal Pradesh, Itanagar.
3. Shri. Himmar Ete,
Urban Programme Officer, Yingkiong,
PO/PD Yingkiong,
District Upper Siang, Arunachal Pradesh.
4. Shri. M. Riba,
Under Secretary, Civil Secretariat, Itanagar,
District Papum-Pare, Aunachal Pradesh.

...Respondents

P R E S E N T

HON'BLE MR JUSTICE P.K. SAIKIA

For the Petitioner : Mr. P. Taffo,

: Mr. D. Pangging,
 : Mr. R.C. Tok,
 : Mr. T. Gyati, Advocates.

For the State Respondents : Mrs. G. Deka, Addl. Sr. GA

For the Respondent : Mr. N. Ratan,
 : Mr. M. Kato,
 : Mr. D. Padu,
 : Mr. K. Tasso &
 : Mr.B. Normuk, Advocates

Date of Judgment : **04.11.2013**

JUDGMENT AND ORDER

In this proceeding, the petitioner has questioned the order dated 24.02.2005 regularising officiating promotion of the respondent No. 3 to the post of UPO w.e.f. 22.10.2001, minutes of the meeting of the DPC dated 11.07.2008 recommending the respondent No. 3 above the petitioner in the seniority list of UPOs as well as the order dated 16.07.2008 giving effect to the recommendation made by the DPC held on 11.07.2008.

1. Heard Mr. D. Pangging, learned counsel for the petitioner. Also heard Ms. G. Deka, learned Addl. Sr. Government Advocate for the State respondents and Mr. N. Ratan, learned counsel appearing for the private respondent No. 3 and 4.

2. The facts as they emerge from the writ petition in question and which are necessary for disposal of the present proceeding in brief are that the petitioner, a Diploma holder in Civil Engineering , joined the Public Work Department (PWD, in short)as Junior Engineer (in short J.E.) on 04.02.1994. While he was serving in that capacity in the PWD Department with sincerity and devotion, he was appointed as Urban Programme Officer (in short UPO) in the department of Urban Development Housing, Arunachal Pradesh on deputation for a period of 2 years vide order dated 15.7.2002 and was posted as UPO at Zero.

3. However, before expiry of the deputation period, a DPC was held on 6.7.2004 which recommended that the petitioner and three others be permanently absorbed as UPO in the Housing Department. Such recommendation was made on the basis of their performance, vigilance clearance and other relevant factors. Thereafter, vide order dated 23.8.2004, the petitioner along with three others was permanently absorbed as UPO in the Housing Department w.e.f. 20.08.2004.

4. The respondent No. 3 who joined the Public Work Department on 10.3.1994 also joined the Housing Department as AUPO on deputation basis on 29.12.1997. However, vide order dated 5.2.2001, the respondent No.3 was permanently absorbed as AUPO in the Housing Department with effect from the date on which he joined the Housing Department, i.e., on 29.12.1997. Similar status was also bestowed on one Shri C. Thawamani who joined the Housing Department on deputation basis w.e.f. 01.12.1997.

5. On his absorption as UPO on permanent basis in the Housing Department, the respondent No. 3 was transferred to Aalo as UPO and was allowed to function as UPO without any extra financial benefit vide order dated 22.10.2001. However, no such privilege was bestowed upon Shri C. Thawamani although who was senior to the petitioner in the rank of AUPO.

6. In the meantime, a special DPC was constituted to consider the case of respondent No. 3 for promotion to the post of UPO. DPC recommended the promotion of respondent No. 3 as UPO as per his seniority list and roster. A photocopy of the aforesaid DPC proceeding is attached with the writ petition as Annexure-VI. However, the respondent No. 4, who was then working as Link Officer in the Housing Department promoted the respondent No. 3 as UPO with retrospective effect from 22.10.2001, the date on which, he was given functional promotion to the rank of UPO. The respondent No.4 issued such order as Under Secretary to the Department vide order dated 24.2.2005 since regular Under Secretary was on leave.

7. However, such promotion was illegal for reasons more than one. In that context, it has been stated that during the time under consideration, respondent No.4 was working as a Link Officer. However, owing to temporary absence of regular Under Secretary, he was officiating as Under Secretary. Under the law, even a regular Under Secretary is not authorised to sign on behalf of the Governor, much less signing such an order by a person officiating as Under Secretary. But then, despite he not being authorised to sign an order on behalf of the Governor, he chose to issue the order dated 24.2.2005 giving promotion to the petitioner w.e.f. 22.10.2001.

