(2010) 2 GLD 746

Gauhati High Court (Itanagar Bench)

Case No: Writ Petition (C) No. 149 (AP) of 2009

Shri Ashim Kumar Gupta Roy and Another		APPELLANT
	Vs	
State of Arunachal Pradesh and Others		RESPONDENT

Date of Decision: March 19, 2010

Acts Referred:

- Constitution of India, 1950 - Article 226, 309

Citation: (2010) 2 GLD 746

Hon'ble Judges: A. Potsangbam, J

Bench: Single Bench

Advocate: R.B. Yadav, for the Appellant; R.H. Nabam, Learned Sr. Govt. Advocate for respondent Nos. 1 to 3 and S. Nag, for Pvt. Respondent No. 4, for the Respondent

Final Decision: Dismissed

Judgement

A. Potsangbam, J.
Heard Mr. R.B. Yadav, learned Counsel for the petitioners and Mr. R.S. Nabam, learned Sr. Govt. Advocate, Arunachal Pradesh, on behalf of the official respondent Nos. 1 to 3. Also heard Mrs. S. Nag, learned Counsel for the private Respondent No. 4.

2. In this writ petition under Article 226 of the Constitution of India, the petitioners, two in number, have challenged the seniority list dated 2.3.2009 of Stenographer Grade-II in the office of the Superintending Engineer (Electric), Department of Power, Arunachal Pradesh (Annexure P/12 to the writ petition) and also the order dated 2.3.2009 promoting the Respondent No. 4, on officiating basis, to the post of Private Secretary in the Department of Power, Government of Arunachal Pradesh (Annexure-P/13 to the writ petition)

3. Brief facts which are relevant for disposal of this writ petition may be noticed as hereunder:

3(i) In the Electricity Department, Govt. of Arunachal Pradesh, there are three grades of Stenographer i.e. Grade III Stenographer, Grade II Stenographer and Stenographer Grade I which is now designated as Private Secretary. Stenographer. Grade III is a direct recruitment post.

3(ii). The petitioner No. 1 was appointed as Stenographer Grade III on 8.7.1987, the petitioner No. 2 on 10.7.1987 and the Respondent No. 4 on 2.3.1994. Next higher post from the post of Stenographer Grade III is the post of Stenographer Grade II and appointment to the post of Stenographer Grade II is governed and regulated by Recruitment Rules framed in the year 1994 by the Governor of Arunachal Pradesh in exercise of powers conferred under Article 309 of the Constitution of India. According to this Recruitment Rules, the post is selection post and 63 1/2 per cent of the vacancies in the grade is to be filled up by promotion from amongst the stenographer Grade III who have completed continuous 5 years service as Stenographer Grade III and qualified for 100 words per minute and the remaining 33-1/2 per cent is to be filled up by direct recruitment. A Selection Committee is to conduct the Stenography speed test for the purpose of promotion to Stenographer Grade II.

3(iii). Stenography speed test of 10 existing Stenographers Grade III was conducted on 1.10.2000 for consideration for promotion to the post of Stenographers Grade II. Thereafter, a merit list of 5 candidates was prepared by the Stenography Speed Test Committee and they are as follows:

Sl. No.	Name of the candidates	Marks obtained
1.	Shri A.K. Gupta Roy	96%
2.	Shri Rajesh Kamalan	95%
3.	Shri Rajendra A E	88%
4.	Shri R.N. Jha	78%
5.	Shri B. Deshmukh	73%

(Annexure P/15 to the writ petition)

It may be noted that at the time of consideration by the Stenography Speed

Test Committee, the petitioners and the respondent No. 4 had already acquired the requisite length of service and as per the merit list as extracted above, the petitioner No. 1 was placed at Sl. No. 1, Respondent No. 4 at Sl. No. 2 and the petitioner No. 2 at Sl. No. 3.

3(iv). Pursuant to the aforesaid speed test, the petitioners and respondent No. 4 were promoted to officiate as Stenographer Grade II by an order dated 31.1.2001 (Annexure-P/3 to the writ petition). The petitioner No. 1 was posted at Miao (APEC-III), respondent No. 4 at Naharlogun (APEC-I) and petitioner No. 2 at Dirang (APEC-1V). The appointment order Annexure P/3 stipulates the following conditions:

No representation regarding transfer and posting as Stenographer Grade-II will be entertained. They should join to their new place of posting within 30 days from the date of issue of this order failing which promotion will be treated as cancelled.

