



GAHC010191222020

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

Case No. : WP(C)/21/2021

ANAMIKA TAMULI
W/O- LAKHESWAR SAIKIA, R/O- PROTECH PELICAN, JAPORIGOG, GHY-55,
KAMRUP (M), ASSAM

VERSUS

THE STATE OF ASSAM AND 2 ORS
REP. BY COMM. AND SECY. TO THE GOVT. OF ASSAM, SOIL
CONSERVATION DEPTT., DISPUR, GHY-6

2:THE SECRETARY
GOVT. OF ASSAM
SOIL CONSERVATION DEPTT.
DISPUR
GHY-6

3:THE DIRECTOR
SOIL CONSERVATION DEPTT.
ASSAM
BHUMISANGRAKHYAN BHAWAN
RG BARUAH ROAD
GHY-0

Advocate for the Petitioner : MR H K DAS

Advocate for the Respondent : SC, SOIL CONSERVATION DEPTT.

BEFORE
HON'BLE MR JUSTICE ARUN DEV CHOUDHURY

For the petitioner : Mr. H. K. Das.
Advocate.

For the Respondents : Ms. R. S. Deori.
Advocate.

Date of Hearing : 25.04.2022 & 02.05.2022

Date of Judgement/Order : 12.05.2022

JUDGMENT & ORDER (CAV)

Heard Mr. H. K. Das, the learned counsel for the petitioner. Also heard Ms. R. S. Deori, the learned Standing Counsel for the respondent Nos. 1, 2 and 3.

1. By way of the present writ petition, the petitioner challenges the order dated 19.03.2020, whereby the prayer of the petitioner for grant of seniority and financial benefit with retrospective effect from the date of original DPC held on 30.07.2015 has been rejected. The undisputed background facts of the present litigation can be summarized as follows:-

- I. Pursuant to a selection process initiated by Assam Public Service Commission, (in short APSC) the petitioner was recommended for appointment to the post of Assistant Soil Conservation Officer (in short ASCO) on 23.12.2009.
- II. Pursuant to a Notification dated 17.05.2010, appointing the petitioner to the post of ASCO, the petitioner joined the service on 18.05.2010.
- III. The Gradation List reflecting the seniority position of the ASCOs

till 2012, the petitioner was placed below one Akhtar Hussain.

- IV. Being aggrieved, the petitioner submitted a representation before the Additional Chief Secretary to the Government of Assam, Soil Conservation Department on 14.08.2015 claiming that the petitioner has been wrongly placed below the said Akhtar Hussain in the Final Gradation List dated 30.07.2015.
- (V) The petitioner claims that prior to such representation dated 14.08.2015, on 30.07.2015, the Departmental Promotion Committee in its meeting held on the even date, recommended different persons for promotion to the next higher rank of Divisional Soil Conservation Officer (in short DSCO). The petitioner claims that she has been wrongly refused such recommendation and one post was kept vacant for the said Akhtar Hussain as he was not eligible for promotion at that point of time.
- (VI) Subsequently, by Notification dated 28.09.2015, 10 (ten) ASCOs were promoted to the next higher post of DSCO wherein the petitioner's name did not figure.
- (VII) Being aggrieved, the petitioner approach this Court by way of WP(C)/6558/2015 assailing the seniority position of the petitioner in final gradation list dated 30.07.2015 and also assailing the decision of the Departmental Promotion Committee.
- (VIII) This Court by judgment dated 08.08.2017 allowed the said writ petition. As the said determination is relevant for present determination, the relevant paragraphs are quoted herein below:-

“24..... Even though in the appointment order of the respondent No. 5 the period for which he was appointed was not prescribed, fact remains that it was made under Regulation 3(f) of the 1951 Regulation. The nature of appointment under the 3(f) Regulation is ad hoc and a stop-gap arrangement and the Service Order provides for direct recruitment to the post ASCO through the APSC. Therefore, the case of the respondent No. 5 is squarely covered by corollary to Conclusion (A) of Direct Recruit Class II Engineering Officer’s Association (supra). Even though the respondent No. 5 continued as ad hoc appointee for some length of time, such period of service cannot be taken into consideration for the purpose of regularization with retrospective effect. However, the State respondents have taken into consideration this period of service and has granted retrospective regularization of service of respondent No. 5 with effect from 09.04.2003 by the impugned order dated 10.01.2012 despite the fact that he obtained recommendation from APSC in the year 2011 after failing to get selected on a number of previous occasions.

