



GAHC010050512019

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

Case No. : WP(C)/2109/2019

BHARATI DASTIDAR
W/O- ISWAR DASTIDAR, R/O- GANESH NAGAR, BAMUNIMAIDAM, DIST-
KAMRUP (M), GHY-21, ASSAM

VERSUS

THE STATE OF ASSAM AND 3 ORS.
REP. BY THE COMM. AND SECY., LABOUR WELFARE DEPTT., GHY-6

2:THE DY. SECRETARY
LABOUR WELFARE DEPTT.
GHY-6

3:THE CHIEF INSPECTOR OF FACTORIES
BETKUCHI
LOKHRA
GHY-40

4:RUMI TALUKDAR
W/O- KUMUD TALUKDAR
R/O- PUB-SARANIA
P.O. PUB-SARANIA
CHANDMARI
GHY-

Advocate for the Petitioner : MR. U K NAIR

Advocate for the Respondent : GA, ASSAM

BEFORE



HONOURABLE MR. JUSTICE SUMAN SHYAM

ORDER

Date : 09-05-2023

Heard Mr. U.K. Nair, learned Sr. counsel assisted by Mr. M.P. Sarma, learned counsel for the writ petitioner. Also heard Mr. T.C. Chutia, learned Addl. Sr. Govt. Advocate, Assam appearing for the respondent Nos. 1 to 3 and Mr. S. Hoque, learned counsel appearing for the respondent No. 4.

2. The controversy involved in this writ petition pertains to the claim of *inter-se* seniority between the writ petitioner and the respondent No. 4 in the cadre of UDA. The facts of the case, in a nutshell, are that the petitioner herein was initially appointed as Lower Division Assistant (LDA) in the office of the Chief Inspector of Factories, Assam on 26-06-1986 and thereafter, she was promoted to the post of Upper Division Assistant (UDA) in the same establishment on 23-02-2007. The respondent No. 4 was appointed as LDA on 19-12-1989 and therefore, she was junior to the writ petitioner in service but she was promoted to the post of UDA on the same day as the writ petitioner i.e. on 23-02-2007. The promotion to the post of UDA was given to the writ petitioner and the respondent No. 4 on the basis of the resolution adopted by the Selection Committee in its meeting held on 21-02-2007 wherein, the committee had considered the eligible candidates for filling up 03 (three) vacant posts of UDA in the establishment of Chief Inspector of Factories, Assam. However, in the gradation list prepared by the department, the name of the respondent No. 4 featured above the writ petitioner. Aggrieved by such erroneous fixation of seniority, the petitioner has approached this court by filing the



instant writ petition.

3. It is the pleaded case of the writ petitioner that the post of Assistant Superintendent in the establishment of Chief Inspector of Factories is required to be filled up by promoting eligible LDAs. When the post of Assistant Superintendent had fallen vacant, the petitioner had requested to the departmental authorities to consider her for promotion to the said post. However, she was informed by the authorities that since the respondent No. 4 was senior to her in the gradation list, she could not be considered for promotion to the post of Assistant Superintendent. By the interim order dated 29-03-2019 passed in this writ petition, this Court had restrained the respondents from proceeding further with the process of promotion to fill up the post of Assistant Superintendent.

4. By referring to the minutes of the Selection Committee dated 21-02-2007, Mr. Nair has submitted that although his client does not have any objection to the promotion given to respondent No. 4, yet, the said respondent, having been promoted against a vacancy reserved for Schedule Tribe (Plain) [ST(P)], the seniority of the respondent No. 4 could not have been determined on the basis of roster point as has been done on the present case. According to Mr. Nair, 10% reservation available for the ST(P) would also not be applicable in the present case, since the cadre strength of the UDA was only 07 (seven). He however, submits that even if the promotion given to the respondent No 4 is held to be valid, even then, law does not permit fixation of seniority on the basis of roster point. In support of above argument, Mr. Nair has placed reliance on a decision of the Supreme Court rendered in the case of **Bimlesh Tanwar Vs. State of Haryana & Ors.** reported in **(2003) 5 SCC 604** as well as the decision of this Court rendered in the case of **Deba**



Kumar Dutta & Ors. Vs. State of Assam & Ors. reported in **2011 (3) GLT 387** to contend that the writ petitioner being senior to the respondent No. 4 in service in the cadre of LDA and the sole criteria for promotion being seniority, the respondent No. 4 could not have been held to be senior to the writ petitioner in the cadre of UDA since the promotion process was one and the same and was meant for all the 03 (three) vacancies in the cadre of UDA.