3(v). The respondent No. 4 and the petitioner No. 2 joined their respective posting on 1.11.2001. However, the petitioner No. 1 did not join in terms of the promotion and posting order as mentioned above. Instead, the petitioner No. 1 submitted a representation dated 2.11.2001 to the Respondent No. 3 with a prayer for modification of his posting either to Itanagar/Naharlogun, on the ground that his wife was working in All India Radio, a Central Govt. Organisation, at Itanagar and he had his aged parents staying with him. On consideration of the representation filed by the petitioner No. 1, earlier posting order was modified by an order dated 4.1.2002 by which, the petitioner was transferred from Miao to Dirang and petitioner No. 2 from Dirang to Miao.

3. Not having satisfied with the aforesaid modified posting order dated 4.1.2002, the petitioner No. 1 filed a second representation dated 7.1.2002 to the respondent No. 3. The second representation indicated that he was prepared to forgo his promotion in order to enable him to stay at Iganagar. The second representation is reproduced hereunder:

The Superintending Engineer (Elect).

A.P. Electrical Circle No. 1,

Department of Power, Itanagar,

Sub: Forgo of promotion as Steno Grade-II

Ref:1. Your order No. SE/APEC-1/S-6/22/01-02/4162-74

Dated 31.1-. 01.

2. Your order No. SE/APEC-I/E/S-

(2)/2Kl-/5252-575

With reference to your Order mentioned above, I had been promoted to Steno Grade -II and posted to Miao/Dirang. But as you are aware I had applied for changing of posting place from Miao/Dirang to Itanagar/Naharlogun as my wife is a Central Govt. employee in the deptt. of AIR at Itanagar my old parents are also staying with me. My son is also school going and he is suffering from neuro problem since last 5 years. For this reason, I cannot take family members with me as there is no AIR office at Miao/Dirang and there is nobody to look after my family at Itanagar if I join at Miao/Dirang.

But it is heartening that my case had not been considered. So under the above circumstances there is no way for me rather to forgo my promotion post.

Sd/A.K. Gupta Roy
Steno-III
C/O the E.E. (Elect)
Capital Elect. Division, Department
Power, Itanagar-791111.

3(vii). Subsequently, the Respondent No. 3 issued another order dated 22.4.2002 by which the petitioner No. 1 was posted at Naharlogun and respondent No. 4 at Dirang. In fact, there was exchange of posting between the petitioner and respondent No. 4 and thereafter, the petitioner No. 1 joined his new posting at Naharlogun on 24.4.2002.

3(viii). It is noticed from the record that the petitioner No. 1 did not join his new posting either at Miao under Order dated 31.1.2001 or at Dirang under Order dt. 4.1.2002 and he remained at Itanagar holding the post of Grade-III, till he joined his new posting at Itanagar on 24.4.2002 in terms of the order dated 22.4.2002 (Annexure P/8 to the writ petition). The learned Counsel for the petitioner has fairly admitted that during the aforesaid period from 1.10.2001 to 24.4.2002, the petitioner remained as Grade III Stenographer enjoying only the pay and allowances of Stenographer Grade III.

3(ix) There is no dispute that joining time provided in the Order dated 31.10.2001 is 30 days from the date of issue of the order and this joining time has neither been extended by the competent authority nor had the petitioner No. 1 applied, in any manner, for extension of the joining time beyond the stipulated period of 30 days. The petitioner No. 1 joined to the next higher post of Grade II Stenographer only on 24.4.2002 whereas the petitioner No. 2 and the respondent No. 4 had already joined their promoted posts of Stenographer Grade II, on 1.1.2001.

4. The case of the petitioner No. 2 is that he was appointed on 10.7.1987 as Stenographer Grade III and as such, he is senior to the respondent No. 4, who was appointed as Stenographer Grade III only on 2.3.1994. The further case of the petitioner No. 2 is that though he was placed one slot below the respondent No. 4 in the merit list of Stenographer Grade II prepared by the Selection Committee, he ought to have been placed above the respondent No. 4 in the seniority list of Stenographer Grade II on the

basis of his seniority position in the lower feeder post of Stenographer Grade III.