25..... In view of the above discussions, the writ petition is allowed. The order of regularization of the respondent No. 5 with effect from 09.04.2003 is set aside and the respondent authorities are directed to treat the respondent No. 5 to have been appointed as ASCO regularly with effect from 10.01.2012. State respondents are directed to appropriately correct the Gradation List dated 30.06.2015 as per respondent No. 5’s merit position in the recommendation of the APSC dated 16.12.2011.

26..... As in the meeting of the Selection Committee held on 30.07.2015, one post of ASCO was not filled up, the respondents are now, directed to hold a Review Departmental Promotion Committee (DPC) meeting for the purpose of consideration of promotion to the post of Divisional Soil Conservation Officer in respect of the post that was under consideration in the meeting held on 30.07.2015. The Review DPC will be convened within a period of two month from the date of receipt of a certified copy of this order by the respondent No.

1”

2. Pursuant to the aforesaid decision, the Review DPC meeting was held on 14.11.2017 wherein it was resolved to recommend the name of the petitioner against the vacancy which was kept vacant in the DPC meeting held on 30.07.2015.
3. Pursuant to this, a Notification dated 30.12.2017 was issued promoting the petitioner to the post of DSCO. It is worth mentioning that while taking a decision in favour of the petitioner by the DPC in its meeting held on 14.11.2017, the claim of the petitioner for giving effect to her promotion from 30.07.2015 was deferred on the ground of the need of having an opinion from the Personal (A) and Finance Establishment (A) Department, Government of Assam.
4. Thereafter, the petitioner filed a representation before the respondent authorities for restoration of her seniority and giving her promotion w.e.f. 2015 as aforesaid. The petitioner also filed representation on 28.09.2018 for grant of consequential benefit. The promotion of the petitioner was finally approved by the APSC on 07.11.2019. Thereafter on 19.03.2020, the impugned order was issued declining the prayer of the petitioner. The relevant portion of the impugned order reads as follows:-

“There appears to be no direction for allowing consequential benefits (seniority or financial benefits) with retrospective effect w.e.f. the original DPC held on 30.07.2015. Consequently, Smti. Anamika Tamuli’s prayer for consequential benefits (seniority or financial benefits) with retrospective effect is hereby rejected.

This is issued in compliance with Hon’ble High Court’s order dtd.

08/08/2017 filed by Smti Anamika Tamuli."

5. In the aforesaid backdrop, Mr. H. K. Das submits that the petitioner is entitled for retrospective promotion from the date on which the other incumbents were promoted on the recommendation of the DPC held on 30.07.2015. The petitioner needs to be promoted with effect from the said date as petitioner was found entitled for promotion by the DPC, the learned counsel submits. Placing reliance on the Judgment of the Hon'ble Apex Court in **Prabhu Dayal Khandelwal –vs- Chairman, Union Public Service Commission and Others** reported in **(2015) 14 SCC 427**, the learned Counsel for the petitioner submits that ,the petitioner shall also be entitled to all arrears of salary, as would have been payable to her, if she had been promoted as DSCO the right time.
6. Learned counsel for the petitioner Mr. H.K. Das strenuously argues that that when retrospective promotion is given, normally she is entitled to all consequential benefits including arrears of salary. Relying on the judgement of **Union of India vs K.V. Jankiraman reported in 1991 4 SCC 109**, he submits that the petitioner was willing to work but was denied the opportunity to work in the promoted post for no fault of her and therefore, she is entitled to the payment of arrears of salary.
7. Per contra, Ms. Deori submits that as the petitioner has accepted her promotion on 30.12.2017 without any protest and therefore, she cannot be granted retrospective promotion. In support of her contention she relied on the decision of the Hon'ble Apex Court in the case of **Dr. A. K. Mitra, DG. C.S.I.R. and Another –Vs- D. Appa Rao and Another** reported **in (1998) 9 SCC 492**.

