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**(1998) 08 GAU CK 0014**

**Gauhati High Court**

**Case No:** Civil Rule No's. 1897 of 1993 and 1104 of 1994

Manjusree Sinha Choudhury

APPELLANT

Vs

State of Assam and Others

RESPONDENT

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**Date of Decision:** Aug. 10, 1998

**Acts Referred:**

- Assam Ministerial District Establishment Service Act - Section 2(4)

**Citation:** (2002) 2 GLT 656

**Hon'ble Judges:** P.G. Agarwal, J

**Bench:** Single Bench

**Advocate:** B.P. Kataki, R. Sarma, B.N. Sarma, G.K. Bhattacharyya, G.N. Das and B. Chakravarty, for the Appellant; B. Sarma, B. Banerjee and A. Hazarika, for the Respondent

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### **Judgement**

P.G. Agarwal, J.

By this common judgment I propose to dispose of Civil Rule No. 1897/1993 and Civil Rule No. 1104/1994.

2. The brief facts are that Srimati Manjusree Sinha Choudhury, the Petitioner in Civil Rule No. 1897/1993 was initially appointed as Lower Division Assistant in the Office of the Deputy Director of Survey on 1.7.73. The Petitioner in Civil Rule No. 1104/1994 Atul Chandra Mohan was also appointed as Lower Division Assistant in the said office on 1.7.74. This office of Deputy Director of Survey was later on redesignated as Joint Director of Survey. Both the Petitioners were given the scale of heads of Department from the date of joining in the above posts. Consequently vide Government Order No. RSS. 173/72/316 dated 8.9.91 the Deputy Director of Survey/Joint Director of Survey was amalgamated with the office of the Director of Land Records and Survey.

3. After the amalgamation a composite gradation list was issued by the office wherein the two Petitioners were shown as junior to one Respondent Arfan Ali who had joined as Lower Division Assistant on 13.6.75 in the Office of the Director of

Land Records and Survey. The Petitioners raised objection and in the meantime Respondent Arfan Ali was promoted as Upper Division Assistant on 29.12.92. Some time on 6.8.92 a draft gradation list was issued showing both the Petitioners as senior to Arfan Ali. Later on the draft list was ignored and a fresh gradation list was published where also the two Petitioners were shown as junior to Arfan Ali ignoring the direction of the Revenue Department. The two Petitioners filed representation and appeal; but to no effect and on 30.11.93 a final gradation list was published showing the two Petitioners as junior to Respondent Arfan Ali. Hence the present writ petitions.

4. I have heard the learned Counsel for both sides and perused the affidavits and other documents filed by the parties. In these two cases the prayer is for fixation of seniority and promotion. I propose to consider the prayer of seniority first as the question of promotion will depend on the fixation of seniority.

5. There is no dispute at the Bar regarding the respective dates of entry into service by the two Petitioners and the Respondent employee. The two Petitioners have claimed that in the erstwhile Department they were getting the pay of the Heads of Department and there was no separate service rule. This goes to show that Respondent Arfan Ali had joined the Government service after the two Petitioners. However, on amalgamation of the two offices the names of all the employees of the erstwhile office of the Deputy Director of Survey were placed below the names of the Lower Division Assistants of the Office of the Director of Land Records and Survey. Learned Govt. Advocate tried to justify this action on the plea that the employees of the office of the erstwhile Deputy Director of Survey were governed by the Assam Ministerial District Establishment Service Rules, 1967 and as such they could not be equated with the employees of the Director of Land Records and Survey. The Assam Ministerial District Establishment Service Rules, 1967 applies to the District Establishment which is defined in Section 2(4) of the said rules as under: "District Establishment" means and includes all non-Gazetted ministerial staff in the offices of the Deputy Commissioner, Sub-Divisional Officers, Sub-Deputy Collectors and Block Development Officers of the District.

Thus it is clear that the Office of the Deputy Director of Survey does not fall under the above definition. The Government has also failed to produce any copy of the notification to show that the above rules were made applicable in respect of the employees of the said office of the Deputy Director of Survey. I therefore hold that there was no service rules to adjudicate the question of seniority. Hence the question for decision is that in the absence of rules what should be the principles for determination of the seniority.

6. In the case of Nirmal Kumar Choudhury and Ors. v. State of Bihar and Ors. reported in 1988 (Supp) SCC 107 the Apex Court held:

It is a well settled position in law that seniority would ordinarily depend upon length of service subject, of course, to rules holding the field. That view has been taken by this Court in several cases and it is unnecessary to refer to all of them. In *A. Janardhana v. Union of India* the situation was somewhat the same as here. The Court found that the method adopted for fixing seniority overlooked the character of appointments and pushed down persons validly appointed below Ors. who had no justification to be given higher place. At page 960 of the reports, the Court observed: ( See p.620: SCC (L&S) p. 486, para 28 )

It is an equally well recognised canon of service jurisprudence that in the absence of any other valid rule for determining inter se seniority of members belonging to the same service, the rule of continuous officiation or the length of service or the date of entering in service and continuous uninterrupted service thereafter would be valid and would satisfy the tests of Article 16 .

We may also refer to a very recent decision of this Court in *K.S. Vora v. State of Gujarat*. The High Court recorded a finding that there is no applicable rule in the matter of fixing inter se seniority in a situation of this type. In the absence of rules, the more equitable way of preparing the combined gradation list would be to take the total length of service in the common grade as the basis for determining inter se seniority.

7. In the case of *State of Arunachal Pradesh and Ors. v. Md. Muslim Miya and Ors.* reported in 1996(11) GLT 519, the Division Bench of this Court also held that in case there are no statutory rules for seniority, the seniority will be counted from the date of continuous working by an employee on a particular post.

8. From the facts of the present case I find that the two Petitioners namely Srimati Manjusree Sinha Choudhury and Shri Atul Chandra Mohan were validly appointed who were pushed down for no apparent reasons and there was no justification whatsoever for giving Arfan Ali and Ors. a higher place. This Court therefore orders that the two above named Petitioners be given seniority just above Arfan Ali and the inter se seniority between the two Petitioners will be from their respective dates of joining.

9. Now coming to the question of promotion I find that Arfan Ali was promoted as Upper Division Assistant long back following the ratio of 2:1 prescribed by the Government. As the two Petitioners are senior to the-said Arfan Ali they are therefore entitled/eligible for promotion to the rank of Upper Division Assistant. The learned Govt. Advocate feebly tried to submit that Smti Manjusree Sinha Choudhury could not be promoted as she is mere Matriculate. The learned Counsel for the Petitioner has drawn attention of this Court to a copy of the gradation list of Upper Division Assistant of the office of the Director of Land Records Establishment as on 1.1.96. At serial No. 7 of the said list there one name of Sachindra Ch. Thakuria, UDA, whose academic qualification is only Matriculate. Likewise Samarendra Talukdar and

UN Deka, both Upper Division Assistants and whose names appeared at serial No. 11 and 16 of the list are also Matriculate, i.e., HSLC passed. I therefore find no merit in the above submission. The learned Counsel submitted that there maybe some difficult in accommodating the two Petitioners as there may not be any vacant post of Upper Division Assistant where one way of overcoming the above problem is cancellation of the promotion of the last two incumbents; but I find that they are working as Upper Division Assistants for long time and they should not be punished for no fault of theirs. Hence as suggested by the Secretary of the concerned Department the Government may create two superannuary post of Upper Division Assistants and place these Petitioners above Arfan Ali.

10. For the reasons aforesaid the Civil Rule No. 1897/1993 and Civil Rule No. 1104/1994 are allowed, however, without costs. Respondents are directed to comply with the directions within a period of three months.