8. It has also been stated that the resolution adopted by the DPC on 7.2.2005 never recommended the State respondent to give retrospective promotion to the respondent No. 3 to the post of UPO w.e.f. 22.10.2001. But taking advantage of working as Under Secretary on officiating basis, he hijacked the entire process and passed an order giving retrospective promotion to the respondent No. 3 to the rank of UPO from the date aforementioned.

9. However, all those exercises were done behind the back of all concerned including the petitioner. He came to know about such retrospective promotion of the respondent No.3 as well as Link Officer doing misdeeds in helping the respondent No.3 to secure promotion to the rank of UPO in 2007 when the department for the first time circulated a draft seniority list of the UPOs in housing department and invited claims and objections from the officers aggrieved by such seniority list.

10. The petitioner along with others similarly situated submitted representation against such arbitrary action of the Govt. and sought immediate restoration of their seniority in the terms of recommendations made by various DPCs. Though State respondents promised that such grievances would be looked into, nothing had been done to ameliorate their grievances. Contrary to it, on 7.12.2008, a Board was constituted to determine the inter-se seniority of the UPOs in the Housing Department.

11. The Board also prepared a seniority list in which the petitioner was placed at Serial No. 10 whereas the respondent No. 3 was placed at SL No. 6 vide recommendation of the Board dated 11.07.2008. On the basis of such recommendation, the final seniority list was published vide order dated 16.7.2008 maintaining the seniority position of the petitioner qua the respondent No.3 as suggested by the Board by its resolution dated 11.07.2008.

12. It has been contended that since the petitioner is senior in the parent department in the rank of Junior Engineer, since he had joined the department aforesaid as UPO on 15.07.2002 and since the respondent No.3 was given retrospective promotion to the post of UPO most illegally, vide order dated 24.02.2005, the respondent No. 3 cannot claim seniority over the petitioner in the Grade of UPO. He, therefore, urges this Court to set aside the order dated 24.02.2005, minutes of the meeting dated 11.07.2007 as well as order dated 16.07.2008 on holding that those orders/resolution are arbitrary, illegal and against the law.

13. Notice of this proceeding was served on the respondents. The State-respondent No. 1 and 2 and private-respondent No. 3 have submitted separate counter affidavits contradicting the claims of the petitioner. In their common counter affidavits, the State-respondents have stated that since the respondent No. 3 had served the parent department as Junior Engineer w.e.f. 10.3.94 and since he had also joined the borrowing department as AUPO in the rank of Junior Engineer, the Service Jurisprudence ordains that the respondent No.3 is to get all service benefits including seniority in the rank of AUPO in the borrowing department from the date on which he joined the parent department in the equivalent post.

14. Therefore, while absorbing him in that rank of AUPO in Housing department vide order dated 05.02.2001, he was absorbed w.e.f. 29.12.97 which further speaks that his service experience in the parent department from the date of his appointment is to be reckoned for all service benefits and therefore, in the terms of order dated 05.02.2001, the State respondents regularised his promotion in the rank UPO w.e.f. 22.10.01

which happens to be the day when the respondent No. 3 was given functional promotion. Being so, there is no illegality, whatsoever, in regularising the officiating promotion of the respondent No.3 from the date aforesaid.

15. The relevant part of the counter affidavit filed by State is reproduced below:-

As per the provision of Rules in the Book-“Establishment and Administration, Chapter-19, Recruitment By Absorption/Deputation clause No. 11(iv)” seniority of persons absorbed after being on deputation has clearly spelt out that “in the case of a person who is initially taken on deputation and absorption later, his seniority in the grade in which he is absorbed will normally be counted from the date of absorption. If he has, however, been holding already the same or equivalent grade on regular basis in his parent Department such regular service in the grade shall also be taken into account in fixation of his seniority, subject to the condition that he will be given seniority from –

-The date he has been holding the post on deputation

-The date from which he has been appointed on a regular basis to the same or equivalent grade in his parent Department whichever is earlier.

As such, by following the same yardstick the respondent No. 3 has been given retrospective benefit which is applicable to all similar case.