4(I). It is also the further case of the petitioner No. 2 that despite several representations for rectification of the seniority list on the basis of seniority position obtained in the lower grade of Stenographer Grade III, no positive action was taken by the competent authority. However, acting on a representation dated 2.5.2008, the Chief Engineer (Power) WEZ, Department of Power, Itanagar, constituted a Review Committee which recommended that the seniority of Stenographer Grade II be re-fixed on the basis of seniority in the feeder post i.e. Grade III Stenographer.

4(II). It may be noticed that the aforesaid re-fixation order was issued on 27.6.2008, almost 7-1/2 years after promotion order was issued. The matter of fixation of seniority in the Grade of Stenographer Grade II was re-examined by the Chief Engineer (Power and Coordinator) EEZ at Itanagar who was the authorised competent authority in terms of Govt. business allocation order issued under No. CE (P)/WEZ/E-III/Pt-1/4990-95 dated 9.5.2008. In other words, the Chief Engineer (Power and Coordination) EEZ is the officer authorised by the Govt. business allocation to deal with service matters, including the fixation of seniority, for the subordinate staff and as such, the Chief Engineer (Power and co-ordination) EEZ, being the competent authority as authorised by the business allocation order, recommended the following:

(A) Since the post of Steno Grade II (SPA) is a "selection post" the Seniority list at Annexure-II prepared and circulated by the SE (Elect), Naharlogun on the basis of the recommendation of the DPC seems to be in order and was at par with the rules for the purpose as can be seen vide para 22 of Swamy"s Mannual on Establishment and Administration (Copy enclosed as Appendix-4)

(B) At para 3 of the Swamy"s Establishment and Administration Mannual of Appendix-A, fixation of seniority has been de-linked from confirmation as per the directive of the Hon"ble Supreme Court and hence the seniority of person regularly appointed to a post according to rule would be determined by the order of merit indicated at the time of initial appointment and not according to the date of confirmation. Hence the claim of Shri Rejendran A E as per his representation dated 5.1.2007 cannot be considered for re-fixating of his seniority just because of him being a permanent cadre employee and senior among others at the lower grade.

(B) As per Swamy"s Mannual on Establishment and Administration vide Para-4 (Appendix-B) an offer of appointment would lapse automatically if the candidate did not join within the specified period stipulated in the order for joining. However in case a govt. employee requests for time extension within the specified period, his seniority would not be affected. Here in the case of Shri A.K. Gupta Roy, it is found that he had made requests for change of his place of posting only vide his representation dated 2.11.2001 (Appendix-C) and nowhere in his representation had made any request for extension of time. On further examination of the case, it is also found that Shri A.K. Gupta Roy instead

of joining to his new place of posting on his promotion to the post of SPA, had put his paper to forgo the promotion vide his representation dated 7.1.2002 (Copy enclosed as Appendix-D). Therefore, he is not entitled for seniority as per the promotion order as at Annexure-1 as per Swamy''s Mannual on Establishment and Administration vide Clause-4 (ii) (Appendix-B) and para 17, 12 at (Appendix-E) respectively.

Therefore, keeping in view the above facts and findings and on the basis of the relevant rules prescribed for determining the seniority, the seniority of the SPAs in question should have been re-arranged as under:

Sl. No.	Name of Sr. PA.	Date of appointment in present post (as mentioned in the seniority list.
1.	Shri Rajesh Kamalan,	1.11.2001.
2.	Shri Rajendra A.E.	1.11.2001
3.	Shri R.N. Jha	1.11.2001
4.	Shri A.K.Gupta Roy	244.2002.

Therefore the order issued by the Chief Engineer (Power) WEZ vide No. CE (Power)/WEZ/E-III/25/2008-09/997-1001 dated 27.6.2008 is not based on the established rules and laws, which may have legal complications and liable for quashing of the order with immediate effect by the State Govt. and restore the original order of Superintending Engineer (Elect), Naharlogun issued vide No. SE/APEC-I/S-6(B)/22/01-02/4/4162-74 dated 31.10.2001 which does not suffer from any deficiencies.