8. The respondent Department took a similar stand at paragraph 5 of the affidavit-in-opposition filed by the respondent Nos. 1, 2 & 3, and the relevant portion is quoted herein below:-

“.....The answering deponent states that vide order dated 30.12.2017 passed by the ` respondent No. 2, Secretary, Soil conservation Department, the petitioner was promoted to the post of Divisional Soil Conservation Officer with prospective effect and the petitioner was posted at Nalbari Soil Conservation Division, Nalbari, Assam in place of Sri Safiur Rehman who was transferred.

It is noteworthy to mention herein that the petitioner had joined in the said promotional post and had neither challenged the validity nor the legality of the order dated 31.12.2017 passed by the respondent No. 2, Secretary, Soil Conservation Department in any forum till date, thus, it becomes clear that the petitioner had understandably accepted the regular promotion to the post of divisional Soil Conservation Officer w.e.f. 30.12.2017, hence it is not open for the petitioner to contend that the petitioner should be considered as promoted w.e.f. 28.09.2015 along with other officers who were promoted to Divisional Soil Conservation Officer as per Departmental Promotion Committee meeting held on 30.07.2015. Further, it is respectfully submitted that if a candidate accepts regular promotion from a particular date then it will not be open to him to contend that candidate should be considered as promoted from an anterior date.

That answering deponent respectfully states and submits that the date of promotion is the date on which promotion is granted and not the date on which the vacancy had occurred. It is respectfully submitted that although there is no absolute bar in giving retrospective promotion, yet the Hon'ble Supreme Court had held that retrospective promotion is permissible only in exceptional circumstances when there is some legal impediment in making promotion”.

9. I have given anxious consideration to the submissions made by the

learned counsel for the parties.

10. From the judgment dated 08.08.2017, passed by this Court in WP(C) No. 6558/2015 and from the materials available on record in the present proceeding, it is clear that on the date of holding of DPC dated 30.07.2015, the petitioner was having the qualification and was also within the zone of consideration and vacancies were available on that date. However, one post was kept vacant for one Akhtar Hussain as he was not eligible for promotion at that point of time. Subsequently, by judgment dated 08.08.2017, this Court held that petitioner to be senior to said Akhtar Hussain by directing the respondents to treat the said incumbents appointment w.e.f. 10.01.2012.
11. In view of the aforesaid facts and determination, it can safely be treated that though direction was issued on 08.08.2017 by this Court, the eligibility of the petitioner occurred at an earlier time i.e. on 30.07.2015. Thereafter, on the basis of the recommendation of DPC the other incumbents were promoted by notification dated 28.09.2015, except the petitioner and said Akhtar Hussain. In the aforesaid factual backdrop and circumstances, though petitioner was promoted by notification dated 30.12.2017, her promotion need to be treated as though it occurred on 28.09.2015 when the notification was issued promoting the incumbents on the basis of recommendation of original DPC dated 30.07.2015. Therefore, notification of promotion in favour of the petitioner dated 30.12.2017 must relate back to 28.09.2015.
12. The doctrine of relation back has been incorporated in a number of legislations and Service Jurisprudence in India. The Black's Law Dictionary

defines 'relation back' as: -

“The doctrine that an act done at a later time is, under certain circumstances, treated as though it occurred at an earlier time.”

13. The Hon'ble Apex Court in ***Delhi Jal Board vs. Mahinder Singh***, reported in ***(2000) 7 SCC 210*** applied the Doctrine of Relation Back in Service Jurisprudence by holding that the findings of a disciplinary enquiry exonerating an Officer would have to be given effect to as they relate back to the date on which the charges are framed. If the Disciplinary Enquiry ends in favour of the Officer, it is as if the Officer had not been subjected to any disciplinary enquiry. Promotion and other service related benefits cannot be denied merely because disciplinary enquiry was pending at the time when the Officer was in the zone of consideration by the Departmental Promotion Committee. The Departmental Promotion Committee can, at best, keep its decision in abeyance till the Disciplinary Enquiry ends in favour of the Officer.
14. The argument advanced by the learned counsel for the respondent department does not find favour from this court for the reason that while the petitioner was promoted she did not have any bargaining power to refuse such promotion. However, after joining she immediately raised her grievances. Such grievances have been considered and the impugned order was issued rejecting her claim. Further, the respondent department by way of filing an affidavit cannot raise a new ground at a later point in time in as much as the claim of the petitioner was not rejected on the said ground rather the same was rejected on the ground that this court in its decision delivered in WP (C) No. 6558 of 2015 has not directed for

granting such benefit.