That with regard to the statement made in paragraph 8 of the petition, it is respectfully submitted that to allow functional status of UPO, in administrative exigencies without financial benefit to anybody is in so, it is not mandatory to apply seniority in such a case. Further, as per reservation roster the respondent No. 3 was at Sl. No. 1 at the time amongst the seniority of AUPO.

16. In regard to the contention that the respondent No. 4 most surreptitiously and without there being any authority had issued the order dated 24.2.05 giving retrospective promotion to the respondent No. 3 w.e.f. 22.01.2001, it has been contended that such contention is without any substance whatsoever since there is absolutely nothing on record to justify such a stance.

17. The private respondent too has filed separate counter affidavit. In his counter affidavit, he has stated that he joined the parent department as J.E. on 10.3.94. Thereafter, he joined the Housing Department as AUPO in the rank of Junior Engineer on 29.12.97 on deputation basis and was

subsequently absorbed permanently w.e.f 29.12.97 vide order dated 5.2.2001.

18. As per the Draft Recruitment Rules, prevalent then, for promotion to the post of AUPO to UPO, a degree holder AUPO is to put in 5 years of service as AUPO whereas a diploma holder was required to serve in the same capacity for 10 years. It is a cardinal principle of Service Jurisprudence that if a public servant joins the borrowing department on deputation in the same capacity in which he was working in his parent department and if he is subsequently absorbed in the borrowing department, in normal circumstances, the service, he rendered in lending department needs to be counted for all purposes including his seniority in the borrowing department.
19. Since under the Draft Service Rules, prevalent then , a degree holder in Civil Engineering working as AUPO needs to put in five years of service to be eligible for promotion to the post of UPO and 10 years in case of diploma holder, petitioner, being a degree holder, became eligible for promotion to the post of UPO w.e.f. 10.3.99. But he was given promotion ---not from that date ---but---was given functional promotion only w,e.f. 22.10.2001.
20. Realising such mistake, committed and the discrimination, meted out to the respondent No. 3, the State respondents vide order dated 24.2.2005 regularised his promotion to the rank of UPO w.e.f. 22.10.2001 i.e. the day when he was given functional promotion to the rank of UPO. Such being the position, by giving him promotion with retrospective effect w.e.f. 22.10.2001, the state respondents did not commit any wrong but they only partly corrected a huge mistake which perpetuated enormous hardships and injustice to the respondent No.3.
21. It is also the case of the respondent No. 3 that since he was deprived of promotion on the date on which his promotion became due, he preferred a petition before this court which was registered as WP(C) (AP) No. 325/2008 seeking a direction requiring the State-respondents to give

him promotion w.e.f. 10.03.1999. This court after hearing the parties therein allowed the prayer directing the State-respondents to give him promotion to the rank of UPO w.e.f. 10.03.1999.

22. In regard to the claim of the petitioner that he is senior to the respondent No.3 in parent department, it has been stated that the petitioner and private respondent No. 3 were appointed as J.E. in the PWD under the same order, vide order dated 4.2.1994. However, the respondent No. 3 joined the department on 10.3.1994 and as such, under the normal Service Rules, only for his joining the parent department before him, the petitioner cannot claim to be senior in the parent department.
23. It has been stated that resolution of the DPC on the basis of which the petitioner claims permanent absorption in the Housing Department as UPO is found to be very doubtful one in view of the resolution of the DPC, copy of which was attached to his counter affidavit as Annexure- 1. In that regard, it has also been stated that though both the resolutions aforesaid cover the same subject matters, yet they speak of recommendations which are different all together.
24. This is because of the fact that though Annexure- 1 to his counter affidavit of the respondent No. 3 shows that the DPC which was held on 5th of July, 2004 did not recommend any of the UPOs on deputation for permanent absorption for want of some information on service matters, the resolution of DPC, relied on by the petitioner, reveals that the petitioner and three others were recommended for absorption as UPOs in housing department. Such a doubtful resolution could not furnish any substratum to the claim of the petitioner that he is senior to the respondent No. 3 in the grade of the UPO.
25. Since promotion of the respondent No.3 in the rank of UPO was regularised w.e.f. 22.10.2001, since the petitioner was appointed as UPO in Housing department on deputation only on 15.7.2002 and since the petitioner was absorbed in Housing department w.e.f. 20.08.2004 (even

one believes such resolution to be genuine and truthful), under no circumstances, the petitioner can claim seniority over him. He, therefore, urges this court to dismiss this proceeding with cost.

