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## Chidananda Dutta Vs Commissioner and Secretary To The Government of Assam, Finance (Taxation Branch), Gauhati

### Civil Rule No. 639 of 1986

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**Court:** Gauhati High Court

**Date of Decision:** Nov. 18, 1987

**Acts Referred:**

Assam Taxation Service Rules, 1968 – Rule 16(2), 16(2), 20, 20

**Citation:** (1988) 1 GLJ 480 : (1988) 2 GLR 356

**Hon'ble Judges:** B.L.Hansaria, J and J.Sangma, J

**Bench:** Division Bench

**Advocate:** G.K.Talukdar, U.Das , U.Barua, N.M.Lahiri, J.P.Bhattacharjee, G.K.Bhattacharjee, D.P.Chaliha, D.N.Choudhary, A.K.Goswami, M.Z.Ahmed, Advocates appearing for Parties

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### Judgement

Hansaria, J.

The fight in this application under Article 226 of the Constitution of India is regarding the interse seniority between the

promoted Superintendents of Taxes and those who were recruited directly to this post. This is a well known fight in service jurisprudential arena.

The promotees expect a better deal because of their having put in long period of service in the cadre. The direct recruits on the other hand lay their

claim perhaps on higher educational qualification.

2. The six petitioners were appointed as Inspectors of Taxes in 1957 and were subsequently confirmed in the post in due course. Some other

Inspectors of Taxes were promoted in 1973 as Superintendents of Taxes under Regulation 4 (d) of Assam Public Service Commission (Limitation

of Functions) Regulation. The Assam Public Service Commission, hereinafter the Commission, was thereafter approached by the Finance

Department on 6.2.74 for selecting promotees for the post of the Superintendent of Taxes. For this purpose, the Finance Department forwarded

names of 32 persons including the six petitioners. Before that, an advertisement had been put in by the Commission in 1973 seeking applications

for direct recruitment to the post of Superintendent of Taxes The competitive examination to select direct recruits was held between 9.12.74 to 2

1.75. Viva voce test was held from 13th September, 1975 to 26th September, 1975. Thereafter the Commission sent a list of 15 persons on

10.10 75 vide AnnexureB to the affidavit in opposite filed on behalf of respondents No. 4,6,7 and 8. Subsequently, the Commission was

requested by the Government by its letter dated 8.11." to send a further list of direct recruits for appointment to the post Superintendent of Taxes,.

The Commission thereafter recommended the names of 12 persons by its letter issued on 3.12.75 as at AnnexureD t the aforesaid affidavitinopposition. Afterward, the Commission recommended cases of 24 promotees for appointment to the post of Superintendent of Taxes

This was by its letter dated 3.3.76. One name which was left out inadvertently was subsequently recommended. The petitioners are among the 24

promotees whose names were recommended by the Commission on 3.3.76. In pursuance of the aforesaid recommendations, the Government

appointed the incumbents on different dates. provisional gradation list of the incumbents, was made vide Notification No. FEB. 393/77/54 dated

23rd August, 1980. Objections were raised bi the promotees as well as direct recruits relating to their places in the provisional gradation list, which

had been prepared in accordance with the provisions finding place in the Assam Taxation Service Rules, 1962, for short the Rules. Rule 16 v f the

Rules dealing with seniority is in the following language :

Ã-Ã½16. Seniority (1) The seniority of a member shall be determined according to the order of preference in the list referred to in subrule (2) of

either Rule 7 or Rule 8, if he joins his appointment within 15 days of the receipt of the order of appointment:

Provided that if a member is prevented from joining within this period by circumstances of a public nature or for reasons beyond his control, the

Governor may extend it for a further period of 15 days If a member fails to join within the period so extended his seniority shall be determined in

accordance with the date of joining.

(2) A member appointed by promotion shall be senior to a member appointed through competitive examination in the same batch.

Note. The expression ""same batch"" shall not be applied in any case where for any reason the promotion list is forwarded by the Commission more

than 90 days after the competitive examination list.

3. Subrule (1) states that a member appointed by promotion .shall be senior to a member appointed through a competitive examination in the same

batch. Note below the Rule says that the expression "same batch"" shall not be applied in any case where for any reason the promotion list is

forwarded by the Commission more than 90 days after the competitive examination list. As it was found that the gap between the list of the direct

recruits forwarded by the Commission on 3.12.75 and the list of the selected promotes which is dated 3.3.76 was 91 days, the power of

relaxation given by Rule 20 of the Rules providing as below

20. Relaxation Where the Governor is satisfied that the operation of any of these rules causes hardship in any particular cases, he may order to

dispense with or relax the requirement of that rule to such conditions as he may consider necessary for dealing with the case in a just and equitable

manner :

Provided that the case of any person shall not be dealt with in any manner less favourable to his than that provided by any of these rules.

was invoked by Notification No. FTX. 234/81/456 dated 23. .82 to extend the aforesaid period of 90 days to 91 days. A final gradation list was

thereafter prepared on 21.6.82.

