

GAHC010014882015



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

Case No. : WP(C)/3259/2015

RAJ GOBINDA BHATTACHARJEE
S/O- LT. RAM RANJAN BHATTACHARJEE, R/O- LACHIT NAGAR, OPPOSITE
KALIMANDIR, GHY- 7, DIST.- KAMRUP M, ASSAM.

VERSUS

THE STATE OF ASSAM and 6 ORS,
REP. BY THE COMMISSIONER and SECY. TO THE GOVT. OF ASSAM,
FINANCE ESTT. B DEPTT., DISPUR, GHY- 6, ASSAM.

2:THE PRINCIPAL SECY. TO THE GOVT. OF ASSAM
FINANCE ESTT. B DEPTT. DISPUR GHY- 6 ASSAM.

3:THE UNDER SECY. TO THE GOVT. OF ASSAM
FINANCE ESTT. B DEPTT. DISPUR GHY- 6 ASSAM.

4:THE SECY. TO THE GOVT. OF ASSAM
FINANCE ESTT. B DEPTT. DISPUR GHY- 6 ASSAM.

5:THE DY. SECY. TO THE GOVT. OF ASSAM
FINANCE ESTT.B DEPTT. DISPUR GHY- 6 ASSAM.

6:THE DIRECTOR OF ACCOUNTS and TREASURIES
ASSAM KAR BHAWAN DISPUR GHY- 6 ASSAM.

7:THE DIRECTOR
E-GOVERNANCE UNIT FOR PUTTING UP ON THE DEPTT.'S WEBSITE
FINANCE ESTT.B DEPTT. DISPUR GHY- 6 ASSAM

Advocate for the Petitioner : MR.S R BORUAH, MR.D CHAKRABARTY

Advocate for the Respondent : SC, FINANCE, MRSA VERMA

BEFORE
HONOURABLE MR. JUSTICE N. UNNI KRISHNAN NAIR

ORDER

Date : 30.07.2024

Heard Mr. D. Chakraborty, learned counsel for the petitioner. Also heard Mr. B. Gogoi, learned standing counsel, Finance Department.

2. The petitioner by way of instituting the present proceeding, has prayed for a direction upon the respondent authorities for consideration of his case for promotion to the next higher post w.e.f. 17.10.2013.

3. The petitioner, herein, who was recruited as an Officer under the Assam Finance Service on 04.12.1978, came to be promoted to the cadre of Finance and Accounts Officer/Treasury Officer in the month of September, 2003, and thereafter, continued in such capacity till the date of his superannuation on 31.05.2015.

4. The petitioner contends that on completion of the period of residency as mandated under the provisions of the Assam Finance Service Rules, 1963; he was entitled to be so considered for promotion to the posts available for the next higher cadre of the service i.e. Financial Advisor/Sr. Finance and Accounts Officer. However, his case was not so considered by the respondent authorities, inspite of vacancies being so available.

5. By referring to the gradation list as published by the respondent authorities from time to time, it is submitted that the petitioner was within the zone of consideration for such promotion. Although there were certain

inconsistencies, in the assignment of the seniority position in respect of the petitioner, in the gradation lists published by the respondent authorities from time to time, however, in the gradation list, so published, on 22.05.2015; his seniority position has been correctly assigned.

6. However, the respondent authorities inspite of there being vacancies available in the promotional cadre, has not considered the case of the petitioner and accordingly, he had to retire from his service on 31.05.2015 from the post held by him in the cadre of Finance and Accounts Officer/Treasury Officer. Accordingly, the present proceeding has been so instituted by the petitioner praying for consideration of his case for such promotion with retrospective effect i.e. with effect from the year 2013 and for notional fixation of his pay and allowances till the date of his superannuation on 31.05.2015.

7. The learned counsel for the petitioner has reiterated the facts as noticed hereinabove and has further contended that inspite of repeated representations submitted by the petitioner for having his case considered for promotion to the cadre of Sr. Finance & Accounts Officer/Financial Advisor; the respondent authorities have not considered his case in the manner required.

8. The learned counsel for the petitioner has also submitted that inspite of the fact that the petitioner had superannuated from his service on 31.05.2015; vacancies having arisen in the promotional cadre of Financial Advisor/Sr. Finance & Accounts Officer much before the date of his superannuation and he being eligible for consideration for such promotion;

his case must necessarily be directed to be considered by the respondent authorities for such promotion, in-as-much as, consideration for such promotion is a fundamental right vested in the petitioner.