26. In regard to the claim that one Shri C. Thawamani was not given similar benefit (benefit of officiating promotion) despite he being senior to the respondent No. 3, it has been pointed out that Shri Thawamani, not being an AGST candidate, cannot deprive the petitioner ---who is AGST candidate -----of the service benefits which statute bestows upon the respondent No.3 since promotion recommended by the DPC was to be made as per the roster and seniority.
27. It has been pointed out that as per the seniority and roster, the respondent No. 3 -----and ---not Shri C. Thawamani ----was to get promotion to the rank of UPO at the relevant point of time. On all those counts, the respondent No. 3 wants the dismissal of the proceeding in hand with costs..
28. I have very carefully considered the submissions, advanced by the learned counsel for the parties having regard to pleading of the parties as well as the documents attached therewith. On making such an exercise, I have found that the entire controversies centre around the order dated 24.2.05 whereby and where-under the officiating promotion of the respondent No. 3 to the rank of UPO with effect from 22.10.2001 was regularised.
29. However, on perusal of the record, it is found that the order dated 22.10.2001 under which the respondent no. 3 was given officiating promotion is closely connected with the order dated 24.2.05. That being the position, before proceeding further, I find it necessary to know whether the officiating promotion has any implication on the service career of a public servant and whether there was any necessity on the part of the State respondents to give the respondent No. 3 the officiating promotion w.e.f 22.10.2001.

30. The question whether the officiating promotion/appointment is lawful can be scrutinised in the light of decision rendered by Hon'ble Supreme Court in the case of *L. Chandra Kishore Singh Vs. State of Manipur*, (1989) 6 SCC 287. The relevant part of the judgment is reproduced below:-

.. "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."

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

" Para 47 (b). 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."

32. It is, thus, found apparent from the above judgments that under certain circumstances, more so, when relevant RR speaks nothing against such officiating appointment/promotion, such officiating appointment/promotion becomes quite lawful and period of such officiating appointment/promotion can even be considered for ascertaining the length of services of a public servant for the purpose of determining his seniority in a particular grade which he was so appointed/promoted to.
33. This brings me to the question if the exigency of the services required the State-respondents to give functional promotion to the respondent No. 3 to the rank of UPO. The State respondents strenuously claim that

due to exigency of the services, the respondent No. 3 was required to be given functional promotion to the rank of UPO .This contention remained totally unopposed. Such unopposed contention of the State-respondents, in my opinion, only shows that the exigency of the services really required the State-respondent to give functional promotion to the respondent No. 3 to the post of UPO.

34. We may also note here that the petitioner was admittedly absorbed in the Housing department well before his period of deputation was over. The above coupled with the fact that the Housing Department, being a nascent department, was in great dearth of required experienced officers to handle the functions and responsibilities, entrusted to it by the State of Arunachal Pradesh, make it very clear that exigency of services truly compelled the State respondents to give officiating promotion to the respondent No.3 to the rank of UPO.
35. I may note here that in their common counter affidavit, the State respondents have categorically stated that the petitioner, being a degree holder in Civil Engineering, became eligible for promotion to the post of UPO w.e.f. 10.03.1999. But the respondent No.3 could not be given promotion from such date. However, on realising such mistake, vide order dated 24.02. 2005, the State respondents regularised the officiating promotion of the respondent No.3 w.e.f. 22.10.1999.
36. Such a stand, taken by the State-respondents not only shows that the officiating promotion of the respondent No.3 to the post of the UPO w.e.f. 22.10.2001 was justified but the order dated 24.2.2005 whereby the State respondents regularised the officiating promotion of the respondentNo.3 with effect from 22.10.2001 was equally justified.
37. In the face of above revelations, I have found that the State-respondents committed no wrong whatsoever in either giving officiating promotion to the respondent No. 3 or in regularising such officiating promotion. Situation being such, I have found that neither the order

dated 22.10.2001 nor the order dated 24.2.2005 suffers from any infirmity, whatsoever.