5. Mr. T.C. Chutia, learned Addl. Sr. Govt. Advocate, Assam on the other hand, has argued that since the petitioner has approached this Court assailing the decision of the selection committee dated 21-02-2007 by filing the writ petition in the year 2019, hence, the petition is hit by the principles of delay, laches and negligence and is liable to be dismissed on such count alone. On merits, Mr. Chutia has drawn the attention of this Court to the stand of the departmental authorities projected in paragraph 5 of the counter-affidavit filed by the respondent No. 3 to contend that since the vacancies arose at different points of time, and the first vacancy was corresponding to the 15th point in the roster meant for ST(P) candidates, hence, the same was used to promote the respondent No. 4. As such, she was found to be senior to the petitioner and the other candidate promoted to the posts of UDA, both of whom are from the General category.

6. Mr. Hoque, learned counsel for the respondent No. 3 has also argued that the writ petition is barred by delay and laches and therefore, liable to be dismissed on such count. The learned counsel for the respondent No. 4 has, however, not addressed any argument on merit but has merely adopted the submissions made by the learned Government Advocate.



7. I have considered the submission made by the learned counsel for both the sides and have also carefully gone through the materials available on record. There is no dispute in this case that the petitioner was senior to the respondent No. 4 in the cadre of LDA nor is there any controversy about the fact that the criteria for promotion to the post of UDA was seniority. It is also not in dispute that as many as 03 vacant posts in the cadre of UDA, under the establishment of Chief Inspector of Factories, Assam, were considered by the Selection Committee (DPC) in its meeting held on 21-02-2007, whereafter, as many as three candidates, *viz*, the respondent No 4, the writ petitioner and Sri S.N. Deka were appointed as UDAs against the three vacant posts. Sri S.N. Deka has, in the mean time, retired from service on attaining the age of superannuation.

8. From the resolution dated 21-02-2007 it appears that the Selection Committee had proceeded on the basis that the 03 vacancies corresponds to roster point number 15, 16 and 17 of the 20 point roster. Since 15th point is meant for ST(P) and the vacancy in respect of point number 15 of the roster arose on 16-02-2001 hence, the respondent No. 4 could be appointed only against the said vacancy. The next vacancy arose in the year 2006 and, therefore, the writ petitioner's promotion has been treated against the said vacancy. It further appears that the aforesaid approach of the Selection Committee is also based on the fact that there is an order passed by this Court on 19-02-2001 in M.C. No. 214/2001 arising out of W.P.(C) No. 5444/1999 filed by the respondent No. 4 whereby, it was ordered that the case of the petitioner for promotion to the next higher post of UDA be considered in terms of the Rules, along with other departmental candidates.

9. It is no doubt correct that by the order dated 19-02-2001, this Court had directed

the departmental authorities to consider the case of the respondent No. 4 for promotion to the post of UDA but such consideration was to be made along with other eligible candidates and as per the Rules. This Court had also not issued any direction to fix the seniority of the respondent No. 4 in a particular manner pursuant to her promotion to the post of UDA. Notwithstanding the same, the authorities had assigned a higher seniority position to the respondent No. 4 in the gradation list of UDA by ignoring the seniority of the writ petitioner in the cadre of LDA and have sought to justify such action by contending that the seniority has been fixed as per roster point.

10. In the case of ***Bimlesh Tanwar (Supra)***, the Supreme Court has categorically held that the roster cannot be used for fixation of seniority. The observation made in the paragraph 40 of the said decision would be relevant and therefore, are being reproduced herein-below for ready reference:-

“40. An affirmative action in terms of Article 16(4) of the Constitution is meant for providing a representation of class of citizenry who are socially or economically backward. Article 16 of the Constitution of India is applicable in the case of an appointment. It does not speak of fixation of seniority. Seniority is, thus, not to be fixed in terms of the roster points. If that is done, the rule of affirmative action would be extended which would strictly not be in consonance of the constitutional schemes. We are of the opinion that the decision in P.S. Ghalaut does not lay down a good law.”