9. Per contra, Mr. Gogoi, learned standing counsel, Finance Department, has submitted that the process for finalizing the gradation list, had taken some time and the same was finalized on 22.05.2015. Thereafter, the process for convening a meeting of the Departmental Promotion Committee(DPC) was underway along with the collection of the requisite materials in this connection, pertaining to the candidates in the zone of consideration, was also being carried-out by the respondent authorities. However, during the pendency of such process; the petitioner had retired from his service.

10. Mr. Gogoi, learned standing counsel, Finance Department, has further submitted that given the number of vacancies as available in the promotional cadre; the petitioner by virtue of his seniority position, as assigned to him in the feeder cadre, would not have been promoted to the cadre of Sr. Finance and Accounts Officer/Financial Advisor.

11. I have heard the learned counsels appearing for the parties and also perused the materials available on record.

12. It is an admitted position that the petitioner had retired from his service on 31.05.2015, on attaining the age of superannuation and thereafter, had instituted the present proceeding on 01.06.2015.

13. Though it is contended that the vacancies were so available in the promotional cadre, however, the exact number of vacancies have not been disclosed either by the petitioner or by the respondents, herein. However, it is seen that the process for convening the meeting of the Selection Committee was underway, as contended by the respondent authorities in the matter, could not be concluded before the date of superanuation of the petitioner, herein.

14. The manner and method for recruitment for promotion to the post of Sr. Finance and Accounts Officer/Financial Advisor is governed by the provisions of the Assam Finance Service Rules, 1963. The post of Sr. Finance and Accounts Officer/Financial Advisor is placed in Grade II of Class I of the Assam Finance Service and the promotion thereon, is to be so effected from the feeder post of Finance and Accounts Officer/Treasury Officer and analogous posts.

15. The said provisions of the Assam Finance Service Rules, 1963, mandates that promotion to the various cadres of the service is to be so effected by way of a selection, so conducted by a constituted Departmental Selection Committee.

16. The issue as arising in the present proceeding is as to whether on a vacancy being available, the case of the petitioner can be directed to be so considered even after the date of his superannuation. Further, whether the petitioner has a vested right to have his case so considered from the date the vacancy has so arisen in the promotional post and/or whether such promotion can only be deemed from the date of the actual promotion being

effected in the case of an incumbent in the feeder cadre.

17. The Hon'ble Supreme Court in the case of ***Union of India v. K. K. Vadera*** reported **1989 Supp(2) SCC 625** had clearly laid down that the promotion to a post should only be granted from the date of promotion and not from the date on which such vacancy had arisen. The relevant observations of the Hon'ble Supreme Court in this connection as made in the said judgment, is extracted hereinbelow:

"5..... We do not know of any law or any rule under which a promotion is to be effective from the date of creation of the promotional post after a post falls vacant for any reason whatsoever, a promotion to that post should be from the date the promotion is granted and not from the date on which such post falls vacant. In the same way when additional posts are created, promotions to those posts can be granted only after the Assessment Board has met and made its recommendations for promotions being granted. If on the contrary, promotions are directed to become effective from the date of the creation of additional posts, then it would have the effect of giving promotions even before the Assessment Board has met and assessed the suitability of the candidates for promotion. In the circumstances, it is difficult to sustain the judgment of the Tribunal."

18. Further, the Hon'ble Supreme Court in the case of ***Ajay Kr. Shukla v. Arvind Rai***, reported in **(2022) 12 SCC 579**, after noticing the judgments in the earlier decisions of the Hon'ble Supreme Court, proceeded to draw the following conclusions:

*"41. This Court, time and again, has laid emphasis on right to be considered for promotion to be a fundamental right, as was held by K. Ramaswamy, J., in *Lift Irrigation Corpn. Ltd. v. Pravat Kiran Mohanty* in para 4 of the Report which is reproduced below: (SCC p. 299)*

4.... There is no fundamental right to promotion, but an employee has only right to be considered for promotion. when it arises, in accordance with the relevant rules. From this perspective in our view the conclusions of the High Court that the gradation list prepared by the corporation is in violation of the right of the respondent-writ petitioner to equality enshrined under Article 14 read with Article 16 of the Constitution, and the respondent-writ petitioner was unjustly denied of the same is obviously unjustified.'