15. It is clarified that this Court after deciding the issue of seniority, relegated the matter to the DPC and did not decide on the merit of the claim for promotion of the petitioner. The Review DPC found the petitioner eligible for promotion against the original vacancy which was considered by the original DPC. In that backdrop, this court rejects the contention of the respondent state that the petitioner is not entitled to retrospective promotion for the reason that she had accepted the promotion without any protest and declare that the petitioner is entitled for retrospective promotion w.e.f. 28.09.2015 when the other incumbents recommended by DPC in its meeting held on 30.07.2015 were promoted. Therefore, the Scales of pay and other benefit needs to be re-fixed notionally with effect from the said date.

The case of Dr AK Mitra,(supra) relied on by the learned counsel for the department is not applicable in the given facts of the present case. In the said case the dispute of seniority was rejected long back based on the representation of the incumbent and the incumbent claimed promotion as a departmental candidate based on his seniority and that too after being unsuccessful in the process of selection to the same post by way of direct recruitment. Therefore the ratio laid down in AK Mitra (supra) is not applicable in the present case.

16. Mr. H. K. Das, learned counsel for the petitioner argues that in the event, the petitioner is held to be entitled for retrospective promotion, she needs to be paid the arrears of salary.

17. Heavy reliance is placed in ***Janakiraman (supra)*** claiming arrears of salary. The background fact of the case of ***Janakiraman (supra)*** is different from the case of the petitioner. In the case of Janakiraman, the employee was put under suspension during departmental proceeding and due to pendency of Criminal Case, sealed cover procedure for promotion was adopted. When the employee was honorably acquitted, the departmental proceedings were held to be invalid and accordingly the Hon'ble Apex Court held that the incumbent was entitled to the arrears of salary. Therefore, in the considered opinion of this Court the ratio of Janakiraman is not applicable in the given facts and circumstances of the present case inasmuch as the promotion of the petitioner was considered in accordance with extant rules in the original DPC dtd. 30.07.2015 and in the review DPC, after determination of seniority by virtue of the judgment dtd. 08.08.2017 of this Court, promotion was granted. This Court while passing the judgment dealt with seniority aspect and not on the merit of entitlement of the petitioner for promotion and therefore, the matter was reverted back to the DPC.
18. The Ho'ble Apex Court in ***Paluru Ramakrishnaiah & Ors. vs. Union of India & Anr*** reported in ***1989(2) SCC 541*** while approving a decision of Madhya Pradesh High Court held that a person will not be entitled to any pay and allowance during the period for which he did not perform the duties of higher post, though in the said case, seniority of the incumbent was restored and promotion was granted from the date junior was promoted. Entitlement of higher scale of pay retrospectively was

affirmed but entitlement of arrears of the salary was negated following the principles of no work, no pay. The Hon'ble Apex Court thus held:-

“19.....The grievance of the petitioners, however, is that this promotion tantamount to implementation of the order of this Court dated February 2, 1981 only on a paper inasmuch as they have not been granted the difference of back wages and promotion to higher posts on the basis of their back date promotion as Chargeman II. As already noticed earlier certain writ petitions filed in Madhya Pradesh High Court were allowed by that court on April 4, 1983 relying on the judgment of this Court dated February 2, 1981 in civil Appeal No. 441 of 1981. Against the aforesaid judgment of the Madhya Pradesh High court dated April 4, 1983 Special Leave Petitions (Civil) Nos. 5987-92 of 1986 were filed in this Court by the Union of India and were dismissed on July 28, 1986. The findings of the Madhya Pradesh High Court in its judgment dated April 4, 1983 thus stand approved by this Court. In this view of the matter to put them at par it would be appropriate that the appellants in Civil Appeal No. 441 of 1981 may also be granted the same relief which was granted to the petitioners in the writ petitions before the Madhya Pradesh High Court. As regards back wages the Madhya Pradesh High court held:

It is the settled service rule that there has to be no pay for no work i. e. a person will not be entitled to any pay and allowance during the period for which he did not perform the duties of a higher post although after due consideration he was given a proper place in the gradation list having deemed to be promoted to the higher post with effect from the date his junior was promoted. So the petitioners are not entitled to claim any financial benefit retrospectively. At the most they would be entitled to refixation of their present salary on the basis of the notional seniority granted to them in different grades so that their present salary is not less than those who are immediately below them”.