4. As the place of the petitioners in the final gradation list found place below respondents 4 to 14, who are some of the direct recruits whose

names had been recommended by the Commission by its letter dated 10.10.75, the petitioners preferred appeal before the Assam Administrative

Tribunal. Getting no relief at the hand of the learned Tribunal, the promotees have approached this Court in its writ jurisdiction.

5. It has been contended by the learned Advocate General, Meghalaya, who has appeared for the petitioners that the learned Tribunal did not

answer the real question which was whether the petitioners and the aforesaid respondents could be said to belong to the "same batch".

According to the learned counsel, the learned Tribunal examined the question in wrong perspective by trying to find out what was the quota

reserved for promotees vis-a-vis the direct recruits. The contention in this regard is that Rule 6 (1) (c) of the Rules which has stated that 50% of the

vacancies to be filled at a time under Class II cadre shall be by promotion of members belonging to Class III cadre, does not lay down any upper

limit for filling up the vacancies by promotion. This rule has according to the learned counsel, visualised the minimum and not the ceiling in this

regard. The necessary corollary of this argument is that the Rules do not visualise any quota for direct recruits. It is urged by the learned Advocate

General, Meghalaya, that the result of the impugned judgment is that even five of the promotees regarding whose seniority there was no dispute got

pushed down in the seniority list which was prepared in accordance with the order of the learned Tribunal. As none of these five persons has

approached this Court, may be because four of them retired by the time the order of the learned Tribunal was passed and one has since retired we

are really not called upon to decide whether the judgment of learned Tribunal passed on the basis of fixation of quota for promotees and direct

recruits is legally tenable or not. We have not felt inclined to examine this aspect of the Tribunal's judgment also because of the fact that it is the

admitted position that in the gradation list which was prepared pursuant to the order of the learned Tribunal, the position of the petitioners vis-a-vis

respondents 4 to 14 has remained as it was in the final gradation list prepared on 25.6.82.

6. We shall therefore confine ourselves to the question whether in view of what has been laid down in Rule 16 of the Rules, the petitioners could

claim seniority over respondents 4 to 14. The answer to this question lies in the decision whether the two sets of officers belong to the "same

batch". In view of the Note appended to Rule 16, they would have belonged to the "same batch" if the promotion list would have been forwarded

not beyond 90 days of the competitive examination list. This period was made 91 days in the present case by the order passed by the Governor in

exercise of power under Rule 20 of the Rules of which mention has been made above. Now, it is apparent that the gap between the list of the

direct recruits containing the names of respondents No. 4 to 14 which is dated 10.10.75 is more than 91 days from 3.3.76 on which date the list

containing the names of the petitioner was forwarded by the Commission. The submission of the learned Advocate General is that the second list of

direct recruits which was sent by the Commission on 3.12.75 has to be regarded as one in continuation of the list dated 10.10.75. This aspect is

sought to be brought home to us by referring to the second list in which the order of preference of the recommended names has been started from

16 onwards. From this it can well be said that the second list was in continuation of the first list. Acceptance of the argument of the learned

Advocate General that the list of 3.3.76 was within 91 days of the list of 10.10.75 would, however, require us to hold that the first list of the direct

recruits was in continuation of second such list. This argument cannot apparently be accepted as continuity can be from a thing which is in existence

and not from a non-existent thing. As the second list was not born when the first list saw light of the day, we cannot hold that the first list was in

continuation of the second list. If the gap is counted from the first list, as it has to be, the promotion list which is dated 3.3.76, was much beyond

the period of 91 days. The direct recruits" whose names found place in the list of 10.10.75 cannot therefore be regarded to belong to the same

batch of the promotees whose names found place in the list dated 3.3.76. We are therefore of the view that the petitioners cannot claim their

seniority over respondents 4 to 14 on the yardstick laid down in Rule 16 (2) of the Rules.

7 The second submission of the learned Advocate General, Meghalaya, is that if the power under Rule 2a of the Rules was invoked to take care of

the delay of one day, the present was a fit case where the delay of further 55 days should have been taken care by the Governor by exercising his

power under Rule 20 of the Rules. In this connection, learned Advocate General, Nagaland, who has appeared for some of the private respondents

has contended that the period was extended from 90 to 91 days because the list of promotees had really been approved by the Chairman of the

Commission on 2.3.76 as would appear from the statements made in para 18 of the aforesaid affidavit in opposition. The relaxation of the rigour

by one day had, therefore, some reason behind it. Learned Advocate General, Meghalaya, contends that there are good reasons for relaxing the

period further as the petitioners had put in long years of service in the department and as the Government had approached the Commission as early

as February, 1974 to give its recommendation relating to the selection of the promotees and if the delay occurred at the door of the Commission,

the petitioner may not suffer for the same This, however, is a matter entirely for the Governor to decide and all that we can say is that on proper

representation being made by the petitioners, it would be for the Governor to reexamine the matter and to pass such order as deemed just and

equitable in this regard keeping in view all the attendant circumstances and the interest of both the promotees and the direct recruits. In so far as

this Court is concerned, from the facts before it, we cannot hold that the petitioners can be regarded as senior to respondents 4 to 14.

8. In the aforesaid view of the matter, the petition cannot be accepted and is dismissed.