The Superintending Engineer (Elect), Naharlogun may be directed to issue a fresh seniority list of the SPAs placing Shri A.K. Gupta Roy [who have forgone his promotion for a period of nearly six months (from 1.11.2001 to 24.4.2002) below Shri R.N. Jha as mentioned in the column herein above.

sd/- Anong Perme
Chief Engineer (Power and Coordination)
EEZ, Department of Power, Itanagar.

According to the aforesaid recommendation/direction of the Respondent No. 2, a fresh seniority list was published on 2.3.2009 in which the petitioners and respondent were

placed in the following position:

1. Shri Rajesh Kamalan-Respondent No. 4.

2. Shri Rajendra A.E.-Petitioner No. 2.

3. Shri R.N. Jhanot party in this case.

4. Shri A.K. Gupta Roy-Petitioner No. 1.

5. Opposing and controverting the contentions raised by the petitioners, the State-respondents and the private respondent 4 filed their affidavit-in-oppositions. It is contended by the State government that though the petitioner No. 1 Shri A.K. Gupta Roy was placed in Sl. No. 1 in the merit list of the Stenographer Graade II as per the recommendation of the speed test selection committee, he did not join to his promoted post for nearly six months. Instead, he submitted a representation dated 2.11.2001 for modifying his posting order. Though his posting order was modified by an order dated 4.1.2002 from Miao to Dirang, still, he did not join to the modified posting. The petitioner No. 1 submitted a second representation dated 7.1.2002 indicating therein that he was prepared to forgo his promotion, if he was not allowed to stay either in Itanagar or Naharlogun and grounds taken in the representation was that his wife was working at All India Radio at Itanagar and his aged parents were staying with him. On consideration of the second representation, the petitioner was allowed to stay at Naharlogun and respondent No. 4 was transferred from Naharlogun to Dirang. It is the further case of the Govt. that as the petitioner did not seek/request for extension of the joining time beyond 30 days as stipulated in the promotion order dated 31.10.2001, his joining time was never extended by the Govt. The petitioner joined his promoted post of Stenographer Grade II, almost after six months after the promotion order was issued. Therefore, his length of service in the grade of Stenographer Grade II would be counted only from the date he joined i.e., 24.4.2002. The issue was again re-examined by the Chief Engineer (Power and Coordination) EEZ, who recommended that the petitioner No. 1 be placed at Sl. No. 4 of the seniority list of Stenographer Grade II as he joined his promoted post only on 24.4.2002, more so, in absence of any extension of the period of joining. In other words, the promotion was refused by the petitioner for a period of about six months. The govt being guided by the principles laid down in Swamy''s compilation on fixation of seniority, took the view that the petitioner No. 1 should not be placed above those officers who joined their promoted posts during the validity period of 30 days as stipulated in the promotion order.

6. The contention of the respondent No. 4 is, more or less, the same with that of the State Govt. However, it is submitted by the learned Counsel for the private respondent that it is the length of service in a grade which is to be considered as relevant factor while determining seniority of an incumbent in a grade. As the respondent No. 4 was placed at Sl. No. 2 of the merit list and also in the provisional seniority list, the respondent 4 jumps

at: Sl. No. 1, on failure of the petitioner No. 1 to join the promoted post within the time stipulated in the promotion order and also on consideration that there is a difference of five months and some odd days in the service of Stenographer Grade-II between the respondent No. 4 and the petitioner No. 1. It is further submitted that in absence of any statutory rules regulating the determination and fixation of seniority of an incumbent in a grade, it is the length of service which is to be taken into consideration while determining and fixing seniority. The argument of the respondent No. 4 has a lot of force.