42. A Constitution Bench in *Ajit Singh (II) v. State of Punjab*, laying emphasis on

Article 14 and Article 16(1) of the Constitution of India held that if a person who satisfies the eligibility and the criteria for promotion but still is not considered for promotion, then there will be clear violation of his/her's fundamental right. Jagannadha Rao. J. speaking for himself and Anand, C.J., Venkataswami. Pattanaik, Kurdukar. JJ.. observed the same as follows in paras 22 and 27: (SCC pp. 227-28)

Articles 14 and 16(1): is right to be considered for promotion a fundamental right

22. Article 14 and Article 16(1) are closely connected. They deal with individual rights of the person. Article 14 demands that the "State shall not deny to any person equality before the law or the equal protection of the laws". Article 16(1) issues a positive command that

"[t]here shall be equality of opportunity for all citizens in matters relating to employment or appointment to any office under the State".

It has been held repeatedly by this Court that clause (1) of Article 16 is a facet of Article 14 and that it takes its roots from Article 14. The said clause particularises the generality in Article 14 and identifies, in a constitutional sense "equality of opportunity" in matters of employment and appointment to any office under the State. The word "employment" being wider, there is no dispute that it takes within its fold, the aspect of promotions to posts above the stage of initial level of recruitment. Article 16(1) provides to every employee otherwise eligible for promotion or who comes within the zone of consideration, a fundamental right to be "considered" for promotion. Equal opportunity here means the right to be "considered" for promotion. If a person satisfies the eligibility and zone criteria but is not considered for promotion, then there will be a clear infraction of his fundamental right to be "considered" for promotion, which is his personal right.

"Promotion" based on equal opportunity and "seniority" attached to such promotion are facets of fundamental right under Article 16(1).

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27. In our opinion, the above view expressed in Ashok Kumar Gupta and followed in Jagdish Lal, if it is intended to lay down that the right guaranteed to employees for being "considered" for promotion according to relevant rules of recruitment by promotion (i.e. whether on the basis of seniority or merit) is only a statutory right and not a fundamental right, we cannot accept the proposition. We have already stated earlier that the right to equal opportunity in the matter of promotion in the sense of a right to be "considered" for promotion is indeed a fundamental right guaranteed under Article 16(1) and this has never been doubted in any other case before Ashok Kumar Gupta right from 1950."(emphasis in original)

19. Accordingly, considering the above-noted decisions of the Hon'ble Supreme Court; it is clear that a government servant cannot, per se, be

promoted from the date, the vacancy had so arisen and mere existence of a vacancy *per se*, will not create a right for retrospective promotion. The manner of filling-up of vacancies in the promotional post are specifically prescribed under the said Rules, which also mandates clearly for a selection process.

20. Having considered the above aspect of the matter, the further issue as to whether the petitioner on his superannuation, will still be entitled to have his case considered for promotion to the post in the promotional cadre, is being considered.

21. The said issue was considered by the Hon'ble Supreme Court in the case of ***Union of India & anr. v. Manpreet Singh Poonam & ors.***, reported in **(2022) 6 SCC 105**.

22. The Hon'ble Supreme Court on examining the matter, had drawn the following conclusions:

“16. It is trite law that once an officer retires voluntarily, there is cessation of jural relationship resorting to a "golden handshake" between the employer and employee. Such a former employee cannot seek to agitate his past, as well as future rights, if any, sans the prescription of rules. This would include the enhanced pay scale. The respondent in Civil Appeal No. 517 of 2017 was rightly not considered in the DPC in 2012 since he was no longer in service at the relevant point of time. The High Court has committed an error in relying upon a circular, which has got no application at all, particularly in the light of our finding that we are dealing with a case of promotion simpliciter as against upgradation of any nature.”

23. Applying the ratio of the decisions in the above-noted cases to the facts of the present proceeding; it is found that the petitioner, herein, has no vested right to be so considered on the date the vacancies had so arisen and the provisions of the Assam Finance Service Rules, 1963, having not

conceptualized any such promotion to be granted with retrospective effect i.e. with effect from the date when the vacancies had so arisen and the promotions therein, being so held to be effective from the date, the promotions were so granted; this Court finds that the claim as made by the petitioner in the present proceeding, does not merit any consideration. Further, it also being settled position of law that an employee in pursuance to his superannuation from service, cessation of master-servant relationship, having occasioned, would not be entitled to agitate his past as well future rights; the present proceeding, admittedly, having been instituted after the petitioner had superannuated from service, the reliefs as sought for by the petitioner, cannot be granted.

24. Accordingly, the writ petition is held to be devoid of any merit and the same, stands dismissed. However, there shall be no order as to costs.

JUDGE

Comparing Assistant