11. In the case of ***Deba Kumar Dutta (Supra)*** this Court has observed that operation of roster will have to be in reference to the prescribed percentage of reservation and in the absence of any quota on the basis of prescribed percentage, there is no question of operating roster to achieve impermissible percentage of reservation.

12. In the present case, it is the admitted position of fact that there are only 07 posts



in the cadre of UDA. Therefore, 10% of 07 being 0.7, filling up even one post from the reserved category candidates belonging to ST(P) by operating the 20 point roster would amount to exceeding the quota of 10% and therefore, would be impermissible in the eye of law. In any event the candidature of the respondent No 4 could at best have been considered as a reserved category candidate *vis-à-vis* the vacancy position but her promotion could not have been treated against any earmarked post in the cadre of UDA. Viewed from that angle the stand of the department to the effect that the promotion of the respondent No. 4 was made against a particular vacancy corresponding to the 15th roster point appears to be fallacious on the face of it and therefore, does not commend acceptance by this Court. Be that as it may, since the writ petitioner is not assailing the promotion given to the respondent No. 4 in the rank of UDA on any such ground, this Court need not be detained on the aforesaid aspect of the matter. The only issue that would, therefore, arise for consideration by this Court in this case is as to whether the *inter-se* seniority of the petitioner and the respondent No. 4 in the cadre of UDA could have been fixed on the basis of roster points. In view of the law laid down in the case of ***Bimlesh Tanwar (Supra)***, the answer to the said question has to be in the negative.

13. It is to be noted here-in that the Selection Committee had met on 21-02-2007 to fill up three vacant posts of UDA by way of promotion. The eligible candidates in the cadre of LDA were considered where-after, three departmental candidates including the writ petitioner and the respondent No. 4, were recommended for promotion to the post of UDA by following the criteria of seniority. Therefore, the seniority of these three candidates in the cadre of UDA ought to have been determined as per their *inter-se*



seniority in the cadre of LDA and by following no other criteria. The same not having done in this case, the gradation list of Grade-III staff (UDA) notified on 07-07-2015, is held to be illegal and hence, liable to be interfered by this court.

14. Coming to the next issue of delay in institution of the writ petition, it may be noted herein that the petitioner has categorically pleaded that the gradation list was never published by the authorities and therefore, she was unaware of the same till the year 2018. Soon after coming to know about the gradation list dated 07-07-2015, she had submitted representation dated 06-04-2018 (Annexure-6) ventilating her grievance in the matter. When the representation had failed to evoke any response from the authorities, the writ petitioner had approached this Court by filing the instant writ petition. The above assertion of the petitioner has not been categorically denied by the respondents in their affidavit. Therefore, having regard to the facts and circumstances of the case, it cannot be said that there was un-explained delay in approaching this Court by filing the instant writ petition.

15. Moreover, the petitioner is alleging discriminatory treatment meted out to her by the authorities by illegally showing her junior in service above her in the gradation list of UDA. The plea of the writ petitioner has been found to be correct by this Court. Therefore, this Court is of the opinion that it is a clear case of violation of fundamental rights guaranteed to the petitioner under Articles 14 and 16 of the Constitution of India. Such a claim, once found to have been established on the basis of cogent materials available on record, cannot be extinguished merely on a technical plea of delay, more so, when the respondents have failed to substantiate such a plea nor have they been able to show



parallel right, if any, having been accrued in favour of the private respondent on account of delay.

16. For the reasons stated above, this writ petition succeeds and is hereby allowed.

17. The gradation list dated 07-07-2015 *qua* the writ petitioner stands interfered with. The respondent Nos. 1 and 3 are hereby directed to initiate immediate steps for re-fixation of *inter-se* seniority between the writ petitioner and the respondent No. 4, in the light of the observations made hereinabove and thereafter, proceed to fill up the promotional post of Assistant Superintendent in the office of the Chief Inspector of Factories, by following the relevant rules.

The aforesaid exercise be carried out and completed as expeditiously as possible, but not later than 03(three) months from the date of receipt of a certified copy of this order.

Writ petition stands disposed of.

There would be no order as to cost.

JUDGE

GS

Comparing Assistant