19. The Hon'ble Apex Court in ***State of Haryana & Ors. v. O.P. Gupta & Ors.***, reported in ***1996(7) SCC 533*** while considering claim of arrears of salary by promotees who were notionally promoted from a deemed date pursuant to fresh determination of seniority under Courts order, rejected the claim applying the principle of 'No work, No pay' and set aside the orders of the High Court allowing such claims, holding the same to be illegal as the promotees did not work for the period in the promoted post. While deciding the issue, the Hon'ble Apex Court followed the ratio of ***Paluru Ramakrishnaiah vs Union of India (supra)***. Para 6 and 9 of ***O.P.Gupta & Ors (supra)*** may be quoted herein below:-

“6.....Having regard to the above contentions, the question arises: whether the respondents are entitled to the arrears of salary? It is seen that their entitlement to work arises only when they are promoted in accordance with the Rules. Preparation of the seniority list under Rule 9 is a condition precedent for consideration and then to pass an order of promotion and posting to follow. Until that exercise is done, the respondents cannot be posted in the promotional posts. Therefore, their contention that though they were willing to work, they were not given the work after posting them in promotional posts has no legal foundation. The rival parties had agitated their right to seniority. Ultimately, this Court had directed the appellant to prepare the seniority list strictly in accordance with Rule 9 untrammelled by any other inconsistent observation of the Court or the instructions issued in contravention thereof. Since the order had become final in 1990, when the appeal had been disposed of by the Court by the above directions, the State in compliance thereof prepared the seniority list in accordance with the Rules and those directions and promotions were given to all eligible persons and postings were made accordingly on December 1, 1992. In the interregnum some had retired. As stated earlier, though the deemed date has been given as 1.1.1983, the

respondents cannot legitimately claim to have worked in those posts for claiming arrears and, as a fact, they did not work even on ad hoc basis

9.....In these appeals unless the seniority list is prepared and finalised and promotions are made in accordance with the Rules on the basis of the above seniority list, the question of entitlement to work in the promotional posts does not arise. Consequently, the payment of arrears of salary does not arise since, admittedly the respondents had not worked during that period. The High Court was, therefore, wholly illegal in directing payment of arrears of salary. The order of the High Court accordingly is quashed”.

20. Thus it is clear that in case of a notional promotion from retrospective date, it cannot entitle the employee to arrears of salary as the incumbent has not worked in the promotional post. These ratios were based on the principle of no work no pay.
21. Therefore, in view of the aforesaid pronouncements and in the given facts and circumstances narrated herein above, this court is of considered opinion that the petitioner is not entitled for any arrears of salary/back wages for the period she did not work. However, the petitioner shall be entitled for arrears of salary on the basis of re-fixation of pay and allowances notionally w.e.f. 30.12.2017 if any, i.e. the date when the petitioner was promoted.
22. Accordingly, this writ petition is allowed in the following terms.
 - I. The promotion of the petitioner pursuant to the review DPC shall relate back to 28.09.2015 when the other incumbents were promoted on the recommendation of DPC dated. 30.07.2015.
 - II. The Scales of pay and other benefits in the promotional post be re-



fixed notionally from 28.09.2015 when the other incumbents were promoted on the recommendation of DPC dated 30.07.2015. However, the petitioner shall not be entitled for any arrears of salary on the basis of such re-fixation, for the period for which she did not work.

III. The petitioner shall be entitled for arrears of salary, if any, determined notionally w.e.f. her date of promotion on 30.12.2017.

IV. Accordingly, the impugned order dated 19.03.2020 is interfered with in aforesaid terms.

V. Parties to bear their own costs.

JUDGE

Comparing Assistant