38. We have already found that the officiating promotion of the respondent No.3 to the rank of the UPO was questioned on the ground that one Shri C. Thawamani who was senior to the respondent No. 3 was not given similar benefit despite he being senior to the respondent No. 3 in the grade of AUPO in the housing department. This contention was vehemently opposed to by respondent No. 3.
39. On the perusal of the pleading, submitted by the respondent No.3, I have found that the respondent No.3 strenuously claims that despite Shri C. Thawamani, being senior to him in the rank of AUPO, he, being a non APST candidate and also not being the officer waiting for promotion to the rank of UPO, as per the roster, could not be given officiating promotion to the rank of AUPO.
40. On the other hand, the respondent No.3, being an APST candidate and also being the officer waiting for promotion to the rank of UPO, as per the roster, was required to be given promotion to the rank of UPO, despite he being junior to the petitioner. Such a contention from the side of the respondent No. 3 too remained totally uncontroverted.
41. In view of the materials on record and also in view of the fact that such contention remains totally unopposed, I am constrained to hold that said Shri C. Thawamani was never illegally superseded by the respondent No.3 as alleged by the petitioner. The fact that there is nothing on record to show that Shri C. Thawamani had ever questioned his alleged superseding by the respondent No. 3 or ever authorised the petitioner to question such alleged superseding make such a conclusion inevitable.
42. Coming to the allegations that respondent No.4 illegally issued the order dated 24.2.2005 giving retrospective promotion to the respondent No.3 although under the law he was not authorised to issue the order in

question and although the DPC resolution never gave retrospective promotion to the respondent No.3 in the rank of UPO, I have found that there is no convincing materials on record to justify the above claims of the petitioner. Accordingly, such claims too stand rejected.

43. Even otherwise, the claim of petitioner that the order(s) under challenged are illegal is liable to be rejected. This is because of the reason that the petitioner came to the Court to undo an order on the basis of which the order dated 24.2.2005 was ultimately passed. It is a settled law that if a party aggrieved by the conduct of State or instrumentalities of the State, he needs to approach the Court well in time.

44. In that connection we may profitably peruse the decision of Hon'ble Supreme Court in the case of P.S Sadasivaswamy versus State of Tamil Nadu reported in (1975) 1 SCC 152. The relevant part is reproduced below:-

“ A person aggrieved by an order of promoting a junior over his head should approach the Court at least within six months or at the most a year of such promotion. It is not that there is any period of limitation for the Courts to exercise their powers under Article 226 nor is it that there can never be a case where the Courts cannot interfere in a matter after the passage of a certain length of time. But it would be a sound and wise exercise of discretion for the Courts to refuse to exercise their extraordinary powers under Article 226 in the case of person who do not approach it expeditiously for relief and who stand by and allow things to happen and then approach the Court to put forward stale claims and try to unsettle settled matters.”

45. In our instant case, I have found that the basis of the order dated 24.2.2005 which is questioned in our present proceeding is the order dated 22.10.2001. There is enormous evidence on record to show that the petitioner was aware of the order dated 22.10.2001. But then, the proceeding in question was initiated in 2008, after a lapse of 8 years of the order 22.10.2001 coming into existence. In my considered opinion, at such a belated stage, the contention that the order dated 24.2.2005 is illegal cannot be entertained.

46. We have already found that in this proceeding, the petitioner questions the order dated 24.2.2005, the recommendation of the Board held on 11.7.2008 recommending placing of respondent No. 3 above the petitioner as well as the order dated 16.7.2008 giving effect to the recommendation dated 11.07.2008. But then, all those order(s) are basically founded on the order dated 22.10.2001 whereby the respondent No. 3 was promoted to the rank of UPO on officiating basis.
47. It is a settled law that unless the basic order is questioned, consequential order cannot be questioned. Since in our instant proceeding, the petitioner did not question the order dated 22.10.2001 although same is found to be the very basic order which gave rise to all other order(s) which are being questioned here, this proceeding is liable to be dismissed on this count too.
48. Since the petitioner along with other was permanently absorbed as UPO in the Housing Department w.e.f. 20.08.2004 and since the respondent No.3 was given regular promotion to the post of UPO w.e.f. 22.10.2001, the respondent No. 3 is senior to the petitioner. Once it is held that the respondent No. 3 is senior to the petitioner in the grade of UPO, there cannot be any escape from the conclusion that the order dated 24.2.2005, the recommendation of the Board held on 11.7.2008 as well as the order dated 16.7.2008 are neither illegal nor unsustainable in law as claimed by the petitioner.
49. In the result, the present proceeding is dismissed. The parties are left to bear their own cost.

JUDGE