7. The learned Sr. Govt. Advocate has submitted that nothing has been shown in the writ petition as well as in the rejoinder affidavit as to how the petitioner No. 1 was prevented from joining to his promoted post between the period from 1.11.2001 to 24.4.2002. That apart, during the aforesaid period, the petitioner No. 1 remained holding the post of Stenographer Grade III at Itanagar and also drawing scale of pay and allowances of Stenographer Grade III, Therefore, his seniority would have to be determined from the date he joined his promoted post i.e. 24.4.2004, more so, in the absence of any extension of joining time beyond 30 days as stipulated in the promotion order dated 2.10.2001. It is the petitioner who is to blame himself for the loss of seniority and nobody is responsible for that. In support of the aforesaid contention, the learned Sr. Govt. Advocate relied upon a decision of the Apex Court, reported in 1996 (9) SCC 2009, wherein, the Apex Court held that the respondents therein were not entitled to count their seniority with effect from 7.6.1972 i.e. the date of Gradation list prepared by the Selection Board on the basis of the merit list as the respondents, therein joined only in the year 1985-86. In the aforesaid case, selection was made in the year 1972 and the respondent therein did not join service due to pendency of some case in the High Court which came to be finally dismissed in the year 1985. The Apex Court held that the respondents themselves have to be blamed for the laches since they did not take any action, namely, impleading themselves in the pending writ petition nor filed any independent writ petition claiming for their appointment and they joined service only after the dismissal of the writ petition. It is further observed by the Apex Court that it is settled law that seniority of the candidates has to be reckoned from the date on which they joined the service and started discharging the duties of the post to which they came to be appointed. In that view, since the respondents therein joined the service in the year 1985-86, seniority cannot be given with retrospective effect from the date of selection of the candidates. The logic and rational of the aforesaid case is squarely applicable in the present case as the petitioner No. 1 was not prevented from joining to his promoted post and he has to blame himself for not joining the promoted post for nearly 6 months.

8. The learned Govt. Advocate has also relied upon the principles laid down in Swamy''s Compilation of fixation of seniority, wherein it is clearly stated that in case of non-extension of joining time, the incumbent shall loose the seniority when joined at a later date. Swamya''s Compilation is consistent with Para 5 of the General Conditions of Service on fixation of seniority as available in the Hand Book of General Circulars, Govt. of Assam. Para 5 under the Heading ''Fixation of seniority'' is quoted below:

5. The seniority of the candidates selected in one batch on the recommendations of the Assam Public Service Commission should be fixed according to their order in the merit list, if they join their appointments within 15 days. If a candidate is prevented from joining within this period by circumstances of a public nature and beyond his control, the period may be extended under the orders of the Head of the Office, if not so extended, he will be graded according to the date of joining.

9. On a pointed query from the Court as to whether the petitioner No. 1 has applied, at any point of time, for extension of the joining time and whether the petitioner remained holding the post of Stenographer Grade III between the period from 31.10.10 to 24.4.2002, Mr. Yadav, learned Counsel for the petitioner has fairly submitted that no application has been filed for extension of the joining time and the petitioner remained as Grade III Stenographer enjoying with the scale prescribed for the same, during the aforesaid period, as he joined his promoted post only on 24.4.2002. Further, the only contention of the petitioner No. 2 is that he is entitled to be placed above the respondent 4 in the seniority list of Stenographer Grade II on the basis of seniority position in the lower feeder post of Stenographer Grade III. Admittedly, the post of Stenographer Grade II is a selection post and promotion to the post is based on merit and seniority list in the grade is to be prepared on the basis of merit i.e. in the speed test conducted by the selection committee and as such, the seniority position obtained by any party in the feeder post looses its significance while determining the seniority in the higher grade of Kaushal Kishore Singh Vs. Dy. Director of Education and Others, the Apex Court held that it is not the law that seniority in one grade or cadre would be dependent on the seniority in another grade or cadre thereby meaning that seniority in a grade is to be determined either on the basis of merit or other relevant factors but not on the basis of the seniority in another grade or cadre. The aforesaid principle is squarely applicable in the case of the petitioner No. 2. Therefore, the case of the petitioner No. 2 has no legs to stand.

10. One vital aspect of the matter which cannot escape the notice of the Court is that the impugned seniority list was prepared by the Chief Engineer (Power and Co-ordination) EEZ, which had been extensively quoted in Para 4 of the judgment and this recommendation is annexed by the petitioner No. 1 as Annexure P/16 in his affidavit-in-reply but the petitioner No. 1 chose not to challenge the recommendation of the respondent No. 2. It is s;settled position of law that when the foundation of an impugned order, already available with the petitioner, is not challenged and challenge being confined to the consequential order, no effective relief can be granted by this Court. On this count alone, this writ petition is liable to be dismissed.

11. In the backdrop of the above discussions, this Court is of the considered view that the writ petition is devoid of merit and accordingly, the same stands dismissed.

12. Interim order, if any, stands vacated.

There shall be order as to costs.